ALTRUISM AND OWNERSHIP:
JUSTIFYING PAYMENT FOR ORGAN DONATION

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For Jacqueline,
Ellie & Charles
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ABSTRACT

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ALtruism AND OWNERSHIP: Justifying PAYment FOR ORGAN DONATION

Organ donation is traditionally based on the notion of making a gift based on altruism. An important aspect of ‘altruistic gifting’ is commitment to a solidaristic approach to meeting transplant needs. In line with this, people are encouraged to donate their organs at death to a common pool for collective provision, or donate a live organ to another freely. Given a chronic organ shortage, proposals have been made to change this system to increase donation. Proposals include introducing some organ market or payment in the form of a reward to incentivise live or deceased donation. However, these proposals have been opposed because of the grip of ‘altruistic gift’ as the only ethically acceptable way to procure and distribute organs.

To support the ethical acceptability of other systems, ‘altruistic gift’ has been subject to various criticisms. One criticism is the moral relevance of altruism: people may donate on other motives other than altruism; or, altruism is not the motive that underpins most deceased organ donations. Another criticism is the moral value of altruism: even if deceased organ donations are in general altruistic, altruism does not express communal virtues like generosity that support solidarity.

A third criticism is the value of the concept of altruism when understood in the pure sense: ‘pure altruism’ fashions an unnecessary or false dichotomy – gift versus sale – in the way people can ethically relate and help each other. Consistent with or following this criticism, it has been argued that use of a financial reward to incentivise donation can be compatible with preserving donation as altruistic albeit in a ‘non-pure’ sense. ‘Altruism’ and reward can co-exist as motives for donation.

This thesis concerns itself centrally with the third criticism. It argues that the concept of altruism delineates a distinctive moral ‘perspective’ of a common humanity that engenders a devotion to others’ interests. Accordingly, as I argue, ‘non-pure’ definitions of altruism are misleading as to how a financial reward can be compatible with altruism. From this, the thesis argues that introduction of a financial reward for organ donation would not preserve donation as altruistic. Based on an understanding of altruism as also a motive for ‘creative’ relationships, the thesis counters criticisms of its relevance and value to deceased organ donation under a gift model.

As part of its legal analysis, the thesis considers the antithesis of ‘altruistic gift’: the idea of organs as property which places individual control on their disposition at its moral centre. It has been argued that organs should be owned as property so that individuals can sell them, or transmit them to relatives so that relatives can claim payment from donation. To provoke thought on whether organs should be owned as private property like any other, the thesis proposes an inheritance regime for organs with family as default successor.
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Publications for the purpose of the thesis


Organs as Inheritable Property? *Journal of Medical Ethics* 2014;40:57-61. First author, with Søren Holm; incorporated into the journal’s special issue on “The Human Body as Property: Possession, Control and Commodification” for its contribution to the debate on control and commercialisation of human biological materials


Other publications (selected) during the period of the thesis


Poster


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CHAPTER 1

1. PROBLEM, AIMS AND APPROACH

1.1 Introduction

Due to the effects of a chronic shortage of organs, organ markets or various forms of payment for donation have been proposed and advocated as means to increase donation rates. Some countries appear to have introduced payment in the form of a reward for deceased organ donation. China reportedly has a programme involving payment (“funeral expenses, $1600 to purchase a grave plot and a $3200 allowance”) for families of deceased donors.¹ Israel appears to have introduced a policy to permit families to accept a sum for agreeing to deceased organ donation for the purpose of providing a memorial service for their deceased donor kin, provided that their kin had not expressed an objection to donation while alive.² Similar funeral reward schemes have been proposed but resisted elsewhere, for example in the US. This is because of the belief that ‘altruistic gifting’ is the optimal ethical framework for acquiring organs. Increasingly, it is argued that ‘gift’ and ‘reward’ are compatible social forms because altruism can co-exist with a reward motive. This ‘motivation-focused’ justification has however been criticised. The central question of the thesis is shaped by these themes and arguments.

1.2 Consequences of Organ Shortage

Transplantation of solid organs is an effective treatment for irreversible end-stage organ failure. The Madrid Resolution resulting from the ‘Third World Health Organisation Global

Consultation on Organ Donation and Transplantation’, which consists of representatives of international scientific and medical bodies, government officials, and ethicists, describes organ transplantation as “cost-effective, mainstream, and a cardinal feature of comprehensive health services”.

Despite “substantial expansion in organ donation from deceased persons in recent years and greater reliance on donation from living persons”, there is a chronic shortage of organs worldwide. In the UK for example, there was a 50% increase in deceased organ donation in the period 2012-2013 compared to 2007-2008. In 2012-2013, 26% of transplants were from live donors. (More than one third of live kidneys transplanted were from live donors.) Nevertheless, more than 7000 people remain on the waiting list. Since 2008, about 1000 people a year die during their wait—around three people die each day. As in other developed countries, demand for organs in the UK is expected to rise because of an ageing population and increasing incidences of obesity and co-morbidities like diabetes, which are associated with a higher incidence of end-stage organ failure. Supply, on the other hand, is expected to remain static. While more than half a million people die in the UK each year, fewer than 5000 die in circumstances in which their organs remain suitable for transplantation. The gap between need and supply is therefore likely to widen.

As a consequence of the shortage, strict criteria for inclusion on waiting lists for organs have to be implemented worldwide. Extended criteria donation (organs from donors with clinical risk factors) and cardiac death donation (associated with poorer transplant outcomes than brain death donation) have also increased to widen the organ pool. Watson and Dark submit:

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“Recipients now have some difficult choices: turn down an organ which has associated risks in order to wait for the possibility of a better one, while risking death without a transplant, or alternatively accept a transplant from a live donor putting them at risk of death, a risk that may be as high as one in 200 for live donation of a liver lobe”.

Almost all countries ban trade in organs for transplant purposes. Iran is the only country with a regulated market (for live kidneys). However, the chronic shortage of organs, coupled with ineffective regulation (particularly in some developing countries), has led to an international black market in organs. Risks of infection, graft failure, mortality and morbidity are higher in transplantations involving trafficked or paid organs. The World Health Organisation estimated in 2007 that organ trafficking accounts for 5-10% of kidney transplants performed worldwide. Every now and then, cases of organ theft, coercion and abuse of sellers, and seller health damage or death from negligent care surface in the media. Those charged with organ trading do not just include traffickers and brokers. For example, in 2007, an English man was given a 12 month suspended sentence and ordered to pay £250 in costs for contravening the Human Tissue Act 2004 for advertising and agreeing to sell his live kidney for £24,000.

Given these developments, it has been said that “the underlying concern expressed in much of the current literature is that no idea for increasing the supply of organs should be

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9 In 2008, a Singapore court charged a then dying Singaporean renal patient who was excluded from the waiting list because of pre-existing medical conditions, and his prospective kidney seller – a financially desperate Indonesian man – for flouting the legislative ban on organ trading. Public Prosecutor v Tang Wee Sung [2008] SGDC 262.
to discounted before it is studied”. Many have called for the ban on organ trading to be lifted. Live organ markets, particularly for kidneys (the most common and successful form of transplant with perioperative mortality estimated to be 0.03%), as well future markets in deceased organs, have been regularly suggested and advocated.

1.3 Altruistic Gifting

Part of the resistance to market means for increasing organ supply is the “strong tradition” that organs should be given as gifts based on altruism. Indeed, most countries adopt a gift law framework to regulate organ donation. A central principle of a gift law framework is that individuals should provide their organs voluntarily to respect their will or autonomy over their body and parts. To this end, individual donative intent is to be established by some mechanism of consent, which usually takes the form of expressed consent or presumed consent.

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16 Ibid.
17 Under expressed consent (or opt in) systems, individuals are to document their intent to donate, for example by joining an organ donor registry. Under presumed consent (or opt out) systems, donative intent is presumed unless individuals register their objection or dissent. Presumed consent has been argued as a fictional consent. See J. Harris. Consent and End of Life Decisions. *Journal of Medical Ethics* 2003;29:10-5. Nevertheless, Glazer argues that presumed consent adheres to the principle of voluntariness if people are informed and regularly reminded of the law, and they can easily register their dissent. Accordingly, “presumed consent models still follow gift principles [even if they do not] satisfy the element of donative intent as clearly as systems of explicit consent”. Ibid: 369. It should be noted that an opt-out system need not ‘presume’ consent. A ‘routine removal’ or conscription system does not presume consent but allows individuals to opt out as ‘conscientious objectors’.
It has been argued, however, that organ trading does not violate the principle of voluntariness: organ trading can be consensual and autonomous under certain social and regulatory conditions.\textsuperscript{18} Regardless, there is a concern that “if financial payment for transplantable organs becomes socially acceptable, the overall social norm that bodies are not property is likely to erode…”\textsuperscript{19} The norm that the human body should not be treated as property is commonly associated with safeguarding respect for or the dignity of human bodies and parts.

International law and documents relating to organ transplantation reflect this view. To protect human rights and fundamental freedoms in the application of biology and medicine, Article 21 of the Council of Europe’s \textit{Convention on Human Rights and Biomedicine} states that “The human body and its parts shall not, as such, give rise to financial gain.”\textsuperscript{20} Guiding Principle 5 of the \textit{World Health Organisation Guiding Principles on Human Cell, Tissue and Organ Transplantation} states that “Cells, tissues and organs should only be donated freely, without any monetary payment or other reward of monetary value.”\textsuperscript{21} Its commentary on this principle states that “Any measures to encourage donation should respect the dignity of the donor and foster societal recognition of the altruistic nature of cell, tissue and organ donation.”\textsuperscript{22}

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In addition, the gift framework purports to establish a communal approach to meeting health needs.\(^{23}\) As an important aspect of the gift framework, people are encouraged to donate their organs unconditionally at death to a common pool for distribution. Multiple organs can be taken from a single deceased donor to save or dramatically improve the lives of several persons. Depending on the organ, factors such as blood group and tissue compatibility, physical health and age, time on the waiting list, and medical urgency would be taken into account in deciding who should be allocated the donated organs.\(^{24}\) Such an allocation algorithm helps promote equity of access and optimal use of the scarce resource of organs.

1.4 Reconciling Altruistic Gifting with Financial Rewards

From the above, we can see that the ‘altruistic gift’ model of organ donation is regarded as upholding important moral and social values, such as human dignity and solidarity, in transplant medicine.\(^{25}\) Nevertheless, it has been argued that ‘gift’ and ‘altruism’, while important concepts in ethical thinking on means of increasing organ procurement, are compatible with payment in the form of a reward for donation.

According to Goodwin, the moral grip of ‘altruistic gifting’ rests on the “presumption… that all gift giving is good, and that altruism as a concept in organ donation is pure and unspoiled by secondary or spurious motivations”.\(^{26}\) Against this ‘pure altruism’ doctrine, it has been argued that individual motives for helping others are often mixed or complex and as such, the

\(^{23}\)Institute of Medicine, *Opportunities for Action*, p. 240.
\(^{25}\)Institute of Medicine, *Opportunities for Action*, p. 240. See also C.B. Cohen. Public Policy and the Sale of Human Organs. *Kennedy Institute of Ethics Journal* 2002;12:47-64. As she asserts, “We have concluded, as a society [America], that the first set of public values [dignity of persons and altruism] overcomes the second [individual choice and faith in money as an incentive for donation] with respect to the provision of organs for transplant, that a system of organ donation conveys our respect for persons and honors our interconnectedness as human beings; selling them, we maintain, diminishes these values. The law, which reflects deeply held beliefs about what is right and good within a society, has acted upon our commitment to these fundamental values and has prohibited the sale of organs” (p.61-2).
‘gift or commodity’ dichotomy that the doctrine engenders is too rigid an approach for considering the ethical acceptability of means to increase organ donation.

Consistent with this view, the Nuffield Council of Bioethics, in its report *Human Bodies: Donation for Medicine and Research* (hereafter, the *Nuffield Report*), states that while “altruism holds a central signifying place in the ethical acceptability of donating materials from the body, in the idea that someone might give part of themselves for the use of another”, it is not “important from an ethical perspective that altruism is thoroughly ‘pure’”.28

As I understand the Nuffield Report, ‘ethical acceptability’ concerns thinking about “the kind of society in which we wish to live”.29 It claims that altruistic donation has a strong ethical appeal in the UK context because altruism is connected to the expression of communal virtues, and consequently with fostering solidarity: “altruism has much in common with solidarity: an altruistic basis for donation helps underpin a communal, and collective, approach to the provision of bodily material for others’ needs, where generosity and compassion are valued”.30 According to Professor Marilyn Strathern (Chair of the Working Party for the report) and Katherine Wright (Deputy Director of the Council), “The Working Party concluded that the primary reason for valuing altruism in the context of the donation of bodily materials is for the crucial role it plays in supporting a solidaristic approach to… meeting the health needs of fellow citizens.”31

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28 Ibid:139.
30 Ibid:5.
Given its link to communal virtues like generosity, the Nuffield Report states that altruism should be defined ‘motivationally’ (as opposed to ‘behaviourally’), that is, “in terms of the internal psychological states that produce behaviours.” The report defines an altruistic act as one that “is primarily motivated by concern for the welfare of the recipient of some beneficent behaviour, rather than by concern for the welfare of the person carrying out the action” (italics mine). Based on this ‘non-pure’ definition of altruism, the report claims that material benefits or financial incentives for bodily material donation need not undermine solidarity, since it is “possible to imagine circumstances in which individuals make decisions to promote the health of others based on a combination of genuine altruism and personal enrichment”.

1.5 Rewarding Deceased Donor Registration

Following from the above standpoint, the Nuffield Report does not recommend the creation of an organ market or a financial reward scheme for live organ donation in the UK because “any encouragement of people to come forward as organ donors for essentially financial reasons would be perceived internationally as a direct challenge to the principles of ‘solidarity’ and ‘unpaid’ donation set out in EU Directives and in international agreements

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32 The Report defines behavioural definitions as those that “focus solely on the costs and benefits of action to the person concerned, without reference to the internal motivational state that may have produced the action in question”. Nuffield Council on Bioethics, *Human Bodies: Donation for Medicine and Research*, p. 139.
33 Ibid. As Peacock, Schefczyk and Schaber argue (against behavioural accounts), “it is part of the ordinary definition of altruistic behaviour that it be motivated by other-regarding concerns. Altruism is constituted by a regard for the interests of others and a motivational disposition to act in their interests” (p. 189). M. Peacock, M. Schefczyk & P. Schaber. The Indispensability of Motives: Thoughts on Fehr and Altruism. *Analyse & Kritik* 2005;27:188-96.
34 Ibid:231.
such as the Declaration of Istanbul,\textsuperscript{37} and could undermine other countries’ attempts to put a stop to unregulated and illegal organ sales”.\textsuperscript{38}

Nevertheless, it recommends the UK National Health Service Blood and Transplant (NHSBT) to pilot a scheme “offering to meet funeral expenses for those who sign up in advance to the Organ Donor Register… and subsequently become organ donors”.\textsuperscript{39} The report justifies the scheme on the argument that the financial reward would prompt altruistic donations: individuals would be motivated to donate to benefit those in need of a transplant and/or their relatives (or otherwise those who would bear the costs of their funeral).

\subsection*{1.6 Criticisms of Motivation-Focused Justification}

Devaney aptly labels the above form of justification as ‘motivation-focused’: justification for “particular rewards concentrate[s] on what the providers’ impetus for contributing to this endeavour are [sic]”.\textsuperscript{40} In her view, the problem with motivation-focused justifications is that conclusions about ‘providers’ impetus’ are “based on assumptions and generalisations and… thus fail to provide a consistent basis on which to establish a system of rewards and recompense”.\textsuperscript{41}

For example, the Nuffield Report analogises women donating eggs for medical research to healthy volunteers for Phase I clinical trials in their motivation: like healthy volunteers, egg donors aim to contribute to scientific knowledge and to produce long-term health benefits for

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{37}Steering Committee of the Istanbul Summit. Organ trafficking and Transplant Tourism and Commercialism: The Declaration of Istanbul. \textit{Lancet} 2008;372:5-6. The Declaration of Istanbul was created during a summit in Istanbul convened by the Transplantation Society and the International Society of Nephrology in 2008. The document aims to provide ethical guidelines for donation and transplantation practices, and call for international cooperation to deal with organ trafficking and transplant tourism that involves transplant commercialism, defined as “a policy or practice in which an organ is treated as a commodity, including by being bought or sold or used for material gain” (p. 5).
\item \textsuperscript{38}Nuffield Council on Bioethics, \textit{Human Bodies: Donation for Medicine and Research}, p.173.
\item \textsuperscript{39} Ibid:175.
\item \textsuperscript{40} S. Devaney. Rewards and Incentives for the Provision of Human Tissue for Research. \textit{Journal of Medical Ethics} 2014;40:48-50:49.
\item \textsuperscript{41} Ibid:50.
\end{itemize}
\end{footnotesize}
the wider community, rather than to promote the well-being of “clear recipients (known or unknown)”.

“The potential gains by others are thus uncertain, remote...”

In the report’s view, this means that altruism is unlikely to play a central role in decisions to donate eggs, unlike decisions to donate organs for transplantation. Citing studies on volunteers’ perspectives on their motives, the Nuffield Report asserts that most healthy volunteers are primarily motivated by the financial reward.

On this basis, the Nuffield Report argues that a shift from “a primarily altruistic model” in egg provision for research in the UK would have less negative effects on solidarity: “where altruism does not play a central role, there appears to be much less justification for avoiding the use of financial reward [monetary compensation in this case] as a form of recognition.”

However, as Devaney argues, paid egg providers outside the UK have expressed “strong altruistic bases” for their decision to donate even as they were strongly attracted by substantial monetary compensation. Healthy volunteers paid to participate in Phase I trials have also regarded ‘altruism’ to be an equally important motive for their enrolment as financial compensation.

As one can argue then, deceased donor registration strongly motivated by financial compensation could also retain a ‘strong altruistic basis’. A rejoinder could be that benefits must be certain and linked to clear recipients for altruism to play a central role in motivation for donation. This link should be questioned, however. Consider non-bodily forms of donation: those who donate cash sums anonymously in aid of medical research like cancer research might be said to be altruistic. As for deceased organ donation, those who register for

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47 Devaney, ‘Rewards and Incentives for the Provision of Human Tissue for Research’ at 50.
donation are more likely to die in circumstances that make them unsuitable donors (only a 1% chance of dying in a way conducive to donation in the UK, assuming 5000 suitable deaths out of 500000 deaths annually; see p. 4). The odds that registration for deceased donation would lead to organ transplantation and thus benefits to patients waiting for a transplant are therefore very low. If so, it may be argued that deceased donor registration could shift from a ‘primarily altruistic’ model and be financially compensated to increase registration.

In sum, motivation-focused reasons to justify the ethical acceptability of a form of payment for bodily material donation are problematic, and could be used to justify other forms of payment or even no payment.

1.7 Thesis Aims and Approach

This thesis primarily considers the issue of using a ‘motivation-focused justification’ vis-à-vis the motive of altruism to determine the ethical acceptability of a payment in the form of a financial reward for organ donation. My reason for examining this issue is not to further the case that ‘altruism-focused’ justification leads to an inconsistent approach, or that it would, as some have claimed, co-opt people into duplicity about their actions.\textsuperscript{49} Rather, ‘altruism-focused’ justification is a misguided project because it is based on an improper understanding of how ‘altruism’ functions as a moral motive, which affects how we should understand its role and value in organ donation. It is because of this improper understanding that any focus on the ‘altruism’ of donors to justify some reward in its role as an incentive would undermine the plausibility of financially rewarded organ donation as an ethically acceptable endeavour.

Drawing on Monroe’s analysis of ‘altruism’, this thesis argues that the concept of ‘altruism’ delineates a \textit{distinctive} moral ‘perspective’ – the notion of a common humanity – which

\textsuperscript{49}Institute of Medicine, \textit{Opportunities for Action}, p. 249.
engenders a *devotion* to others’ interests.\(^{50}\) Because of the element of devotion, altruism is fundamentally at odds with *calculative* reasons for helping others. Roughly, I follow Wuthnow’s definition: ‘calculative reasons’ refer to reasons for helping others on an expectation formed before help is rendered that one will receive a specific benefit, not necessarily directed to one’s own interests, if one were to help.\(^{51}\) It is the lack of calculation in this sense that altruism engenders a sense of purity in one’s will as part of its phenomenology, and why altruism need not be undermined should one’s interests be furthered by helping others as an outcome. On this understanding, I argue that ‘non-pure’ understandings of altruism are misleading as to how a financial reward can be compatible with altruism. Accordingly, the thesis argues that if a financial reward were to be provided to *incentivise* organ donation, whether live or deceased, then it should be clear that organ donation is no longer based on the principle of altruism. This does not mean that donation would be based on ‘bad’ motives, or that a solidaristic approach to meeting health needs would be undermined (as I argue in Article Three of the thesis, ‘Altruism and Reward: Motivational Compatibility in Deceased Organ Donation’).

To achieve these aims, the thesis will visit the ‘gift or commodity’ debate to examine the ‘pure altruism’ doctrine, as well as proposed ‘non-pure’ definitions of altruism to reconcile altruism with financial rewards. In addition, it will examine arguments against the idea that

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\(^{50}\) K.R. Monroe. 1996. *The Heart of Altruism: Perceptions of a Common Humanity*. Princeton, N.J.: Princeton University Press. Monroe uses ‘perspective’ to refer to a complex frame of mind. Weinstein sums it up: perspective for Monroe consists of “cognition and cognitive processes, expectations, worldviews, empathy, and views of self… Based on these components, the most altruistic subjects – especially the rescuers – consistently saw themselves as members of a shared humanity. They thought of themselves as ordinary people who had not done anything praiseworthy by saving other people’s lives. They exhibited a universalistic worldview, in which being part of the human community was more important than being part of a just world or believing in the inherent goodness of people. They understood what is meant to be in need, and therefore felt that they had no choice in their actions.” (p. 50). J. Weinstein. Creative Altruism: The Prospects for a Common Humanity in the Age of Globalization. *Journal of Futures Studies* 2004; 9: 45-58. Monroe’s analysis of altruism is discussed in Article Two ‘The Concept of Altruism: Its Role and Value in Deceased Organ Donation’; Article Three ‘Altruism and Reward: Motivational Compatibility in Deceased Organ Donation’; and the thesis’s Conclusion.

deceased organ donors are in general not motivated by altruism, or that their altruism is not expressive of communal virtues like generosity. If these arguments hold, then the claim that preserving altruism in deceased organ donation supports solidarity in organ transplantation, as the Nuffield Report and defenders of altruistic gifting have held, is weakened. These lines of inquiries into how altruism functions as a moral motive for helping others will culminate into a critique of the Nuffield Report’s argument that a funeral reimbursement scheme for deceased donor registration will continue to prompt altruism in donation.

As part of its legal analysis, the thesis will examine what may be called ‘ownership-focused justifications’, which treat individual ownership of bodies and parts as an ethically significant idea in selecting a particular legal regime for individual control of bodies and parts, namely a property regime. The debate on ownership of organs has traditionally been tied to the matter of whether organ sale should be allowed.52 Recently, arguments have been made in favour of “modified”53 property regimes for example, a regime in which while individuals do not have the lifetime right to sell their organs, their passing would create such a right which they may transfer to their relatives.54 Alienation or transfer rights – whether sale, gift or bequest – can


be constrained by “weighty moral reasons, or reasons of great and pressing social utility”.

Thus even if organs are recognised as individual property, whether individual sources/owners or their relatives have a right to sell the sources’ organs would depend on reasoning about the moral and social advantages of recognising these rights in a given jurisdiction.

This thesis has three parts. The first part (inclusive of this chapter) contains a ‘Philosophical Approach’ and a ‘Legal Approach’. Specific questions aligned with the thesis’s aims will be formulated at the end of each approach section. The Philosophical Approach will discuss the ‘gift or commodity’ debate’, and arguments for and against the role and value of altruism in organ donation. The Legal Approach will focus on calls for organs to be owned as individual property. Specifically, I focus on arguments for the recognition of organs as individual property in England and the US. These two jurisdictions are selected because of the range of legal and policy-related cases and controversies on the use and disposition of bodily materials. Reflection on these controversies and cases, as well as the property models suggested in response, will form the backdrop to consider the question of what property framework ought to govern the transfer of organs.

Summaries of four stand-alone articles that make up the second part and core of the thesis will then be provided, followed by the articles themselves. Lastly, a conclusion chapter will discuss common threads that run through the articles, and suggest what the thesis has contributed to the subject of justifying the ethical acceptability of payment for organ donation.

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55 G. Gaus. 2012. Property. In: The Oxford Handbook of Political Philosophy. D. Estlund, ed. Oxford: Oxford University Press: 93-114:105. The point can be elaborated by the following from Mason and Laurie: “Ownership of property is therefore a strong and significant way of controlling and protecting our interests. But, it is by no means an absolute, and like all other legal rights that we enjoy, property rights can be tempered in our own interests or in those of others. We need not, therefore, accept exercises of ownership that go against our better interests, such as the disposal of vital organs, or uses that would be detrimental to our health. Nor need we go so far as to permit ownership of ourselves or others as entire living, breathing human beings – for that would be slavery, and a fortiori impermissible”. K. Mason & G. Laurie. Consent or Property? Dealing with the Body and Its Parts in the Shadow of Bristol and Alder Hey. The Modern Law Review 2001; 64;710-29.
CHAPTER 2

2 PHILOSOPHICAL APPROACH

2.1 Introduction

This chapter will discuss the ‘gift or commodity’ dichotomy to highlight arguments for rejecting the ‘pure altruism’ doctrine, a doctrine that has been attributed to the classic text on bodily material donation—Titmuss’s *The Gift Relationship*.\(^{56}\) It will then cover approaches to reconciling the gift form and payment in the form of a reward for organ donation on the claim that altruism and reward can co-exist as motives. This claim is based on alternative understandings of altruism than its ‘pure’ form. Finally, I will go into arguments on the moral insignificance of altruism to considering the ethics of approaches to increase deceased organ donation rates. Philosophical/ethical questions will be derived from this discussion to consider a central question that drives this thesis: should financially rewarded organ donation be ethically justified on the ground that it is consistent with the principle that donation should be altruistic?

2.2 The Gift of Titmuss?

The expression ‘gift of life’ was used to persuade the public of the good of organ transplantation and the humane, noble and communal nature of donation.\(^{57}\) It continues to be a dominant trope to frame the social and moral meaning of donation. For example, the preamble to the non-legal but widely professionally endorsed document *Declaration of*

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Istanbul on Organ Trafficking and Transplant Tourism (created during a summit in Istanbul convened by The Transplantation Society and the International Society of Nephrology) states that “…countless acts of generosity by organ donors and their families… have made transplantation not only a life-saving therapy but a shining symbol of human solidarity… The legacy of transplantation must not be the impoverished victims of organ trafficking and transplant tourism but a celebration of the gift of health by one individual to another”.  

The notion of the ‘gift’ itself as it applies to bodily material donation appears to be first used by the British sociologist Titmuss in his book The Gift Relationship around 1970. The ‘gift relationship’ signifies a social policy of restricting blood giving to what Titmuss calls ‘voluntary community donation’ (that is, the institution of the then National Blood Service as part of the National Health Service (NHS) universal health care). In Titmuss’s view, voluntary community donation comes closest to the “abstract concept of a ‘free human gift’”, being a practice that creates the “absence of tangible immediate rewards in monetary or non-monetary terms; the absence of penalties, financial or otherwise; and the knowledge among donors that their donations are for unnamed strangers without distinction of age, sex, medical condition, income, class, religion or ethnic group”. The Nuffield Report states that:

[The gift [as argued by Titmuss] epitomised the benefits of a non-payment system of blood collection – practical and medical advantages came with voluntary and altruistic donations from people who wanted to contribute to the common pool… Since then, the notion has passed into general parlance, to be joined with any kind of donation.}

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For sure, *The Gift Relationship* expresses the concern of organs becoming commodities should blood become so. As Titmuss writes, “if blood is considered in theory, in law, and is treated in practice as a trading commodity then ultimately human hearts, kidneys, eyes and other organs of the body may also come to be treated as commodities to be bought and sold in the marketplace.” 61 How relevant Titmuss’s idea of the gift relationship is to organ donation is a matter of debate. Unlike solid organs like kidneys, blood is regenerative and can be donated regularly. Organs differ from blood in their human significance. Organ donation also bears different risks and burdens from blood donation. For example, those who become deceased organ donors will incur loss of bodily integrity at death; the extent of this value varies according to individual beliefs on its afterlife significance. Nevertheless, Prottas avers that:

[a] public system dedicated to obtaining organs as gifts raises many of the same questions raised by Titmuss. How does a society organize the “harvesting” and “distribution” of such gifts? What are the roles of families, doctors, and public bodies in such a system? What obligations are incurred when a lifesaving medical system is constructed on a foundation of acts of altruism? 62

Certainly, proponents and likewise critics of altruistic gifting have engaged with Titmuss’s arguments to come to their own position on the ethics of means to increase organ procurement in light of a chronic organ shortage.

2.3 Gift and Commodity: Compatible Forms?

*The Gift Relationship* has been regarded as a narrative of a categorical opposition to all payment forms – “mutually exclusive and morally incompatible social forms” 63 – for all

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bodily material donation. On this view, Waldby and Mitchell state that the aim of their book *Tissue Economies* is to “complicate and disorganize the gift-commodity dichotomy” set up by Titmuss. Applying his arguments to today’s context, they conclude that “his reliance on what he considered the inherent moral and distributive qualities of gift systems as a solution to all potential problems [in tissue exchange] is no longer an adequate response”. As they note, human tissues such as skin, bones, blood, cells etc., albeit in processed or cultured forms, have been circulating internationally as commodities for quite some time. This raises the question as to why solid organs for transplant should not follow suit in a context in which a ‘national body’ (fellow citizens as donors) has failed to provide an adequate supply.

As Tutton points out, “the ‘gift relationship’ can be seen as essentially a political representation, from a liberal-socialist perspective, of the virtues of the welfare state vis-à-vis market-based healthcare…” In short, Titmuss regards the gift form as a foundation of the welfare state. According to Cherry, Titmuss was concerned that “if medicine becomes commercial, it will move from being an intimate relationship, or at least from having the character of the mom-and-pop drugstore and bakery shop, to possessing only those points of anonymous regard that characterize large-scale markets”. He assumes that the ‘Titmussian’ gift form concerns (A) the production of personal or affective connections and bonds, and (B) such bonds can only be forged through face to face interaction. On these assumptions, he argues that the ‘gift’ is a socially alienating form, particularly in deceased organ donation: the

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“vast national bureaucracy [of organ procurement systems] alienates in the sense of creating a significant distance between donors, on the one hand, and recipient and physicians, on the other”.  

Murray emphasises, however, that the Titmussian gift pertains to relations between strangers as an integrative thread in the social fabric of modern societies. As a defender of the ‘altruistic gift’, Murray argues that “[r]elationships governed by markets keep moral and social dimensions to a bare minimum. Gifts, by their open-endedness, defy such minimalization. Impersonal gifts such as blood or body parts… may not regulate relationships between specific individuals, but they serve other functions by regulating larger relationships and honoring important human values, precisely those threatened by massive and impersonal bureaucracies.” Archard takes this further. He argues that it is precisely because many relations and cooperative structures in modern large-scale societies are not face to face that Titmuss propounds ‘community’ or social integration as the central value of the gift framework.  

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70 T.H. Murray. Gifts of the Body and the Needs of Strangers. Hastings Center Report 1987;17:30-8:35. Healy argues that “whether [tissue] exchange is commodified may matter less than whether it is industrialized, which is to say administered by rationalized organisations…Rationalized organizational systems may look ruthless to people, and it is often their impersonal quality that provokes outrage” (p. 122). In his view, procurement organisations have “industrialized” voluntary unpaid organ donation “by treating it as a resource extraction problem” (Last Best Gifts, p. 44). They “become committed to their own public accounts of donation and think about their interests and obligations that reflect the content of their relationship they have with suppliers and recipients… this does not necessarily lead them to act in ways that benefit themselves or those they serve” (p. 113). For example, recipients might want to establish personal relations of some kind with donor families and vice versa. Lewino, Stock and Cole’s study found that most donor families and recipients want to meet, and regard it as their right to do so. Nevertheless, transplant coordinators regard it as their responsibility to ensure anonymity and privacy between recipients and donor families, which is justified as standard procedure to safeguard both parties’ interests. D. Lewino, L. Stocks & G. Cole. Interaction of Organ Donor Families and Recipients. Journal of Transplant Coordination1996;6:191-5. Clayville (in 1999) reported that transplant coordinators’ decisions not to allow meetings between recipients and donor families confused and frustrated them. L. Clayville. When Donor Families and Organ Recipients Meet. Journal of Transplant Coordination 1999;9:81-6. The anonymity condition has been relaxed to some extent. In view of the positive psychosocial benefits (as such donor families finding solace in knowing that recipients are doing well), procurers in the UK and elsewhere now allows anonymous written correspondences between deceased donor families and recipients, as well as live stranger donors and their recipients, subject to the agreement of both parties, which could lead to a facilitated meet-up.  
71 According to Sykora, there is a flaw in the way Titmuss links altruism and community. As he notes, Titmuss refers to Mauss’ anthropologist findings on gift economies as tools of social integration in archaic, small scale
the gift relationship as referring to an “imagined community”: “affective closeness” can be imagined across the distance and non-contact through actions motivated by generosity and altruism such as giving life-saving body parts to strangers”.  

Cherry has another argument: “[t]he interests of prospective organ vendors and recipients to have health care choices regarding their body parts respected in a personally attentive manner offer market opportunities that have yet to be adequately explored”.  

He argues that it is in the interest of those involved in organ procurement and transplant services to “cultivate virtues of gift giving, kindness, attention, and personal recognition of the other” for a market to operate well.  

There seems to be a model already in practice. In Iran’s live kidney market, a seller will receive a monetary gift and one year free health insurance from the government, and also opportunities to attend annual donor appreciation events. (This is in addition to the negotiated payment they receive from their buyers.)

Live sellers and buyers could also develop personal relations. The insights of economic sociologists could help explain why. According to Appadurai, ‘commodity’ is not an object but a possible phase in the social life of an object. An object transferred through a commodity pathway could acquire the permanent status of an ex-commodity and even a gift. Appadurai does not argue for this, but his views could lend support to the argument that organ buyer and

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73 Ibid: 108.
seller relations could shift to an interpersonal gift relation. This is not unimaginable. An American kidney buyer (in the black market) was reported to correspond regularly with her South African seller, and “though hardly wealthy herself, says she intends to send cash gifts each Christmas and on his birthday”.

As Williams and Zelizer argue, “people strive to define the moral life in a wide variety of social contexts that involve both economic dimensions and socioemotional relationships”. In their analysis, people strongly differentiate between various kinds of social relations. Different exchange tokens and payment forms, including cash, are provided and accepted to express or sustain differentiated relational significance. Based on this view, they argue that the ‘Hamlet’ poser of ‘to commodify or not to commodify’ should be abandoned in favour of an “an often-painful assessment of how to create differentiated interpersonal ties that are just, equal, socially beneficial, and satisfying to their participants in both their material and their symbolic dimensions”.

Extending Zelizer’s ideas to the issue of motivation and improving donation rates, Healy argues that people should not in principle object to the idea of receiving payment or remuneration for bodily material donation: “it might not be difficult for families of organ donors to accept a payment in connection with their decision to donate. But because the form of payment will mark the kind of social relationship established by the transaction, the organ procurer must tread carefully.”

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80 Healy, Last Best Gifts, p.12. Form is thus vital to differentiating ties. During Singaporean Chinese weddings, for instance, giving money in a red packet by an appropriate family member at an appropriate time to the wedding helpers (including bridesmaids and the best man) expresses appreciation for their help, rather than remuneration for their services.
2.4 Funeral Expense Reimbursement as a Reward Gift Form

In line with Healy’s view, proposed financial incentives for organ donation have often been framed as ‘reciprocal gifts’. For instance, an ethics committee set up by the American Society of Transplant Surgeons (ASTS) concluded in 2002 that offering families reimbursement for donor funeral expenses or monetary contribution to a charity of their choice to motivate them to donate a deceased kin’s organs are ethically acceptable financial incentives. The committee articulated its criteria for ‘ethical acceptability’, which include the principles that the incentive “should preserve the concept of the organ as a donated gift” and “not subvert or diminish the current standard of altruism”. For the committee, these incentives are different in social meaning from other suggested incentives such as direct cash payment and income tax benefits (which for the committee translates in meaning to cash payment). According to some members of the committee,

some people may view [their] difference as symbolic, but in our view, the symbolism is very important. Symbols that are figurative representations of core social values and boundaries are both subtle and complex and do not always stand up to purely rational analysis… The Red Cross gives T-shirts, food, and drinks to those who donate blood but would not give their cash equivalent. Despite the increasing encroachment of market forces into medicine, we believe that the symbol of altruism in organ donation continues to represent powerful notions.

Or as Dunham IV puts it, “Proponents of this approach [indirect financial incentives or material rewards for deceased donation] often seek to distinguish it from a market-based approach by arguing that the compensation is public, not private, and thus, represents the appreciation of the entire community rather than the product of a private contract between

82 Ibid:1363.
parties for the sale of a good.” To the extent that the reward is presented as an expression of social recognition or public gratitude, paid organ giving can still be encouraged and characterised as altruistic gifting.

Various problems have been identified with this approach to reconciling a financial reward with altruistic gifting. The Institute of Medicine report *Organ Donation: Opportunities for Action* points out that “it is by no means clear that the transplantation community can control public perceptions of incentives, particularly if they have significant material value”.

Furthermore, medical professionals in the US involved in requesting families to permit deceased organ donation testified to the committee appointed by the institute to write the report that “offering cash payments to donor families while simultaneously appealing to their altruism would be awkward”.

Veatch criticises the approach strongly: “Giving monetary rewards in exchange for the gift of organs seems to be a blatant corruption of the language. The term “rewarded gifting” seems to be proposed only because liberal western societies are so strongly committed to the gift model that it is attractive to try to make sales sound like gifts.” On the specific proposal of offering to motivate families to agree to donation, he argues that:

…the funeral is normally paid out of the estate. If funeral costs are borne by the transplant agency, the estate increases by that amount. The beneficiaries of estate get that much more. That is almost the same as buying the organs. I say almost the same because new deception is involved. The participants—the family as well as organ procurers—may

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85 Institute of Medicine, *Opportunities for Action*, p. 249.
86 Ibid:245. As Mahoney writes, “If prospective donors and the public reject the distinction between “an incentive of material value and a payment for organs,” the upshot could be serious reputational harm for the transplant profession with no concomitant benefit of increasing the organ supply.” Mahoney, ’Altruism, Markets, and Organ Procurement’ at 31.
actually fool themselves into believing they have remained in the gift-giving mode.\textsuperscript{88}

This criticism may not apply to the Nuffield Report as it diverges from the ASTS ethics committee on the addressee of its proposed funeral reimbursement offer, that is, to individual donors rather than to families. The report recommends not offering this reward to incentivise families because of the concern that they may be regarded as using the body of their deceased kin as a means to their end rather than an end in itself, thus failing to respect the dignity of the kin.\textsuperscript{89} The question remains as to how the gift can still be based on and expressive of altruism in a socially and morally meaningful way. The next section will discuss this question.

\textbf{2.5 Altruism: From Pure to Primary Motive}

Epstein and Danovitch claim that “in the legal transplant jargon”, ‘altruism’ means any motivation(s) other than those formed under market transactions.\textsuperscript{90} From an ethical perspective, however, ‘altruism’, as an aspect of the bodily gift, is often taken to refer to ‘pure altruism’.\textsuperscript{91} According to Satel, “the doctrine that altruism should count as the sole legitimate impulse behind [organ] donation can be traced to” Titmuss.\textsuperscript{92} Sykora labels him an altruism ‘purist’ who objected to even fringe benefits (e.g. a day off) for blood donation.\textsuperscript{93}

\begin{itemize}
\item \textsuperscript{88}Veatch, \textit{Transplantation Ethics}, p. 158-9.
\item \textsuperscript{89}Nuffield Council on Bioethics, \textit{Human Bodies: Donation for Medicine and Science}, p.174.
\item \textsuperscript{90}M. Epstein & G. Danovitch. Is Altruistic-Directed Living Unrelated Organ Donation a Legal Fiction. \textit{Nephrology Dialysis Transplantation} 2008;24:357-60:357.
\item \textsuperscript{93}Sykora, ‘Altruism in Medical Donations Reconsidered’.
\end{itemize}
Putting aside the issue of whether ‘pure’ altruism can be attributed to Titmuss for now, a traditional argument for recognising the limits of pure altruism in bodily material donation is that while “pure altruism is commendable”, people should not be constrained to act on this motive when there is good reason to believe that more lives will be saved or improved through introducing a profit or reward motive for organ giving.\(^{94}\) Furthermore, as Arrow argues against Titmuss, allowing market options does not prevent people from donating from altruism.\(^{95}\)

In addition, it seems that people are rarely motivated purely by concern for others as they help others. Based on her research with volunteer workers, Cushing states that a “pure notion [of altruism] serves an analytic purpose [in philosophical discussions] but it is unreasonable to make it a gold standard that we hold people up to”.\(^{96}\) In her view, we are relational beings, and so our impulses to help others typically interact with our own feelings, desires and interests. Likewise, arguments have been made to bring ‘altruism’ to a more ‘realistic’ standard in organ donation

As Dunning writes, “when it comes to the impact of motives on social behaviour, one must be mindful of equifinality”.\(^{97}\) The principle of equifinality states that “a single behaviour can be motivated by many different motives” or that an “individual may harbor multiple motives that spur his decision”.\(^{98}\) This principle appears to hold in deceased organ donation. Empirical studies have shown that individuals favourable towards deceased donation expressed various motives like ‘To save other people’s lives’

\(^{94}\)De Castro, ‘Commodification and Exploitation’ at145.
\(^{95}\) K. Arrow. Gifts and Exchanges. Philosophy and Public Affairs 1972:1: 343-62.Satel argues that having market options would reveal “who the truly altruistic donors are, namely those who refuse remuneration even when they have the option to receive”. Satel, ‘The Waiting Game’ at 41.
\(^{98}\)Ibid.
or ‘The thought that I might need organs from others one day’, for families who donated organs expressed motives such as ‘a desire to help others’, ‘the right thing to do’, and ‘coping with loss’. For Childress, ‘equifinality’ suggests that altruism may co-exist with financial incentives as motives for deceased organ donation.

Donors [including families] may have all sorts of mixed motives for donating—ranging from altruism, which is certainly important, to a sense of obligation, to a desire to find redemptive meaning in a tragic set of circumstances, to a hope that their loved one can live on in others, to a desire for praise, honor, fame, and so forth. Once we recognize that motives are often, and perhaps usually, mixed and that the procurement system does not require pure altruism as the donor’s sole motivation, then we can begin to consider not only how the society could remove disincentives to donation, but also how it might provide incentives—i.e., additional motivating reasons—without replacing a moral sense of altruism… One question that arises is whether, within moral constraints, we could find more meaningful and powerful incentives, perhaps even financial ones.

The above paragraph expresses a view that I term ‘Altruism-Reward Compatibility’ (ARC). To be clear, ARC is a view on what could count as altruism. It rejects the idea that some beneficent action A is altruistic only if it is motivated solely by a concern for the welfare of others. It goes beyond the claim that A could be altruistic if it is partly motivated by a concern for others and partly by a concern for oneself. Rather, it claims that A could be altruistic if it is partly motivated by concern for others and partly by a reward for performing A. A proponent of ARC may, though she need not, accept the moral significance of altruism in organ donation. Such moral significance can be unpacked into various principles:

I. Donation is not ethical (or ethically acceptable) unless done purely for altruistic reasons.
II. Donation is not ethical unless done (at least) partly for altruistic reasons.
III. Donation done solely for a reward motive is not in principle unethical, but altruistic donation is morally better.

Logically, a proponent of ARC may endorse principle I—while accepting that beneficent acts that are motivated partly by can be altruistic, she may believe for ethical reasons that organ donation should be motivated purely by concern for others. Typically, however, proponents of ARC endorse either principle II or III since the point of expressing ARC, at least in the organ donation literature, is to argue for exploration of ways to increase organ donation, particularly financial rewards, other than appealing to pure altruism. The Nuffield Report for example endorses principle III: in its view, while pure altruism is morally best as a motive for donation, ‘partial’ altruism, even when mixed with a reward motive, is ethically acceptable since it is sufficient for supporting solidarity in organ donation.

Still, it is not clear though why offering a financial reward for organ donation will not subvert or eliminate altruism in donation.

One possible explanation is that altruism is in fact a reward-seeking form of behaviour. Ferguson, Farrell and Lawrence argue, contra Titmuss, that voluntary unpaid blood donation is an act of benevolence rather than (pure) altruism because it is motivated by a belief that one would be personally rewarded by the act: one donates blood because of the psychological reward of positive emotions or a heightened sense of self-worth.102

Consistent with this view, Sykora argues that altruism for Titmuss just means charity but charitable giving is best explained from an evolutionary psychology viewpoint as

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behaviour driven by the ‘internal’ reward of ‘good feelings’. According to Sykora, neuroimaging studies show that feelings produced by expectation and reception of a financial reward can be (and probably are) qualitatively the same as feelings produced by expectation and reception of an emotional reward for helping others. This supports his argument that the line between pure altruism and commercial exchange is not clear cut. They are different poles of the same continuum of human actions and social relations underpinned by reciprocity, whether reciprocity is linked to evolutionary causes or to psychological causes like motivations. Financially rewarded donation can lie somewhere on this continuum which, while it would not be on ‘pure altruism’, would be closer to that pole than commercialism.

It is hard to dispute that our social practices and actions are based shaped by an element of ‘give and take’. Nevertheless, it has been argued that altruism should not be equated to just another form of reward-seeking (or aversion avoidance) behaviour. Ten warns that “if we extend the notion of self-interest too broadly, then there will be little or nothing with which to contrast it… we will end up claiming that every voluntary act, not matter how great the cost to the agent, and no matter what terrible state it left her in, was done because it gave her satisfaction to do it, and so it must in the end be in her self-interest [sic]. Such an expanded notion of self-interest cannot explain anything, cannot predict anything. It is empirically empty.” This parallels Campbell’s criticism of Sykora: “The problem with such reductionist and deterministic arguments is that they offer no escape from the closed circuit of their logic... any other reason offered for the way humans act must simply be translated into the same causal explanation.”

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103 Sykora, ‘Altruism in Medical Donations Reconsidered’.
To explain ARC in a way that does not rely on blurring the line between altruism and reward motives, it has been suggested that altruism can remain the dominant motive in response to an offer of a reward for deceased organ donation. Consequently, donation can still be categorised as predominantly altruistic. Steinberg defines the term ‘predominant altruism’ as “intentional and voluntary acts that aim to enhance the welfare of another person that come with a reward of a relatively trivial nature”.\(^{106}\) “An act may retain a predominantly altruistic character even though the purity of the altruism is minimally compromised.” Lavee et al. uses the same term to justify Israel’s revision of its organ transplantation law in 2010 to provide priority for organ allocation for those opt in for deceased donation.\(^{107}\) They argue that altruism would still predominate in those incentivised to register for donation not because of the triviality of the reward, but its improbability: “most people who sign an organ donor card will never need an organ themselves and in all likelihood will ultimately receive no material reward for their promised donation”.\(^{108}\)

Most proposed financial incentives for deceased organ donation are not, however, trivial or improbable rewards. This approach to argue for ARC thus invites the problem of how to get the reward just ‘right’ for altruism to remain the dominant motive. Too low a reward and the reward would not incentivise donation – it might even be construed “as an insulting low payment given the real cost of a funeral and the vast amount of money invested in organ transplantation”. Too high a reward, and the dominance of altruism becomes compromised. The ASTS ethics committee acknowledges this problem:

\(^{108}\)Ibid:1132.
Providing a financial incentive that would be appropriate to convey gratitude, although not providing an excessive amount that undermines societal values and altruism, is not an easily accomplishable goal. Moreover, the difficulty was compounded by the following observation: an excessive amount for an individual of one socio-economic status may not be an inordinate benefit for another.\textsuperscript{109}

Despite the difficulty of setting an appropriate amount, rewarded deceased organ donation may still be justified as altruistic. One may follow the reasoning used by the Nuffield Report to defend the ethical acceptability of its proposed donor funeral reimbursement scheme.

As mentioned in Chapter One, the Nuffield Report defines an altruistic action as ‘one that is \textit{primarily} motivated by concern for the welfare of the recipient of some beneficent behaviour, rather than by concern for the welfare of the person carrying out the action’ (italics mine).\textsuperscript{110} According to the report, those already inclined or disposed towards donation would be primarily motivated to benefit those in need of a transplant, spurred by an additional or secondary motivation of benefiting relatives by means of the reward. For those with no inclination to donate in the absence of the reward, their registration would still be altruistic since its primary motivation would be to benefit one’s relatives or those would otherwise bear the costs of their funeral. Since motivation remains primarily other-regarding under a reward scheme, the reward scheme does not threaten solidarity.

2.6 The Moral Insignificance of Altruism?

As discussed earlier, ARC may be made in recognition of the moral significance of altruism. It has been argued, however, that altruism has little or no moral import in

\textsuperscript{109}\textit{Arnold, ‘Financial Incentives for Cadaver Organ Donation’ at 1366.}
\textsuperscript{110}\textit{Nuffield Council on Bioethics, Human Bodies: Donation for Medicine and Science, p. 231.}
evaluating the normative parameters of organ donation. Wilkinson and Saunders make this argument – separately, and on different definitions of altruism – to support the in-principle ethical acceptability of means to increase deceased donation rates that affect organ allocation, such as ‘conditional group-donation’: providing individuals the option to designate some particular group(s) – for example, those from a specific ethnicity, children etc. – to receive their organs at death.\textsuperscript{111}

Wilkinson notes that because of altruism, deceased donation is commonly characterised or lauded as a generous act or an “amazing gift”.\textsuperscript{112} He argues that such a link is inaccurate because self-sacrifice is a necessary ground for altruism to be laudable, but most deceased donors do not care about their bodily remains, and therefore do not sacrifice much if at all. The value of altruism is overstated. Thus, not much would be lost morally speaking by allowing conditional donation.

Altruism has been linked to the impartial principle of allocating according to greatest need, which helps ensure equitable access to transplant organs. Wilkinson questions this relationship because altruism “in its normal sense, refers roughly to a non-self-interested concern for the interests of others”.\textsuperscript{113} On this definition, he argues that conditional donation could still be altruistic even if it leads to a less equitable way to allocate organs. Even if conditional donations are not altruistic, not accepting such donations would mean that less people’s need for a transplant would be met. Altruistic people, Wilkinson argues, would prefer “more organs to more altruism”.\textsuperscript{114}

\textsuperscript{112}Ibid:149.
\textsuperscript{113}Ibid:149. Wilkinson uses the same definition in his article ‘What’s Not Wrong with Conditional Organ Donation?’ in \textit{Journal of Medical Ethics} 2003;29:163-4.
\textsuperscript{114}Wilkinson, \textit{Ethics and the Acquisition of Organs}, p. 151.
Ultimately, Wilkinson doubts the moral significance of altruism to either organ procurement or allocation because “The system cannot possibly check people’s motives and does not try to at all in the case of dead donors. If someone wants to donate an organ, the system does not ask whether his reason is selfless concern for others or to spite his family.”¹¹⁵

Saunders, on the other hand, argues that “genuine altruism” cannot be “other-concern [that is] limited to members of a particular group”.¹¹⁶ Rather, the moral essence of altruism is its impartiality: to meet need irrespective of one’s interest in or relationship with those in need. On this understanding of altruism, he argues that since donated deceased organs are by and large directed to fellow citizens, most deceased donations should in fact be regarded as motivated by solidarity rather than altruism. As the Nuffield Report defines, ‘solidarity’ refers to “the idea that we ‘re [sic] all in this together”, with an implication of mutual obligations and mutual support within a definable community (based, for example, on geography or on shared interests)”.¹¹⁷

As Saunders argues, conditional donation is “likely to appear more attractive to us” once we recognise that solidarity rather than altruism is the usual motive for deceased organ donation.¹¹⁸ To be clear, the reasoning here is that conditional donation as a ‘partial’ policy is consistent with the current organ procurement system in the way it motivates donation, namely through partial concern (solidarity).¹¹⁹

The thesis focuses on altruism as an evaluative concept to determine whether payment for donation is ethically acceptable. However, if altruism is morally insignificant to the evaluation of deceased donation and its promotion as Wilkinson and Saunders argue,

¹¹⁵ Ibid:151.
¹¹⁶ Saunders, ‘Altruism or Solidarity’ at 376.
¹¹⁸ Saunders, ‘Altruism or Solidarity’ at 381.
¹¹⁹ I address Saunders and Wilkinson’s arguments in Article Two, ‘Is Altruism Morally Irrelevant to Deceased Organ Donation? A Response.’
then altruism should not ethically matter as to whether payment for donation should be introduced. From this perspective, I respond to their criticisms of altruism to defend the role and value of altruism. Examination of their definitions also serves as a useful platform for me to argue that altruism ought to be understood as a concept that denotes the perspective of a ‘common humanity’, which serves the broader argument of the thesis, namely, payment, even in the form of social rewards, is incompatible with promoting altruism in deceased organ donation.

2.7 Conclusion

We have covered three positions on altruism in relation to the ethics of means to increase organ donation. Each of these positions raises questions about how altruism functions morally as a motive for donation.

I. ‘Pure altruistic gift’ should be jettisoned in favour of more motivationally diverse but ethical and efficient social forms in negotiating an organ shortage.

As noted, some commentators trace the ‘pure altruism doctrine’ to The Gift Relationship. It should be noted though that Titmuss explicitly stated that no voluntary community donors can be “said to be characterized by complete, disinterested, spontaneous altruism…”120 In fact, donation must be supported by self-interested reasons, including self-love and the prudential reason that one might receive free blood and help by the health service one day.121 What then might Titmuss’s idea of altruism be, and how does it relate to valuing the gift form over the commodity form?

120 Titmuss, The Gift Relationship, p. 238.
121 Ibid:212&238.
II. The idea that donation ought to be altruistic should not rule out the ethical acceptability of whether to increase deceased donation by partial schemes such as conditional donation. This is because most donations are motivated by solidarity and not genuine altruism, which is impartial in its concern. And if we define altruism as ‘non-self-interested concern for others’, then actions expressing partial concern are compatible with altruism. Conditional donation can be altruistic and thus ethical. Regardless, the fact that no inquiry into motives is conducted gives us ground to question the moral significance of altruism to deceased donation.

Is the moral essence of altruism ‘impartiality’, ‘non-self-interested concern for others’, or something else? Can the moral importance of altruism in deceased donation be upheld even if motives for donation are not and cannot be checked?

III. In the Nuffield Report’s view, ARC is achieved if a reward scheme prompts donation that are in most if not all cases based on altruism as the primary motive.

Is this argument convincing, in light of the idea that the primary value of altruism is for its role in supporting solidarity?

These questions will be used to consider whether a financial reward for organ donation should be justified with reference to the idea of preserving the moral and social character of organ donation as altruistic gifting.
CHAPTER 3

3. LEGAL APPROACH

3.1 Introduction

Numerous important legal issues may be raised in the context of organ transplantation, for example whether or not mentally incapacitated adults or children can give consent to live donation; whether to legislate for a shift from a express consent to a presumed consent system in jurisdictions like England and the US; and whether or not to revise legislation related to organ transplantation so that an organ market can be created, or at least allow financial rewards to be offered to individuals or relatives to incentivise donation. Consistent with this thesis’s focus—justifying payment for donation, I focus on the last legal issue.

As George writes, “Courts and Parliaments have traditionally addressed the trade in human body parts from a property perspective.” In the previous chapter ‘Philosophical Approach’, we discussed how notable organisations bodies such as the ASTS and the Nuffield Council on Bioethics have advocated or proposed ‘lesser’, indirect payment, such as donor funeral expense reimbursement as a form of societal reward to incentivise deceased donation. Such payment forms need not necessitate the recognition of the human body as individual property. They could be permitted by statutory rules, as in the case of Israel. Currently, legislation that regulates organ transplantation in England – the Human Tissue Act 2004 – explicitly

123 George. ‘Is ‘Property’ Necessary?’ at 17.
124 Section 29 (a) of Israel Organ Transplant Act 2008 states an exception to the prohibition of reward for organ donation: “A corporation approved by the Minister for the purposes of this Article (in this Act — an approved corporation) may give a reward to a living person, or to his relative — either during the person’s lifetime or after his death — for that person’s consent to the post-mortem removal of an organ from his body, of for his relative’s consent to the post-mortem removal of an organ from his body, but only under terms laid down by the Minister for approving that corporation; however, with respect to certain types of reward, the Minister may direct within the said terms of approval that no such reward shall not made to that person’s relative except with the person’s consent.”
forbids any reward for organ donation (elaborated below). In the American context, uncertainty has been expressed as to whether or reward payments violate the National Organ Transplant Act of 1984 and the Uniform Anatomical Gift Act, which is a key reason why these payment schemes have thus far not been introduced.

However, if individuals own their body as private property, then *prima facie*, individuals ought to be able to use their body parts for material gain, or even as objects of commerce. To quote Beyleveld and Browsword, “…if we have property in our own bodies and property parts, then standard principles of freedom of contract (and property) suggest that there should be at least a presumption in favour of permitting commerce of this kind, provided that the dealing is free of duress or duplicity”. Common law approaches to the body do not recognise the body and its parts as property usable by their source or their close relations for material gain, let alone commercial use. Hence, reform or at least clarification of statutory provisions against organ sale in the England and the US would need to be done to allow rewarded donation.

In what follows, I will discuss some English and American cases to shed light on common law principles that support body parts as property of their sources, or as property of third parties. I then describe the legislative frameworks in England and the US on organ donation and transplantation, and how the ban on organ sale – which extends to a ban on reward for organ donation, or could be interpreted as such – in the two jurisdictions came about. These two lines of discussion will lend an understanding as to why the “no reward imperative” for organ donation has been regarded as normatively unjustified.

Selection of these two jurisdictions follows from my ‘Philosophical Approach’, which focuses on arguments taking place in these jurisdictions for the compatibility of altruism with reward for donation. It should be noted that the Human Tissue Act used to apply in full in England, Wales and Northern Ireland as regards organ transplantation. (Scotland has a separate legislation – the Human Tissue (Scotland) Act 2006 – for organ transplantation.) Wales will soon move to a presumed consent system in 2015 following the passing of the Human Transplantation (Wales) Act in 2013. As the thesis focuses on justification of rewarded donation in express consent systems, I therefore direct my attention to English law alone.

This chapter is primarily interested in the justification of payment for donation from a legal perspective. In the interest of space, I will discuss Horton’s reasoning for allowing families to be paid in return for donation.127 Specifically, he argues that reasons that underpin legislation against lifetime sale of organs by individuals need not apply to a legal regime in which individuals could transmit their deceased organs to their heirs and beneficiaries as part of their estate, whereupon at their death, their heirs or beneficiaries could decide to donate the organs in return for some payment.

I focus on Horton’s reasoning also because it could support the Nuffield Report’s proposal for the NHS to conduct a pilot study to determine whether payment for funeral expenses to attract deceased donor registration would increase donation rates. As the Report justifies its proposal, “Those close to the donor may benefit directly, and also would clearly have the option of declining the offer of burial costs being met by the NHS.”128 Thus, under the Report’s proposal, families as intended beneficiaries would remain the final decision-makers on acceptance of the reward payment, although to be clear they would not be the ones who

127 D. Horton. ‘Indescendibility’.
decide on donation, unlike Horton’s proposal. Horton’s proposal also goes beyond the Nuffield Report’s, as he argues for a plurality of approaches to increase donation, including allowing heirs to sell the organs for cash. At the end of the chapter, I will raise some issues with Horton’s argument, which will form the backdrop of the fourth article of the thesis “Organs as Inheritable Property?”

3.2 ‘No Property in a Dead Body’ Principle

According to Hardcastle, “The starting point for any analysis of the common law in respect of living persons lies with the legal treatment of slaves . . . . Although the early common law considered that slaves could be regarded as chattels, English law thus moved to recognise that a living person should not be considered to be property…”\(^\text{129}\) It is a well-established common law principle that the living human body is not the subject of property. Hawes claims: “It follows from this general rule that no one may own a human corpse, the reason being that the occurrence of death cannot engender or trigger property rights which had not existed when the person had been alive.”\(^\text{130}\)

Historically, common law courts have applied the ‘no property’ principle to a dead body, although this ‘no property in a dead body’ principle has been said to be “doubtfully established”.\(^\text{131}\) English common law recognises that relatives have a possessory interest in their kin’s dead body for funeral disposition; an executor or administrator of the deceased’s estate – not necessarily a relative – is entitled to the return of the body in the exercise of his or her possessory right.


This right has been referred to as a ‘quasi property right’ in American common law. ‘Quasi-property’ is used to denote this right because it is underpinned by interests – possession and exclusive control – regarded as central elements of property.\textsuperscript{132} Transfer of these interests is however prohibited and deemed to be of “no independent pecuniary significance”.\textsuperscript{133} ‘Quasi-property’ suggests that relatives do not have to demonstrate physical injury to claim damages for emotional distress suffered by mistreatment of their deceased kin dead body. Increasingly, American courts hold that compensation for this form of emotional distress should be addressed through the tort actions of intentional infliction of emotional distress or interference with a dead body.\textsuperscript{134} Thus, in \textit{Carney v Knollwood Cemetery Association}, it was opined that the “quasi-property approach and the accompanying limitation on recovery have long been discredited”.\textsuperscript{135} In \textit{Brotherton v Cleveland}, the court held that a wife had a constitutionally protected property interest vis-à-vis possession of her dead husband’s body, including his corneas which were removed by the coroner.\textsuperscript{136} The recent case of \textit{Newman v Sathyavaglswaran} follows \textit{Brotherton}’s reasoning.\textsuperscript{137} In \textit{Newman}, the court of appeal held that next of kin’s right to possess the bodies of their deceased family member constituted an adequate property interest, the deprivation of which must be given due process protection.

### 3.3 Work/Skill/Alteration Principle

English law have recognised exceptions to the ‘no property in a dead body’ principle which go beyond relatives’ interest in possession for final disposition. They originate in an Australian case, \textit{Doodeward v Spence}, in which possessory control over a still-born


\textsuperscript{133}Ibid:1897.

\textsuperscript{134} In \textit{A B v Leeds Teaching Hospital NHS Trust} – a case which concerned retention of deceased children’s body parts with the express authorisation of the parents, Gage J refused to extend these common law torts to the case, holding that the matter should be fall under negligent acts instead. [2004] 2 FLR 365, [2004] 3 FCR 324.

\textsuperscript{135}514 N.E.2d 430 (Ohio App. 1986) at 3d.32.

\textsuperscript{136}923 F.2D 477, 481 (6th Circ. 1991).

\textsuperscript{137}287 F.3d 786, 791 (9th Cir. 2002).
two headed foetus preserved and used for commercial exhibition was contested.\textsuperscript{138} The court held that a deceased body could become another’s property when he “has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial…”\textsuperscript{139}

This \textit{Doodeward} principle can be said to be a ‘work/skill/alteration’ acquisition principle: ownership interest of a deceased body or part may be acquired by a person as a result of his labour or skill, in which attendant alteration of the body or part for some socially valuable purpose may play a role in the characterisation of the interest.\textsuperscript{140} It was applied almost a century later in \textit{R v Kelly}, the first time an English court held that deceased body parts could be property under common law and therefore may be stolen.\textsuperscript{141} Upholding the conviction of a technician and an artist for theft of body parts (for use as moulds for the artist’s sculptures), the Court of Appeal found that “parts of a corpse were capable of being property… if they have acquired different attributes by virtue of the application of skill, such as dissection or preservation techniques, for exhibition or teaching purposes”.\textsuperscript{142}

The \textit{Doodeward} principle has been criticised as vague as to when work or skill would alter a body and its parts from being in a mere cadaveric state to one that can be owned as property.\textsuperscript{143} For example, in \textit{Dobson v North Tyneside Health Authority}, the Court of Appeal did not consider a preserved brain removed by the hospital for post-mortem examination as

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{138}[1908] 6 CLR 406.
\item \textsuperscript{139}[1908] 6 CLR 406 at 749-50.
\item \textsuperscript{140}The principle may be broken up into separate exceptions, for example: ‘work and skill’; ‘metamorphosis’; and ‘value added’. See Price, \textit{Human Tissue in Transplantation and Research}, pp. 255-64.
\item \textsuperscript{141}[1998] 3 All ER 741.
\item \textsuperscript{142}Ibid: At 749-50. It should be noted that Rose LJ raised in obiter dicta the possibility of common law recognising body parts as individual property but only if ‘they have a use or significance beyond their mere existence’. Ibid:750.
\item \textsuperscript{143}See Price, \textit{Human Tissue in Transplantation and Research}, pp. 255-264; M. Brazier & E. Cave, \textit{Medicine, Patients, and the Law}.
\end{enumerate}
\end{footnotesize}
the property of the hospital.\textsuperscript{144} It did not think that this preservation was on par with the skill or labour required for embalming a corpse or preserving human tissue for a scientific collection or exhibition purposes. Aside from the lack of clarity in on when Doodeward supersedes ‘no property’, their interplay has been criticised for creating the “odd paradox whereby our bodies and their parts are not our property (or least do not form part of our estate) but put… to the uses of medicine, their body parts become, as if by magic, property, but property owned by persons unknown for purposes unforeseen by the deceased”.\textsuperscript{145}

\section*{3.4 PROPERTY, PUBLIC INTEREST AND ABANDONMENT}

This last criticism is well demonstrated in the landmark US case of \textit{Moore v Regents of the University of California}.\textsuperscript{146} A patient-subject, Moore, sued some clinician researchers and the university for conversion (among other claims) of his excised spleen cells when he found out that they were engineered without his knowledge or consent into immortal cell lines and then patented to derive significant profits. Moore’s conversion claim was undercut when the California Supreme Court held that his excised cells were not his property because of the factual and legal distinction between patented cell lines and excised cells, and, importantly, the lack of precedent supporting such an interest. In reaching the latter conclusion, the court observed that:

\begin{quote}

laws governing such things as human tissues, ... transplantable organs… deal with human biological materials as objects sui generis, regulating their disposition to achieve policy goals rather than abandoning them to the general law of personal property. It is these specialized statutes, not the law of conversion, to which courts ordinarily should and do look for guidance on the disposition of human biological materials.\textsuperscript{147}

\end{quote}

\begin{flushright}
\textsuperscript{144}[1999] 1 WLR 596.
\textsuperscript{146}793 P.2d 479 (Cal. 1990).
\textsuperscript{147}Moore, 793 P.2d at 495 (footnotes omitted).
\end{flushright}
As to whether conversion law should be extended to this case, the court declined to do so in the public interest of not impeding medical research: recognition of the bodily material as the source’s property would hinder researchers’ work by hindering efficient access to the “necessary raw materials”, and, by increasing their liability, “threatens to destroy the economic incentive to conduct important medical research…”

It should be noted that the court’s judgment against Moore’s conversion claim was also grounded on a presumption of abandonment as regard his interests in his excised spleen. As Render writes, “the central holding of Moore is merely an articulation of the standard for abandonment in the context of bodily material: we abandon our bodily material when we consent to its removal and make no provision for its disposition or return”. In other words, Moore had no intent to seek the return of his spleen cells in consenting to their removal for medical treatment, which precluded any claim of a future interest in his own bodily material.

3.5 Property Interest and Intent

Intent to seek a return is central to the ruling in Yearworth v North Bristol NHS Trust. Six cancer patients about to undergo chemotherapy treatment stored samples of their sperm with the North Bristol Trust for future reproductive use in case the treatment damaged their fertility. When the samples were irretrievably damaged due to storage facility mismanagement, the men sued the Trust for negligence. They advanced three causes of action: (1), they suffered personal injury due to negligence; (2), they suffered damage to property due to negligence; and (3), they suffered losses resulting from breach of bailment relations. The court of appeal dismissed (1) as the samples were no longer functional to or integral with the men’s bodies. On (2), although the court could have applied the Doodeward...
principle to the stored sperm (which means rejecting them as the men’s property), it observed that:

In this jurisdiction developments in medical science now require a re-analysis of the common law’s treatment and approach to the issue of ownership of parts or products of a living human body, whether for present purposes (viz. an action of negligence) or otherwise.\footnote{[2009] EWCA Civ 37, para 45.}

On this broader stance, the court held that for the purpose of their claims of negligence, the men had ownership of their sperm samples because they alone produced the sperm with the sole intent that it might later be used for their benefit. The court also recognised bailment relations between the men and the Trust, and held that the latter as bailee had breached its duty of care towards samples, which precluded the men from their future and important use. In light of breach of bailment relations, the court concluded that the claimants could recover damages from the Trust for psychiatric injury and/or mental distress caused by loss to property.

With \textit{Yearworth} as precedent, the Australian court in \textit{Kate Jane Bazley v Wesley Monash IVF Pty Ltd} applied bailment relations to rule that stored sperm samples were the property of the deceased source, and that his widow, as the executor and principal beneficiary under his will, was entitled to possession of the samples under the succession law of Australia.\footnote{[2010] QSC 118.} As Skene observes, there are two conditions in the test used in \textit{Yearworth} and \textit{Bazley} for recognising a person P or his representative’s possessory interest in P’s bodily material.\footnote{L. Skene. Proprietary Interests in Human Bodily Material: \textit{Yearworth}, Recent Australian Cases on Stored Semen and their Implications. \textit{Kate Jane Bazley v Wesley Monash IVF Pty Ltd}(2010) QSC 118; Jocelyn Edwards; \textit{Re The Estate of the Late Mark Edwards}(2011) NSWSC 478. \textit{Medical Law Review} 2012;20: 227-45.} One, P intends to use the bodily material at a future point.\footnote{[2009] EWCA Civ 37, para 45.} Two, there is agreement (gratuitous bailment, contract etc.) between P and the entity that stores the material that it will be available later for use by P or a third party. Recognition of bodily material as the property of the source or his
relation in these cases is thus highly sensitive to context: a function of the source’s intent and his transaction with some party by which the right was formed.

In *Yearworth*, the court referred to the American Case of *Hecht v Superior Court of Los Angeles* County (1993)\(^{156}\) because of its potential significance to *Yearworth*. In the end, it considered *Hecht* to be a step further than the claim that the men (in *Yearworth*) was asking the court to consider. In *Hecht*, the court held that Hecht, the intended donee of the stored sperm of her deceased boyfriend, had ownership interests in his sperm. In reaching this decision, the court strongly implied that a deceased’s stored sperm could be regarded as part of his estate—thereby permitting their disposition according to his will—because of his contract with the sperm bank which evidenced his intent and future interest in their use for reproduction. However, because of the deceased donor’s intention in storing the sperm—to produce a child with Hecht, it held that Hecht did not have the “legal entitlement to give, sell, or otherwise dispose of [the] sperm”.\(^{157}\) Accordingly, the court limited the donee’s ownership interests in the sperm—Hecht cannot sell or contract the sperm away—so as to protect the donor’s right to reproduce. Thus, the donee’s proprietary rights could be severely limited by the donor’s intent.

### 3.6 What Can Be Drawn From the Cases

The legal status of the human body and parts as property is regarded as “unsettled”.\(^{158}\) This reflects the piecemeal approach of courts to recognise or deny private interests in separated body parts or cadavers as property rights. Their decision, as we may note from the previous section, may depend on the nature of the interests in the bodily material to its source, for example the socially recognised human interest in having offspring, as in *Yearworth*; or,

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consideration of an important public interest at stake, for example, progress of medical research that needs to be driven by commercial profit, as in *Moore*.

Still, we can observe some principles at work in the cases cited above on the issue of body parts as property. First, there is ‘no property in a human body’, subject to some exceptions (see below). We see this applied in *Colavito v New York Organ Donor Network*, a case in which an end-stage renal patient sued the New York Organ Donor Network for conversion for directing an organ to another patient that was intended for him.159 (The wife of a deceased friend donated both of his kidneys to Colavito.) During the Second Circuit of the United States Court of Appeals, Sack J. observed that unlike relatives who seek legal action for mistreatment of the bodies of their deceased kin, Colavito suffered a real loss or deprivation as opposed to mere emotional distress: “Plaintiffs such as Colavito are not using the term “property” as a legal fiction upon which to base a claim for emotional harm. They have – or assert that they have – a practical use for the organ, not a sentimental one.”160 However, Sack J. “observed that cases of misdirected organs are better analysed under relevant statutory provisions [in this case the New York Public Health Law] rather than common law principles”.161 Accordingly, the Second Circuit certified to the New York Court of Appeal (New York’s highest court) the question of whether the applicable provisions of the New York Public Health Law vest an intended organ recipient with rights “that can be vindicated in a private party’s lawsuit sounding in the common law tort of conversion or through a private right of action inferred from the New York Public Health Law”.162 As regards recognising Colavito’s conversion claim under common law, the New York Court of Appeal

160 438 F.3d 214 (2nd Cir 2006), para 46.
162 486 F.3d 78 (2nd Cir 2007), para 3.
held that no precedent has “strayed meaningfully from the doctrine that there is no common law property right in a dead body”. 163 It acknowledged that “the “no property right” jurisprudence was developed long before the age of transplants and other medical advances”, and thus there might be circumstances in “which someone may conceivably have actionable rights in the body or organ of a deceased person”. 164 For the purposes of the case, however, it concluded that Colavito has no common law right to the organ.

Second, and we can be brief about this, the ‘work/skill/alteration’ principle provides an exception to the no property rule, which enables third parties to possess and use separated body parts for legitimate purposes, including commercial uses. Third, the intent and future interests of a person as regards his bodily material may provide another exception. This exception to the ‘no property principle’ follows “from the right of the donor to control the disposition of his own body”. 165 At American common law, such a principle may vest third parties in their role as intended donees or beneficiaries of a person with the right to control his deceased bodily parts as property beyond mere possession for burial. However, their proprietary interests are not transferrable by sale and are limited by the interests of the person.

In the next section, I discuss the Human Tissue Act and the National Organ Transplant Act and the Uniform Anatomical Gift Act to discuss their respective bans on organ sale, and also the sort of control a person might have over his organs and other body parts in the jurisdictions of England and the US.

3.7 Organ Donation in England: Statutory Framework

Legislation on organ transplantation in England has at least twice been triggered and shaped by a series of scandals. In 1988, impoverished men (mainly from Turkey) were recruited to come to England and paid to provide a live kidney each for paying patients.\textsuperscript{166} This case led to the enactment of the Human Organs Transplant Act 1989, which made organ sale illegal. This Act made it an offence for a person to receive or make any payment for the supply, or offer to supply an organ which is removed from a living person or a cadaver, with the intention to transplant the organ into another person.\textsuperscript{167} ‘Payment’ was defined as payment in money or money’s worth.\textsuperscript{168} It did not extend to reimbursement for the cost of removing, transporting, preserving organs to be supplied, or any expenses or loss of earnings incurred by a person so as reasonably and directly attributable to the supply of an organ from his or her body.\textsuperscript{169}

The current regulatory regime for organ transplantation in England is contained in the Human Tissue Act 2004. In force since 2006, the Human Tissue Act replaced and repealed The Human Organs Transplant Act 1989, the Human Tissue Act 1961 and the Anatomy Act 1984 as they relate to England and Wales and corresponding Orders in Northern Ireland. A new body, the Human Tissue Authority (HTA), was set up by the Human Tissue Act 2004 to oversee the Act and to regulate these activities. It is important to note that the Human Tissue Act was not primarily passed to improve the regulation of organ transplantation. Its impetus was the public outcry over removal and retention of human tissue (including children’s organs), primarily during autopsies, without authorisation or familial knowledge at some hospitals in England. Consequently, the remit of the Act is broad, covering storage and use of

\textsuperscript{166} Mason & Laurie, \textit{Mason and McCall Smith’s Law and Medical Ethics}, p. 544.
\textsuperscript{167} See s(1).
\textsuperscript{168} See s(1)(3).
\textsuperscript{169} See s(1)(3)(a) and s(1)(3)(b)
human tissue (except for sperm and eggs) for various scheduled purposes such as post-
mortem, research, public display and of course organ transplantation. Section 32 of the Act
continues the ban on organ sale from the Human Organs Transplant Act and extends it to
cover all controlled human material under the Act. A person contravenes the Act if for
example he “gives or receives a reward for the supply of, or for an offer to supply, any
controlled material”. 170 ‘Reward’ means any “financial or other material advantage”. 171
Section 32(7) permits reimbursement of expenses in relation to transporting, removing,
preparing, preserving, storing relevant material and also any loss of earnings given to an
individual supplying human material (including costs incurred by others to be passed along a
chain of suppliers).

Due to its triggering event, the Human Tissue Act makes consent the central legal principle
for the lawful storage and use of human tissue from the living or the deceased. 172 As regards
deceased organ donation, the Act makes it a requirement to obtain consent from persons prior
to death or from their nominated representative(s). It extends the consent model by allowing
ranked qualified relations, including kin (spouse and partner; highest rank) and kith (friends
of longstanding; lowest rank) to give consent. 173 Consent must be sought from these relations
when the deceased had not given consent or had no nominated representative. It should be
noted that those close to the deceased do not have legal standing to veto individual wishes. 174

170 See s(32)(1).
171 See s(32)(11).
172 Even though consent is fundamental, the process of consent for organ donation is balanced with the social
goal of preventing organ wastage. For example, Section 43 makes it lawful to take minimum necessary steps
and the least invasive approach to preserve parts of a body found suitable for transplant use prior to establishing
whether consent has been or will be given for removal of those parts for transplantation.
173 See s3(6)(c). See also Human Tissue Authority. Code of Practice 2 (Donation of solid organs for
174 The HTA Code of Practice 2 (Donation of solid organs for transplantation) states that “those close to the
deceased… should be encouraged to recognise the wishes of the deceased and it should be made clear, if
necessary, that they do not have the legal right to veto or overrule their wishes” (para 99).
Thus, the Act provides individuals and their relations (under certain conditions) with significant control on use of their bodily materials. Such control amounts to a “negative power to preclude certain uses” of body parts, rather than “the positive freedom for participants to specify desired uses” for body parts as might be the case under a property regime.\(^\text{175}\) As Nwabueze writes, the Human Tissue Act “left beyond cavil its preference for a consent framework to a property regime”.\(^\text{176}\) Only under section 32(9)(C) was ‘property’ mentioned: it exempts from the prohibition of commercial dealings in human material for transplantation “material which is the subject of property because of an application of human skill”, which follows from the \textit{Doodeward} principle.

### 3.8 Organ Donation in the US: Statutory Framework

In the US, organ donation and transplantation are regulated by the \textit{Uniform Anatomical Gift Act}\(^\text{177}\) and the \textit{National Organ Transplant Act 1989}\(^\text{178}\)—a federal law. Federal laws are laws that “generally apply to people living in the United States and its territories”.\(^\text{179}\) Federal law originates with the US Constitution, which empowers Congress to enact statutes for limited purposes (for example, regulating interstate commerce) with or without the approval of the President. Federal courts may strike down the law if they do not think it does not agree with Constitution. Uniform Acts, on the other hand, are drafted by the Uniform Law Commission and approved by the National Conference of Commissioners on Uniform State Laws for the purpose of promoting “uniformity in


\(^{177}\) Uniform Anatomical Gift Act §§ 1, 2, 13 (1968, 1987)


state laws on all subjects where uniformity is deemed desirable and practicable". The term ‘Uniform Laws’ can therefore mislead. Upon approval, a uniform law “is not law anywhere in the United States”. It is simply “a legislative proposal addressed to fifty state legislatures” by which they may enact identical or similar laws.

The Uniform Anatomical Gift Act was rolled out in 1968 to provide a favourable legal environment for donation of human tissue and organs for transplantation and other medical purposes. Prior to its enactment, “organ donation was handled on a state-by-state basis and systems varied significantly across the country”. All fifty states adopted this important law in some version. Incorporating the common law of gifts with statutory provisions tailored to anatomical gifting, the Act created for a person the power, not recognised at American common law, to make a gift of all or parts of his own body after death by will or a document of a gift signed by the donor in the presence of two witnesses. The Act also permits close relatives to make an anatomical gift unless there is notice of contrary indications by the deceased person. It was revised in 1987 because of its perceived inefficiency in encouraging donation, such as failure of individuals to make a written directive on donation, and systematic failure to ask families to consider donation. It was also revised in 2006 (see below for further discussion. The 2006 version was enacted by twenty states in 2007.)

The Uniform Anatomical Gift Act of 1986 did not ban payment transactions related to organ donation—its drafters felt that the matter of payment should be left to “the

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183 Goodwin, Black Markets, p. 113-4.
decency of human beings”. What was not foreseen was a significant increase in living non-related donation based on payment, and relatives expecting to be compensated in return for agreeing to deceased donation. Nevertheless, like in the UK, the ban on organ sale was triggered by a specific scandal. In 1983, a former physician publicly advocated for the US government to set up a fund to compensate families of deceased donors, and proposed to set up a business to “commission kidneys from persons living in Third World countries or in disadvantaged circumstances in the United States for whatever price would induce them to sell their organs”. This led to the US Congress to pass the National Organ Transplant Act of 1984. A federal statute, the National Organ Transplant Act makes it “unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce”. To increase transplantation efficiency by improving the allocation process, the National Organ Transplant Act established the Organ Procurement and Transplantation Network – operated by The United Network for Organ Sharing, a private, non-profit organisation under federal contract – to maintain a national registry for organ matching.

3.9 Reward as a Legislative Imperative?

The legislative ban on organ sale in England and the US has been described as knee-jerk reactions that could have done with more forethought. Due to space constraint, I will refer to one or two commentaries in each jurisdiction on their respective ban. As Mason and Laurie write as regards the ban in England (and the UK at large), “Clearly the legislative intention is

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186 Ibid. 1983.
189 Mason & Laurie, Mason and McCall Smith’s Law and Medical Ethics, p. 448.
to distinguish altruism from commercialism and to approve the former while condemning the latter”.\footnote{Ibid:544.} However, as they ask, “Is it impossible that a commercial donor could make his or her decision in a reasoned manner and on his own altruistic grounds?”\footnote{Ibid:545.} This question is raised in respect of the report that one of the Turkish sellers “intended to devote the proceeds to the medical treatment of his daughter”.\footnote{Ibid. At footnote 69.}

Mason and Laurie also suggest that the ills of payment for organ donation can be countered by this market structure: the HTA buying all the organs from people in the UK and allocating them on the usual algorithm.\footnote{This follows from Erin and Harris’s proposal for a monopsonistic market, whereby “only one purchaser, an agency like the National Health Service (NHS)... would buy all organs and distribute according to some fair conception of medical priority. There would be no direct sales or purchases, no exploitation of low income countries and their populations...” Erin & Harris. ‘An Ethical Market in Human Organs’ at 137.} As one may note, the legislative ban in the UK (as well as the US) came about to prevent this trend forming: poor people brought into the country to sell their organs to rich patients (not limited to citizens). In the end, Mason and Laurie recognise the practical difficulty of enforcing a geographically confined market, which dampens their enthusiasm for a market.

As for the US situation, Dunham IV argues for changing the law to allow a futures market approach to alleviate the organ shortage.\footnote{Dunham IV. ‘“Body Property” Challenging the Ethical Barriers in Organ Transplantation to Protect Individual Autonomy’.} (Currently, more than 120,000 people are waiting for a transplant in the US.) This follows from Crespi’s views.

The legislative history of NOTA reveals little if any careful policy analysis justifying the very broad prohibition of organ sales. Congress appears to have assumed without reflection that allowing any form of compensation to be paid to organ donors would violate fundamental social norms. There was no attempt made to examine alternative regulatory frameworks that might harness financial incentives to enhance organ availability without transgressing those norms. In particular, there was no effort made to distinguish between the effects of allowing a cash market in organs to exist and the quite distinct effects of allowing compensation to
be paid for organs only through a carefully designed futures market framework.

According to Crespi, the scope of the National Organ Transplant Act’s prohibition on payment for donation is itself uncertain because of the lack of clarity on what ‘valuable consideration’ might encompass: “The term… is one of the broadest in all the law, and is universally understood to cover noncash compensation, deferred compensation, and payment of compensation as directed to third parties”.\(^{196}\) As he notes, it has been argued that ‘valuable consideration’ as provided by the Act does not extend to non-cash compensation such as reimbursement of donor funeral expenses. In 1995, Pennsylvania’s Department of Health had planned to pilot a scheme to reimburse up to $3000 in funeral expenses for families who had consented to donation of their deceased kin’s organs.\(^{197}\) A trust fund was created to raise the money which was sufficient to offer only $300 to each family of 400 anticipated donors. Nevertheless, the scheme was never piloted because of the concern that it might be in breach of the National Organ Transplant Act.

As defined by the Act, “valuable consideration” does not include “the reasonable payments associated with the removal, transplantation, implantation, processing, preservation, quality control, and storage of a human organ or the expenses of travel, housing, and lost wages incurred by the donor of a human organ in connection with the donation of the organ”.\(^{198}\) Given that “reasonable payments” is “associated with virtually the entire sequence of operations that might be involved in organ transplantation”, Crespi argues that “one could contend that payments of current or deferred compensation [to potential live donors] to

\(^{195}\) Crespi. ‘Overcoming the Legal Obstacles to the Creation of a Futures Market in Bodily Organs’ at 15.
\(^{196}\) Ibid:57.
\(^{197}\) Dean’s Bulletin. Should Organ Donors be Compensated? Available at http://weill.cornell.edu/deans/2009/02_09_09/article_02-02_09.shtml (accessed 29 March 2014); S. Pollard. The Impact of State Legislation On Organ Donation—Results of a UF Pilot Scheme. *Nephrology Dialysis Transplantation* 1997;12: 2510-1. The procurement organisation would reimburse the sum to the funeral home rather than directly to the family.
induce them to give them up are reasonable payments”. Rodrige et al. note however that “Although some recent interpretations suggest that [the National Organ Transplant Act] were never intended to prohibit provision of government-provided compensation for donors, the more rigid interpretation has prevailed”. ASTS members have advocated for the National Organ Transplant Act to be clarified (or revised) to allow the “implementation and careful evaluation of indirect, government-regulated strategies to increase organ donation”. A representative of the America Medical Association, which used to be “implacably opposed to compensation”, also testified before Congress in 2002 that pilot studies on financial rewards for decease donation should be conducted. Crespi provides an argument to support this cause.

As a counter to the argument that the legislative history of [in the US] evidences congressional intent to prohibit organ sales, and that therefore the “reasonable payments” language should be construed to not include compensation paid to donors for their organs, one can argue that the legislative history evidences even more clearly the legislative intent to alleviate organ shortage, and that all textual ambiguities should be resolved in a manner that furthers achievement of this primary objective.

Crespi’s view was expressed in 1994, and should be taken in this context. The Uniform Anatomical Act 2006 evidences strongly a congressional intent to forbid organ sale. Other than “designed to encourage the making of anatomical gifts”, the 2006 version seeks to preserve “the current anatomical gift system founded upon altruism by requiring a positive affirmation of an intent to make a gift and prohibiting the sale and purchase of organs focused

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199 Crespi, ‘Overcoming the Legal Obstacles to the Creation of a Futures Market in Bodily Organs’ at 57.
201 Ibid:2172.
202 Mahoney, ‘Altruism, Markets, and Organ Procurement’ at 18
204 Crespi, ‘Overcoming the Legal Obstacles to the Creation of a Futures Market in Bodily Organs’ from 57-58.
on alleviating the organ shortage”.\textsuperscript{205} Section 16 prohibits sale or purchase of body parts as it applies to “removal of a part from an individual… [that is] intended to occur after the individual’s death”.\textsuperscript{206} Of relevance here is also the design of the Act to “honor and respect the autonomy interest of individuals to make or not to make an anatomical gift of their body or parts”.\textsuperscript{207} Section 8(a) of the 2006 version bars all other persons “from attempting to override an individual’s decision to make or refuse to make an anatomical gift”.\textsuperscript{208}

### 3.10 Organs as Descendible Valuables

Horton recently provides a novel argument in support of compensated or rewarded deceased donation.\textsuperscript{209} As he notes, The National Organ Transplant Act and the Uniform Anatomical Gift Act do not just make organs market-inalienable. Under the Uniform Anatomical Gift Act, an individual cannot will an anatomical gift to another unless the latter is the transplant recipient. Also, the Act does not provide the estate with the right to transfer parts of the deceased to specified others. In \textit{Evanston Ins. Co. v. Legacy of Life Inc}, the court stated that the “The Anatomical Gift Act does not give the estate the right to designate a recipient once the individual dies… Nor can the estate be compensated financially for the individual's tissues”.\textsuperscript{210} Thus, the Uniform Anatomical Act also makes indescendible.

Market-alienation and descent (or succession) are regarded as common features or tied to the notion of ownership as private property. Horton argues that the “laser-like focus on [market-] alienability”\textsuperscript{211} has obscured descendibility as a socially and ethically acceptable mechanism for financially incentivised deceased donation: “Rather than deeming body parts to be fully

\begin{footnotes}
\footnote{Uniform Anatomical Gift Act Prefatory Note (Revised 2006), 8A U.L.A. 3 (Supp. 2007).}
\footnote{Uniform Anatomical Gift Act § 16(a) (revised 2006), 8A U.L.A. 30 (Supp. 2007).}
\footnote{Uniform Anatomical Gift Act Prefatory Note (Revised 2006), 8A U.L.A. 3 (Supp. 2007).}
\footnote{Ibid.}
\footnote{Horton, ‘Indescendibility’.}
\footnote{[2012] 370 S.W.3d 377 (Tex. 2012), at 386-7.}
\footnote{Horton, ‘Indescendibility’ at 113.}
\end{footnotes}
alienable during their life, law makers could chart a modest course by making these objects
descendible and only then transferrable for [valuable] consideration”.212 The basic idea is that
a person could bequeath his organs to his family as part of his estate, after which the family
could decide how to alienate the organs. (As we have noted, the Nuffield Report’s proposal
could be supported by such reasoning.) The National Organ Transplant Act and the Uniform
Anatomical Gift Act should be amended to permit descendibility as he proposes.

Horton considers some reasons to reject his proposal. I will focus on the most important one,
namely that individual property that is not lifetime tradable should also not be descendible.
Horton argues that descendibility is not a “posthumous version of market alienability”.213 As
he points out, Estate of Walker shows that lifetime alienable property need not be descendible
on the owner’s death.214 The deceased, Walker, did not reveal to his adopted children the
names of their natural parents, or give them the adoption papers containing the names whilst
alive. In willing all his personal property to his adopted children, a dispute occurred as to
whether or not the adopted children were entitled to the papers. While accepting that they
were Walker’s personal property, the court rejected the children’s request for the papers.
According to Horton, the court seemed to think that Walker did not hand them to his adopted
children prior to his death because he was concerned about invasion of the natural parents’
privacy. He “was [however] less concerned about this harm when he wrote his will, implying
he succumbed to the moral hazard of testation”.215 Horton explains the court’s decision:

The fact that they [people like Walker] have only chosen to take a
potentially disruptive action after death raises an inference that their
testamentary wishes are infected with nihilism. In the rare instances when
these concerns are present, indescendibility may attach to something that
was fully alienable during life.216

Thus, individual wills may not be enforced because of negative externalities or ill-effects on third parties. Horton argues that the key policy reason for the ban on market alienability of organs is however to protect their ‘owners’, in view of the expected, disproportionate participation of the poor as sellers and subsequent post-sale regret. Policy reasons against market alienability therefore need not apply to descendibility: “the dead do not suffer when they make unwise decisions”. 217 He notes some overlap objections, for example commodification concerns: “perhaps allowing people to treat their bodies like the junk in their attic would coarsen our sense of what it means to be human”. 218 In his view, this concern presents a weak argument against his proposed legislative regime since potential deceased donors “are on the verge of being buried or cremated. Thus, indescendibility would be much harder to justify than market alienability”. 219 Furthermore, “the indescendibility of body parts disproportionately impacts poor families”. 220

Horton notes some ‘administrative’ problems with a ‘descendible- then- full market-alienability’ regime. According to Horton, “succession [is] mandatory: once something is descendible, it must be passed on”. 221 Thus, should organs be descendible like any other property, those who want to buried or be cremated whole would need to pay a tax bill reflecting the fair market value of their bodily material, since the US Internal Revenue Service bases estate tax liability on the net worth of the deceased’s property, “no matter how much ends up in the hands of her heirs and beneficiaries”. 222 Accordingly, Horton suggests that the National Organ Transplant Act and the Uniform Anatomical Gift Act should be amended to allow ‘partial descendibility’ at the minimum. In other words, families who agree to donate organs as part of their deceased kin’s estate should be allowed to at least receive

218 Ibid:103.  
220 Ibid:103.  
221 Ibid:105.  
some form of compensation or reward. To increase efficiency in addressing the shortage issue, however, he argues that the two Acts should be revised to allow states to “experiment with various forms of compensation for willing decedents”.\textsuperscript{223} Thus, “other jurisdictions could treat corpses like all other belongings and thereby serve as laboratories for... the administrability problems I have identified”.\textsuperscript{224}

### 3.11 Issues with Reasoning from Descendibility

Horton’s reasoning can be extended to support revision of legislative bans on organ sale in other jurisdictions such as England and it is in this spirit that I engage with his reasoning. In the following, I identify some issues with his reasoning and his proposal.

Firstly, Horton dismisses the commodification concern too easily. The fact that deceased bodies would be cremated or buried soon does not ease the commodification concern from the perspective of those who maintain that organs should be altruistic gifts. Caplan writes, with respect to allowing families to profit from their deceased kin’s body in the US context: “Calls for markets, compensation, bounties, or rewards should be rejected because they convert human beings into products, a metaphysical transformation that cheapens the respect for life and corrodes our ability to maintain the stance that human beings are special, unique, and valuable for their own sake...”\textsuperscript{225} This concern may apply to even diseased cells excised from the body. In Moore, Justice Arabian, in his separate judgment which concurred with the majority view of the Supreme Court, opined that in asking the court to recognise his right to profit from his bodily material, Moore “entreats us to regard the human vessel—the single

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{223}Ibid:154.
  \item \textsuperscript{224} Ibid:154.
  \item \textsuperscript{225} A. Caplan. 1997. \textit{Am I my Brother’s Keeper? The Ethical Frontiers of Biomedicine}. Indiana UP: Bloomington, IN:100.
\end{itemize}
\end{footnotesize}
most venerated and protected subject in any civilised society—as equal with the basest commercial commodity. He urges us to commingle the sacred with the profane…”

The commodification concern may be rooted in religious views. Regardless, it coheres with “body exceptionalism”, defined by Eyal as “the view that we should treat the body and perhaps other elements of the self differently than we do material resources”. As he writes, “People… perceive trade either in a person or in objects that they associate with a person – especially a person’s body, and above all its solid internal parts – as a cue that that person or people like her can be treated as commodities. Such perceptions are almost visceral, not something that valid philosophical argumentation could easily shift…”

As Radcliffe-Richards argues, opposition to organ sale is fundamentally visceral. We may of course take a more ‘rational’ approach on the issue of compensated or rewarded donation in light of their potential to alleviate the organ shortage problem.

As regards Horton’s proposal, much like the Nuffield Report’s, the ability of families to benefit financially from donation is unlocked by the deceased’s intent. Nevertheless, much like wills and testaments for property/assets, not all people would signal their intent for their organs to descend to their relatives for whatever reasons. In this respect, if lifting the legislative ban on organ sale is primarily targeted at increasing donation rates, then it may be argued that relations ought to be able to inherit organs without the prior expressed intent of their deceased kin. As one may note, this is at odds with the American common law

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226 793 P.2d 479 (Cal. 1990), at 497.
228 Ibid:237.
exception to the body as property discussed earlier: apart from an interest in possession for funeral disposition, a close relation may have other ownership interests in a person’s deceased bodily material as part of his estate, but these interests are constrained by the person’s intent as regards the disposition of his material. Nevertheless, allowing families to benefit without the intent of their deceased kin may be supported by one of Horton’s key reasons for descendibility: not to disproportionally impact on poor families. If we are to reason within a succession framework, allowing organs to descend to families without source’s intent follows from principles of intestate succession at common law.

More problematically, Horton does not consider what should happen if individuals opt to donate without willing their organs to their families for possible benefit-reaping (provided this is allowed), that is, they want to donate for free. As we have discussed, the Uniform Anatomical Gift Act bars third parties from overriding an individual’s decision to make or refuse to donation, while in England, relatives have no legal standing to veto donation. Should these provisions be extended to bar relatives from overriding an individual decision to refuse payment for donation? A well-known phenomenon in the US, UK and many other countries, transplant procurers are reluctant to proceed with procurement if families are strongly opposed.230 Thus, in the public interest of increasing donation rates and to minimise conflicts at point of procurement, it is arguable that should legislations be revised to allow payment, they ought to be revised such that families may receive whatever is being offered as payment despite the intent of the deceased kin. As Horton notes, testamentary wishes even if valid may not be enforced in view of their negative externalities. On the other hand, a problematic outcome may be that some individuals may express an objection to donation even if they are inclined towards voluntary unpaid deceased donation.

230 In 2011-2012, 125 families in the UK were allowed to override the consent of their dead kin. J. Laurance. 2013. Number of Organ Donors Increases by 50% But Relatives Should Not Have the Last Word, Says Head of Government Taskforce. The Independent April 11.
Other issues may be raised. Assuming that a plurality of payment and market schemes is permitted in the US, which Horton suggests is most optimal for increasing donation rates, should families be allowed to transfer organs interstate so as to obtain the payment they desire? We can go on. All in all, Horton’s reasoning provides a novel approach to thinking about payment for donation. What sort of inheritance regime should be legislated if organs are also lifetime market-alienable, particularly if we disregard the body exceptionalism thesis, that is, we treat organs like any other property and resource? This is the central question of the thesis’s fourth article “Organs as Inheritable Property?”

3.12 Conclusion

In this chapter, a number of seminal judgments of the courts were examined to analyse the proprietary status of the human body and its parts in English and American law. It may be argued that in these two jurisdictions, the body is now in some limited contexts recognised as individual property or property of their intended donee or beneficiary, but any proprietary interest recognised is not treated as market-alienable. We discussed the legislative frameworks in these two jurisdictions for organ transplantation, and some commentators’ views as to why these frameworks are normatively unsatisfactory given the organ shortage situation. Horton’s argument for compensated or rewarded donation was also examined in some detail from which some issues were raised to inform my research question on payment for donation from a legal perspective. In Article 4 of this thesis, I (with Holm) make the case that if organs are freely alienable property like any other, then they should also be inheritable property, with family as default successor. The intent is to provoke thought on the extent to which we would be committed to rejecting body exceptionalism in arguing for markets or rewards for organ donation.
CHAPTER 4

4. SUMMARY OF ARTICLES

4.1 Article 1: The Social Rationale of the Gift Relationship

Published in *Journal of Medical Ethics*:

Article One ‘The Social Rationale of The Gift Relationship’ examines the primary social rationale of the gift relationship as put forward by Titmuss. There is an interpretation of Titmuss that the central moral value of preserving blood as an altruistic gift is to promote an ‘imagined’ community or a sense of emotional belongingness among fellow citizens. Against this view, the article argues that the gift relationship is primarily concerned with reconciling liberty with social justice and welfare concerns. Key to the Titmussian gift framework is maintaining in individuals a social responsibility to help others meet their vital or basic needs. Since this responsibility can be underpinned by or associated with non-altruistic motives, the article also argues that Titmuss does not hold a ‘strong’ standard of motivational altruism in which donation must be solely or purely motivated by altruism for it to be ethical. Consistent with these understandings, the article argues against the attribution of a sharp dichotomy between gift and commodity in Titmuss’s thinking. It offers a novel but plausible interpretation that while the gift relationship stands in opposition to the treatment of blood and other bodily therapeutic materials as private commodities, it is not in principle opposed to the use of material rewards to motivate bodily material donation. Given that *The Gift Relationship* is regarded as a classic defence of the pure altruism doctrine, my interpretation, if it holds, undermines historical-normative support against the compatibility of gift and payment in bodily material donation.
4.2 Article 2: The Moral Insignificance of Altruism to Deceased Organ Donation? A Response

(Unpublished manuscript)

In Article Two ‘The Moral Insignificance of Altruism to Deceased Organ Donation? A Response?’ I examine a series of criticisms that seek to undermine the moral significance of altruism – its moral role or value – in deceased organ donation. These criticisms are made in order to provide support for the ethically acceptability of what is known as ‘conditional group-donation’, which has been regarded as incompatible with altruism in deceased donation.

Altruism has been asserted by some as a requirement for deceased donation to be ethical. Against this, it has been argued that altruism is irrelevant, or at best only a desirable motive in deceased donation. This is because the procurement system does not check and cannot check donors’ motives. Let us call this the ‘verification problem’. In addition, it has been argued that altruism’s moral value is signaled by self-sacrifice but most deceased donations are not self-sacrificial at all. As such, contra the usual characterisation of donation as acts of generosity, most deceased organ donations do not express any significant moral qualities at all. Accordingly, even if conditional donation undermines altruism, nothing much morally speaking would be lost. Going further, it has been suggested that self-sacrifice is a necessary criterion for altruism, but most donations are not altruistic. It has also been argued that most deceased donations are not genuinely altruistic because concern is not directed impartially in pure response to need, the latter of which is the essence of altruism. Rather, concern expressed through deceased donation is usually partial, directed at some group, which is a moral attitude compatible with conditional donation.
This paper is, to my knowledge, the first to synthesise and respond to arguments against the moral significance of altruism in deceased organ donation, which are arguments that may have implications for considering the ethical acceptability of other means to increase the supply of organs, particularly organ markets. It considers the verification problem, and argues that it is not a significant problem once we understand that the moral value of altruism, as a motive, lies in its being a maxim for a pattern of life, rather than as a psychological cause of some isolated action. As a maxim, altruism serves to engender a devotion to the interests of universalisable others as a mode of self-flourishing. In this light, self-sacrifice is neither a necessary element of what altruism means, nor a necessary element of the moral value of altruism. As I shall also argue, altruism as devotion or living for others is often ‘creative’ in the sense that it directs us to express concern for others in need, as we may encounter them, on a notion of a common humanity. Accordingly, altruism can be partial and thus compatible with conditional donation. The paper concludes by clarifying altruism’s role in opposing conditional donation.
4.3 Article 3: Altruism and Motivational Compatibility in Deceased Organ Donation

Published in *Bioethics*:

Article Three ‘Altruism and Motivational Compatibility in Deceased Organ Donation’ takes a critical look at the ‘Altruism-Reward Compatibility’ (ARC) argument. To my knowledge, it is the first to provide a detailed analysis as to why altruism cannot co-exist with reward if reward were used to incentivise donation. To focus the argument, the article examines the Nuffield Report’s appeal to ARC to justify the ethical acceptability of introducing a donor funeral expense reimbursement scheme in the UK to incentivise people to register for deceased organ donation. Specifically, it argues that the report’s suggested reward scheme is likely to produce forms of mixed motivations which would not satisfy the report’s definition of altruism. Ultimately, the article argues that use of a reward to incentivise donation stands diametrical to promoting an ‘altruistic perspective’. It concludes with the claim that if a financial reward is used to incentivise organ donation, then it should be recognised that the donation system has shifted from an altruistic framework, although it need not diverge from a solidaristic framework.
4.4 Article 4: Organs as Inheritable property?

Published in *Journal of Medical Ethics*:

(This paper was incorporated into a special issue of the *Journal of Medical Ethics* on ‘The Human Body as Property? Possession, Control and Commmodification’.)

Article Four ‘Organs as Inheritable Property’ considers whether an inheritance regime should be legislated should organs become individually owned as lifetime, freely alienable property. A case is made for the default rule of the family to inherit a deceased person’s transplantable organs to control its alienation and direction. Some succession rules would be considered and defended in the course of discussion. These include the *exclusion* of the right to waste transplantable organs as part of succession, which is consistent with liberal ownership. The article then considers some objections to organs as inheritable property, particularly the rejection of family proprietary control of a person’s dead body on the ground of protecting the ‘symbolic existence’ of that person. To balance the interests of the living in use of deceased organs and the symbolic interests of individuals in their dead bodies, the article puts forward Strahilevitz’s novel property rule as a solution: individuals could direct their whole bodies for funeral disposal which would be legally honoured if they had marketed future interests in their deceased organs and rejected the highest bid to signal the genuineness and strength of their interest in whole body funeral disposal. Through its argument for the inheritance of organs like any other material asset, the article contributes to the debate on control and commoditisation of bodily material by provoking thought on how far one is committed to rejecting ‘body exceptionalism’ in advocating for organs to be treated as private tradable property.

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Chapter 5

5 Article 1: The Social Rationale of the Gift Relationship


5.1 Abstract

This paper argues that for Richard Titmuss the rationale of the gift relationship as a national blood policy is to reconcile liberty with social justice in the provision of an essential health resource. Underpinned by a needs-based distributive principle, the gift relationship provides a social space for a plurality of values in which to engage with and motivate people to voluntarily give blood and other body materials as a common good. This understanding of the gift relationship as a value pluralistic framework and its implications will be used to discuss the issue of using economic mechanisms to increase the supply of body materials or goods, including organs for transplantation. I argue that while the gift relationship excludes a policy in which body goods are treated as private commodities and distributed primarily on the basis of achieving market efficiency, it is not in principle opposed to the use of material rewards, including financial ones, to motivate people to donate.
5.2 Introduction

Richard Titmuss’s arguments for the procurement and distribution of blood as an “anonymous altruism” system, which he terms “the gift relationship” (TGR), seem to have a deep influence on the regulation of human body material donated for therapeutic or research purposes. For instance, the EU Tissues and Cells Directive states that donors should be altruistic and remain anonymous to recipients in tissue and cells application programmes. Nevertheless, Titmuss’s arguments for the administrative and medical benefits of TGR as superior over a commercial system have been considerably qualified if not undermined since his time. For example, while he might have been right then in claiming an intimate link between blood quality and the form of the procurement system (i.e. whether commercialised or not), this can no longer be plausibly held. Experiences such as the AIDS epidemic show that organisational form is only one of several factors in the delivery of safe blood. The appeal of TGR’s rationale in considering the regulation of BMD continues to be defended however in terms of its positive social effects. As Titmuss argues, TGR helps promote a sense of community. Integral to understanding this social goal of TGR is his view on “the role of altruism in modern society” which aims at fusing “the politics of welfare and the morality of individual wills.”

A common understanding of “Titmussian altruism” is “a selfless gift to others without expectation of remuneration.” Selfless or non-materially motivated acts of concern by and for social strangers help foster a “feeling” of communal togetherness in society, as mediated by procurement organisations as they rely on such motivations to supply blood to the public.

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232 Titmuss, The Gift Relationship.
235 Ibid.
236 See, for example Murray, ‘Gifts of The Body and The Needs of Strangers’.
The introduction of an economic mechanism - defined here as an instrument that uses material rewards, monetary or otherwise, to motivate donation – into the system would drive out such altruistic motivations and replace them with self-seeking ones. Ultimately, communal cohesion and civic volunteerism in realising the common good, which may go beyond the context of blood donation, would be eroded. Under this account of altruism as an invariable view on what donors’ moral psychology should be like, TGR posits a strong dichotomy between ethics and economics with each domain having its own proper mode of social relationships, individual agency and welfare realisation. As a framework that engages only with altruistically motivated agents, this “strong” interpretation of TGR has been used to support an “in-principle” objection towards rewarding other types of BMD besides blood, including live organs, despite significant differences in donor risks and sacrifices.\(^{239}\)

In appealing to TGR for how BMD should be regulated, we should at least be clear about the essence of its socio-ethical rationale. This paper argues that TGR should be interpreted as a framework that allows a plurality of values in which to engage with and motivate people to voluntarily contribute body materials or goods as a public service. As a value pluralistic framework, TGR is not fundamentally concerned with safeguarding altruistic motivations as a source of positive social effects in the procurement of a good like blood. Rather, the role of altruism in TGR is to constrain competitive, materially self-seeking behaviour by structuring individual agency (procurers and donors) towards a collaborative pursuit of providing blood as a common good or welfare resource that is to be distributed primarily on a needs-based principle of justice.

To support my interpretation, some background on Titmuss’s idea of a social policy (as used in opposition to a market-driven policy) will be provided. As a social policy, TGR aims to

\(^{239}\)Campbell, *The Body in Bioethics*, p. 32.
reconcile liberty, defined here positively as the freedom to act on one’s values as a member (or citizen) of a society, with social justice in the provision of blood or other essential health goods. Seen in the light of “social justice liberalism” as its fundamental orientation, TGR is more flexible towards the use of economic mechanisms than what the strong interpretation holds. It is not in principle opposed to the use of material incentives so long as the values of individual agents for supplying or giving a body good are tied up with the value of distributing it based on common need as the ethical direction of the gift. Thus, a system that rewards individuals for BMD may be compatible with TGR so long as it meets the conditions of social justice.

5.3 Social Justice and Social Policy

Titmuss is not considered a social justice theorist though his idea of social policy aligns with the central tenets of social justice liberalism,240 which includes the view that every individual is due certain goods regardless of character or social contribution.241 Following the ethical socialism of his contemporaries such as Richard Tawney,242 Titmuss is committed to the idea that liberty is dependent on egalitarian social structures.243 In his view, social policy is fundamentally concerned with distributive justice to support the welfare of each and every citizen.244 To achieve this objective, the essential goods of life such as those relating to health should be provided as a common resource and distributed according to need. According to Titmuss, social policy is exemplified by TGR. The rationale or justification of TGR should thus be located within his broader concern with social justice liberalism.

Titmuss also states that social policy should be concerned with economic values and objectives.\textsuperscript{245} He emphasises however that it should be based on “[e]thics first and economics afterwards.”\textsuperscript{246} In other words, the principles of social justice liberalism should be foremost in regulating the provision of essential goods. Policy-making for blood should not therefore be reduced to or dominated by mere economics analysis, especially when it is underpinned by a “crude” utilitarian theory.\textsuperscript{247} However, in Titmuss’s view, some economists in his time relied on this theory to advocate for the then UK blood system to shift to a market-driven system, which essentially follows the principles of a free market, to address shortages in blood. Accordingly, their key assumptions are that: (i) the pursuit of welfare is the pursuit of utility viewed as individual desire-fulfilment. Utility can be measured monetarily by what Anderson calls the “compensating variation” of the individual: the maximum one is willing to pay to receive the benefits of a good, such as blood, or the minimum one is willing to accept as payment to offset the costs of giving up that good;\textsuperscript{12} (ii) giving and receiving of blood is descriptively and normatively a reciprocal exchange for individuals to maximise their own utility (in other words, the relationship between donors and recipients should be regarded as merely instrumental); (iii) welfare realisation by a blood system should be solely or primarily evaluated by its efficiency in maximising utility calculated by the sum total of individual utilities; and (iv) since compensation for both the choices of giving and receiving blood is subject to the variable valuation of each individual, such efficiency will be best approximated by a system that leaves individuals as free as possible to exchange blood via the price mechanism. Blood is thus treated as a private commodity to be competed for in both supply and demand.

\textsuperscript{245}Ibid:213.
\textsuperscript{246}Titmuss, \textit{The Gift Relationship}, p. 208.
\textsuperscript{247}Ibid:195.
Against these economists, Titmuss argues that shifting to a market-driven blood system would impact negatively on liberty, welfare and other values that we are concerned about. To find empirical evidence to support his case, Titmuss examined the then partially commercialised US system, which showed that blood was supplied mainly by the poorest and most vulnerable in society, particularly those at high risks of transmitting blood borne diseases. This reveals a key ethical problem with instituting a market-driven system: It structures agency and choice that contravene the objective of beneficence. On one hand, recipients would be exposed to the choice of receiving blood with increased risks (for which they may have to pay a higher price). On the other hand, individuals who are poor and vulnerable would be given the freedom to sell their blood even if there are existing risks to their health which would be exacerbated in their being bled beyond acceptable medical standards. Nevertheless, in order to be efficient, procurers of blood in a market-driven system would tend to seek such donors so long as their compensation variation is the lowest for undertaking its risks and burdens.

Furthermore, Titmuss’s study on the US system revealed that blood was distributed mainly to higher socio-economic groups. From the perspective of crude utilitarianism, such a social state may be evaluated as efficient and “right” if the sum total of individual utilities has been maximised. And given that the criteria for rational action is focused on maximising utility which is up to each individual to pursue, it is not a function of a market-driven system to ensure that those who are not in a position to compete financially can meet their need for blood. As Titmuss argues, policy-making for blood or other essential goods should be sensitive to distributive equity, as disparity in access between the poor and the rich would produce conflicts and eventually social disintegration. Blood policy for Titmuss should thus be “social” rather than merely economic by incorporating the objective of community-building.
5.4 Community as Emotional Integration

For Titmuss, interactions within market-driven systems cannot by themselves produce over time the normative reasoning and behaviour needed for social life. Such systems should therefore not serve as the fundamental mechanism to coordinate voluntary cooperative behaviour in the provision of every good. As a proponent of social justice, Titmuss is unique in his emphasis that distributive systems for essential goods can at the same time function as mechanisms for shaping exercises of liberty that help individuals in society integrate as a community. Within the framework of TGR it is clear that key to this communitarian objective is the organisation of a social space for altruistic giving. As Titmuss writes, “[t]he ways in which society organises and structures its social institutions ... can encourage or discourage the altruistic in man; such systems can foster integration or alienation.”

However, Titmuss does not provide a theoretical framework that explains the concepts of community and altruism or their exact relationship. This puts into question the kind of economic mechanisms that can be accommodated within TGR. In addressing this theoretical lacuna, Archard proposes that community for Titmuss has much to do with ties of emotion to others in society, while altruism, in line with the common definition mentioned earlier, is a voluntary act of giving solely or primarily motivated by selfless care or concern for others. In this light, TGR is a system that distributes not just a health good but also the good of affective togetherness with others that we can experience – even if we do not interact face-to-face or relate at some personal level – by means of the selfless gift of blood. As Archard

argues, TGR is concerned with building and sustaining emotional bonds across the distance of society which, unlike the impersonal nature of market relations, have a humanising effect; TGR is hence charged with the role of indirectly shaping our socio-ethical personalities by contributing to the fulfilment of our need for emotional identification or integration with anonymous others whom we share a social space.

Under this reading, using material rewards, particularly financial ones, as a means to incentivise donation would conflict sharply with the communitarian agenda of TGR as it would undermine selfless concern or altruism as the motivational source. The introduction of financial incentives into the system would reduce the force of altruistic motivations by impoverishing their meaning as the value of acting from selfless altruism is reduced to acting for individual utility or monetary value. As Archard argues, this helps explain Titmuss’s opposition to a partially commercialised or mixed system which provides donors the options of giving for material gain and giving gratuitously; gratuitous giving would be reduced or driven out because of the denudation of its meaning. This philosophical analysis seems to be supported by the empirical findings of the economist Frey in his seminal work on the “crowding out” effect (to be discussed more fully later). Proponents of TGR often appeal to this effect to argue against the use of economic mechanisms: they would likely reduce rather than increase supply given that the motivation for BMD is generally to express selfless altruism.

5.5 Community, Altruism and Value Pluralism

Interpreting the communitarian agenda of TGR as emotional integration opens its justification as a public policy to serious doubt however. We can doubt for example whether altruistically motivated donations have any concrete effect on facilitating emotional

251 Campbell, The Body in Bioethics, p.43
integration among citizens. There seems to be no way in which we can prove or disprove their link or to show that a society with an altruistic blood system is more selfless or caring than one with a market system because of the altruistic system.\textsuperscript{252}

In addition, such a communitarian project would render TGR a highly illiberal policy. Implicit in this project is a value hierarchy of liberty. Given that the social goal and value of TGR is emotional integration, the freedom to give gratuitously is ranked as a more valuable form of liberty than our freedom to give for material gain. This seems to imply that even when the rate of donation of a body good like organs for transplantation is persistently inadequate to meet patient needs, individual citizens should still be turned away from their personal value hierarchies and asked to align their rational agency with achieving the common good of emotional integration. On the supply side, all potential living donors would be directed towards properly (i.e. altruistically) motivated exercises of liberty – even though concerns about their rationality and will tend to be raised if they are indeed so selfless\textsuperscript{253} – over non-altruistically motivated exercises that may in fact be ethically acceptable in a given society. Conversely, on the demand side, transplant patients – who could be placed low on the waiting list for posthumous donation and whose intimate relations could be medically unsuitable for donation – would be channelled towards valuing certain qualities of relations with social strangers over their well-being and other goods, including those tied to intimate relations. With such a prioritization of the value of altruistic motivations, the rationale of TGR seems to diverge significantly from the modern liberal, social justice ideal of respecting “reasonable pluralism” in public reason and policy-making, which implies preserving as

\textsuperscript{252}Ibid:21.
broad as reasonably possible a social space for individuals to live and cooperate with each other based on their varied axiological sets and priorities.  

There are however good textual reasons not to read Titmuss’s account of community as social integration of an affective kind. Importantly, altruistic giving in TGR should not be grounded in any form of motivation, selfless altruism or otherwise. Indeed, Titmuss writes that the term “supplier” should replace “donor” to describe those who give blood as the act of giving need not imply an “altruistic motive.” In his survey of these ‘suppliers’, Titmuss notes the social and ethical complexity of their motivations. Some people did give blood purely out of care for others. Others were prudentially motivated by the fact that it is good for them to keep the system going by giving. More than a few were however motivated by the reciprocal benefits, including free health checks and other material considerations. Although these behaviours are utility or materially motivated, Titmuss remains non-judgmental. Accordingly, he concludes: “None of the donors’ answers were purely altruistic. They could not be for… no donor type can be depicted in terms of complete, disinterested, spontaneous altruism. There must be some sense of obligation, approval and interest; some feeling of ‘inclusion’ in society…” In his view, the “individuality and diversity” of motivations “add life and a sense of community.”

TGR therefore functions like a market system as regards liberty because it provides individuals the freedom to give and cooperate with each other based on their own values, including non-moral ones. As Titmuss writes, altruistic giving may be valued as expressions of individual fulfilment or self-love. However, he emphasises that the reason for such a choice may simply be giving life to others with no further reductive explanation. He argues

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256 Ibid:238.
that despite their different or mixed motivations for giving, there is an ethical rationale that binds most givers, namely “a high sense of social responsibility towards the needs of other members of the society.” Due to this sense, Titmuss refers to gifting in traditional communities to frame his idea of altruism because it structures the phenomenology of pursuing the good as the phenomenology of acting from obligation towards others, which in these communities is based on reciprocal rules. Nevertheless, he makes it clear that TGR is different from traditional gift frameworks because it instils an element to choice and rationality that is unilateral. The needs of anonymous strangers can be valued by individuals as a good in itself independently of links to their utility or fulfilment. Titmuss’s idea of altruism can be read as akin to Bernard Williams: “[To] regard the interests of others, merely as such, as making some claim on one, and, in particular, as implying the possibility of limiting one’s project.” However, while Williams discusses altruism in the context of non-organised, personal moral behaviour, Titmussian altruism relates specifically to impersonal cooperation with an institution whose telos is to meet a common need. Under this context, Titmussian altruism does not denote selfless modes of motivations. Rather, it denotes a commitment to a needs-based distribution that individuals can value and endorse as a constraint on their voluntary giving other than those that would promote their interests (whether self- or other-regarding), which has deep implications for how we understand liberty and justice in at least some domains of our cooperative activities for pursuing welfare.

Titmuss’s idea of community should thus be delinked from an affective account. He hints at this by stating that TGR signifies “the notion of ‘fellowship’ which [is]... conceived of as a matter of right relationships which are institutionally based.” In the same paragraph, he states that TGR is an example of a social policy that facilitates a fellowship of equality and

258 Ibid:236.
liberty between individuals. If I am right about the significance of interpreting the rationale of TGR as based on social justice liberalism, we can interpret Titmuss as saying that our sense of community with social strangers depends on institutions that base cooperative behaviour on mutual respect for liberty and a shared sense of justice in which human equality is tied to responsiveness to common need rather than to individual merit or worth. TGR respects the equal liberty of individual to give or not to give based on their personal set and order of values. At the same time, it ensures their equal liberty (or right) to receive blood based on need. The common good of blood is thus supplied without prescribing or mandating cooperation and distributed in a way that is free from reducing ethics to a moral logic of reciprocity: Blood allocation should not be based on reciprocation of social or economic contribution. According to Titmuss: “[S]tructurally and functionally, the [then UK] Health Service is not socially divisive; its universal and free access basis has contributed much… to the social liberties of the subject in allowing people the choice to give or not to give blood for unseen strangers.” In other words, each citizen is affirmed as part of a moral community that can be trusted to look after one’s essential good in fair consideration with others even if one does not share the same socio-ethical behaviour or affective identity. It is this communitarian sense that TGR aims to facilitate to help integrate a pluralistic society and inject a non-alienating quality into our relations with social strangers. Value pluralism rather than emotional integration is therefore the central concern of TGR. What Titmuss wants to show with his arguments for TGR is that the social fact of value pluralism in modern societies can be negotiated by systems other than a market which, with a monistic account of value as utility, transfixes our evaluative standards for social relations, rational action and welfare on efficiency in exchange, and dispenses with other criteria like equity in distribution.

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In sum, TGR is a form of mutually beneficial social cooperation that, to use Sen’s words, “accommodate[s] unilateral obligations that we may acknowledge because of our power to achieve social results that we have reason to value (without necessarily benefiting from those results.)”\textsuperscript{262} The meaning of altruistic giving in TGR should be understood as an expression of our freedom to contribute to the social result of a needs-based just distribution. Altruism, as Titmuss writes, is “a fusion of intelligence and concern for social justice and equality.”\textsuperscript{263} (p 212).

5.6 Motivating BMD in TGR

Outside his arguments for TGR, Titmuss writes that economics is “a means to serve liberty and alternative conceptions of excellence”\textsuperscript{264}(p 14) and “social policy... must function as an instrument for the encouragement of economic flexibility.”\textsuperscript{265} Given these claims, and the understanding that TGR is a value pluralistic framework, it seems odd that Titmuss would be ideologically opposed to the use of economic mechanisms as a way to increase BMD in all social situations, especially when supply and consequently welfare may be significantly improved.

At times, Titmuss writes as though he would endorse a strong interpretation of TGR with a principled opposition to materially rewarded donations. For instance, he quotes the then President of the American Medical Association who said that “…money payments for blood can destroy the motivation of the family and friends to replace the blood and could result in the creation of too many ‘semi-professional’ donors who would contribute too frequently, to the detriment of their own health…”\textsuperscript{266} Nevertheless, we should note that of key importance

\textsuperscript{262} A. Sen. 2009.\textit{The Idea of Justice.} London: Allen Lane: 138
\textsuperscript{263} Alcock et al., eds. \textit{Welfare and Wellbeing}, p. 212.
\textsuperscript{264} Titmuss, ‘Introduction’ at 14.
\textsuperscript{266} Titmuss, \textit{The Gift Relationship}, p. 223.
to Titmuss is how the system structures the relationship between procurers/donors and recipients, and correspondingly the freedom to give. Thus, as regards the crowding out effect, what Titmuss actually says is that “commercial blood programs [rather than material incentives]... are driving out the voluntary system [rather than selfless altruism]”.  

As Waldby and Mitchell point out, “Titmuss believed that the greatest threat to the gift system was not the pragmatic example of the blood system in the United States per se but… neo-liberal market rationalism” which views relations between strangers in society only as “instrumental, nonbinding commodity relations between producers and consumers.”

The rationale of TGR as a public policy choice, to reiterate, is not to promote the good of selfless, non-materially motivated donations. Rather, it is to resist the systemic introduction of neo-liberal market rationalism into structures of social relations that would result in blood and other essential body goods to be treated “in theory, in law, and…in practice” as “trading commodities.”

As such, Titmuss’s central disagreement with a market system is not that it allows individuals the freedom to give for material gain. As highlighted earlier, he accepts that some blood donors would need to be motivated by material rewards. For Titmuss, the socially and ethically problematic form of liberty in the supply of essential body goods is the freedom to sell as it is tied to the freedom to “decide on the specific destination of the gift”. What he is opposed to, in principle, is therefore the freedom to control whom to give, regardless of their need, based on utility exchange as structured by competitive, market-driven frameworks. Under such social arrangements, the values that can be expressed in supplying a body good are narrowed into utility maximisation of a material kind rather than directed towards a sense of collective responsibility for donors’ and recipients’ welfare.

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267 Ibid:223.
268 Waldby & Mitchell, Tissue economies, p.12 & p.16.
269 Titmuss, The Gift Relationship, p.158.
An in-principle objection to a market-driven system for BMD should therefore not be equated to an in-principle objection to the use of an economic mechanism for BMD. Whether the use of material incentives for a particular type of BMD is consistent with TGR would depend on its organisational form: Can the system for procurement and distribution be designed to be socially responsible and just? To fulfil these principles, the system can loosen the connection between supply and distribution so that only one aspect of cooperative behaviour is subject to reciprocity as an element of justice. Consider again the case of organ donation. As has been proposed, a single national agency rather than competitive procurers can be established to financially reward citizens who donate live organs anonymously *in a non-directed fashion* to a public supply, which is subsequently distributed to assuage need according to some fair criteria of medical priority.\(^{271}\)

The meaning of the Titmussian gift, even if it is motivated by material gain, is thus maintained as a voluntary public service to contribute to a common good. What needs to be added to such a proposal for it to be consistent with TGR’s rationale is that a systemic responsibility for donors’ well-being – including the rejection of potential donors based on unacceptable, objectively established medical or psycho-social risks – should be ensured despite the fact that they would be materially rewarded.

It may be objected that an economic mechanism for BMD would regardless of organisational design unduly induce the poor or exploit the injustice of their background conditions. These issues, while certainly important, are beyond the scope of Titmuss’s arguments for TGR. It may also be argued that material incentives (especially financial ones) would nevertheless crowd out selfless altruism, which is as a matter of social fact the primary motivational source for BMD, with the counterproductive outcome of reducing supply. TGR’s opposition

\(^{271}\)Erin & Harris, ‘An Ethical Market in Human Organs’. 
to an economic mechanism for BMD should be viewed as pragmatic in nature rather than in principle.

In response, we should note the policy implications that Frey concludes in his analysis of the crowding out effect. According to Frey, policymakers should allow individuals to act on their intrinsic motivation (i.e. motivation in which satisfaction is gained from the value of the meaning of the act itself, which may include but not limited to selfless altruism or fulfilment of civic duty, rather than material gain) as regards the supply of a good if such motivations are cardinal to regarding participation as voluntary; an external intervention, not necessarily incentives, would be regarded as undermining their sense of self-agency and control, hence decreasing their willingness to supply the good. Nevertheless, as he argues, policymakers should not rely exclusively on intrinsic motivations, as they vary from time and place and from good to good, and disregard institutional conditions that shape the meaning of the incentives, which may “crowd in” supply when they are perceived as supporting individual agency. Those who are concerned about the crowding out effect in a particular BMD by an economic mechanism should therefore not presume or overestimate the behavioural importance of altruistic motivations, or underestimate the importance of organisational design.

As a recent study with various European citizens shows, public attitudes towards financial rewards for organ donors (to justly reciprocate their losses or sacrifices) are favourable so long as the system is not driven by “the profit-oriented logic of the market-place.”

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272 Frey B, ‘From the Price to the Crowding Out Effect’.
273 Changing the donation decision from opt-in to opt-out may therefore produce a crowding out effect in Frey’s theory.
As Raymond notes, Titmuss understands that any gift framework is influenced and constrained by the particular cultural (both social and economic) values of a society. 275 Thus, whether TGR should be applied to regulate particular type of BMD in a given society, and whether and what kind of material incentives should be used would depend on the dialectic between the values of that society in the giving and receiving of that good and the fundamental principles of TGR. If selfless altruism fails to adequately supply a body good despite organisational efforts in fostering this motivation, TGR as a value pluralistic framework should not be opposed to the use of material incentives, particularly “robust” kinds that can accommodate the diverse valuings and complex motivations of potential donors by not polarising the choice of donation into selfless altruism and utility maximisation, 276 which may increase the social inclusiveness of the system and its effectiveness in meeting its supply and health goals. Such economic mechanisms may be vital for the continued relevance of TGR as a public policy for BMD. Ultimately, TGR is a social space for creative solutions to reconcile liberty, justice and community in meeting a common need.

CHAPTER 6

6 Article 2: The Moral Insignificance of Altruism to Deceased Organ Donation? A Response (unpublished manuscript)

6.1 Introduction

Many countries experience a significant and chronic shortage of organs for transplantation. To meet transplant needs, people in countries like England are encouraged to donate their organs at death to a common pool for distribution. While donation rates (including live donation) have increased significantly, around 7000 people are currently on the UK waiting list.277 Organ markets have been regularly proposed and advocated as a way to reduce the shortage.278 However, there is resistance to the market approach because of the traditional view that organs should be donated as gifts: the gift model preserves and reinforces “the values of human dignity, solidarity, compassion and altruism”.279

As regards altruism, Prottas claims that “organ transplantation rests wholly on altruism and generosity… organ donation may not be compensated—the voluntary decision must be based on altruistic motives” (italics mine).280 Childress argues that this is an overstatement for deceased donation since “there is no inquiry into motives, as long as it is clear that financial compensation is not involved”;281 moreover, people may donate on all sorts of mixed reasons, other- and self-regarding. These two points against altruism as a requirement for ethical

279 Institute of Medicine, Opportunities for Action, p. 240.
280 Prottas, The Most Useful Gift, p. 50.
281 Childress. ‘The Failure to Give: Reducing Barriers to Organ Donation’. 
donation may be supplemented by the claim that it is hard if not impossible for transplant staff to check motives.\textsuperscript{282} Let us call this the ‘verification problem’ of altruism.

According to Moorlock, Ives and Draper, “it is clearly motivational altruism that is currently considered important in organ donation. What are of concern to transplant authorities are the (altruistic) reasons that motivate a donation, rather than the contingent (altruistic) consequence…”\textsuperscript{283} There is some ground for this claim at least with respect to the UK. The Nuffield Council on Bioethics, in its report \textit{Human Bodies: Donation for Medicine and Science} (henceforth the Nuffield Report), endorses the continued promotion of altruism in bodily material donation, including organ donation, as altruism helps support a solidaristic approach in meeting health needs.\textsuperscript{284} Relating altruism to communal virtues like generosity, the report states that it is “concerned with the motivational aspects of altruism”\textsuperscript{285}: “the internal psychological states that produce behaviours”\textsuperscript{286}

As Moorlock, Ives and Draper note, while the concept of altruism “may have started as a means of prohibiting organ trade, it has since been used to determine the acceptability of other practices relating to organ donation”.\textsuperscript{287} With the verification problem as support, Moorlock, Ives and Draper argue that altruism should be regarded as at best a desirable (a ‘good to have’) component, rather than a requirement, for donation to be ethically acceptable. They make this point in view of the UK Department of Health (DoH)’s categorical rejection of ‘conditional’ donation: offers of organ donation on the condition that a/the donated organ(s) go/goes to an individual or members of a particular group. The DoH has set the policy that

\begin{footnotesize}
\textsuperscript{283} Ibid.
\textsuperscript{284} Nuffield Council on Bioethics, \textit{Human Bodies: Donation for Medicine and Research}.
\textsuperscript{285} Ibid:231.
\textsuperscript{286} Ibid:139.
\textsuperscript{287} Moorlock, Ives & Draper, ‘Altruism in Organ Donation: An Unnecessary Requirement’.
\end{footnotesize}
“organs must not be accepted if the donor or the family wish [sic] to attach conditions about the recipient”.

‘Two’ fundamental principles were expressed by DoH against conditionality. One, conditional donation “offends against the fundamental principle that organs are donated altruistically and should go to patients in the greatest need”. Two, it “offends against the fundamental principle that organs are donated voluntarily and freely and should go to patients according to the agreed criteria”. The first was expressed in a report investigating the case of a hospital accepting a race-conditioned donation in 1998. The second was expressed in a report on introducing a policy to permit request for an allocation of a deceased donor organ to a close relative or friend under exceptional circumstances. This follows from public dissatisfaction with the Human Tissue Authority’s denial of a renal patient’s request for a kidney from her deceased daughter in 2009, on the reason that “donated organs are to be “allocated to the person on the UK Transplant waiting list who is in most need” in addition to being “the best match with the donor”. Moorlock, Ives and Draper submit that the two fundamental’ principles suggest “that donation is only altruistic if it is without any constraints or conditions [on allocation]”. They urge that altruism be considered as only “a sign” and “not the only sign” to evaluate whether to accept an offer of donation because of the costs to those waiting for a transplant in rejecting any donation. It is unclear how they think ‘altruism’ can be used as ‘sign’ of ethical donation, given that they subscribe to the verification problem.

290UK Health Departments. 2010. Requested Allocation of a Deceased Donor Organ. UK Health Departments.
291Ibid. The document states that “Consent or authorisation for organ donation must not be conditional on their request for the allocation of a donor organ to the donor’s specified relative or friend going ahead.” (para. 10).
293Ibid:129.
295Ibid:5.
To argue for the ethical acceptability of conditional group-donation, Wilkinson and Saunders argue, in separate papers, that altruism should play little or no role in ethical thinking on means to increase deceased donation. Wilkinson uses the verification problem to doubt the relevance and thus the moral significance of altruism to organ donation and to organ allocation (which conditional donation will affect). He also questions the moral value of altruistic donations even if and when they might be regarded as altruistic. Saunders goes further and argues that deceased donations should not be characterised as altruistic: they are motivated by solidarity rather than altruism. Wilkinson defines altruism as “a non-self-interested concern for the interests of others”. Saunders, on the other hand, considers “genuine altruism” to be a “wholly disinterested”, ‘impartial’ phenomenon. Both also appeal to the notion of ‘sacrifice’ to reject the role of altruism in deceased organ donation. Henceforth, ‘donation’ will stand for ‘deceased organ donation’ unless stated otherwise.

To sum up this lengthy introduction, there is a group of authors – Moorlock and colleagues, Wilkinson, and Saunders – that argue, albeit not by the same reasoning, against the moral significance of altruism in donation to support the ethical acceptability of conditional donation. Importantly, their various arguments against the moral significance of altruism in donation could be extended to provide support for a market in deceased organs: it should not ethically matter whether altruistic donation would be undermined by financial payment if voluntary unpaid donations are in the first place not generally motivated by altruism, or do not express any significant moral value even if altruistic. Given the traditional appeal to the

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296 Both authors also use their respective arguments to support the ethical acceptability of giving priority access to organ allocation to those who register for deceased donation. To focus the paper, I will not discuss this means of increasing donation.
297 Wilkinson, *Ethics and the Acquisition of Organs*.
298 Saunders, ‘Altruism or Solidarity?’
299 Ibid.
300 Wilkinson, *Ethics and the Acquisition of Organs*, p. 149.
importance of altruism in maintaining donation as unpaid, opponents of organ markets should take arguments against the moral significance of altruism seriously.

This paper is to my knowledge the first to provide a counter-response to arguments against the moral significance of altruism in deceased donation. In line with this aim, I will first engage with Wilkinson and Saunders’s definitions of altruism, and their respective arguments that the concept of altruism has little or no moral significance to the ethical evaluation of means to increase donation. To deal with their arguments more concretely, I will refer to the specific workings of the transplant system in the UK. The paper then considers the verification problem, and argues that it is not a significant problem once we understand that altruism is more of a principle or maxim for a mode of life, rather as a psychological cause of some particular action. (I follow O’Neil’s definition of ‘maxims’ as “those underlying principles or intentions by which we guide and control our more specific intentions.”302) As a maxim, altruism serves to extend individual willingness to give weight to the interests of others beyond kin and kith over one’s interests. In this regard, altruism expresses a devotion to the interests of generalised others. In clarifying the moral significance of altruism in and outside the context of organ donation, the paper ends with some remarks on the role of altruism in opposing conditional donation and markets in organs.

6.2 Overvaluing Altruism

According to Wilkinson, “the traditional idea of donation is an inaccurate picture of the moral value of giving”.303 He claims that ‘donation’ has become almost a synonym for “the idea of the gift as well as the ideas of generosity and altruism”.304 In his view, altruism does not signal or express generosity in most individuals who register for donation. As he claims,
“Many people do not care what happens to their organs after they die”.\textsuperscript{305} Altruism in most donations is therefore ‘minimal’ because donors would not sacrifice much if at all. Accordingly, characterising or lauding donations as generous or “amazing gifts” is by and large “sentimental hyperbole”.\textsuperscript{306}

With respect to the DoH’s principle (‘organs are donated altruistically and should go to patients in the greatest need’) to criticise acceptance of race-conditioned donation, he points out that ‘altruistic donation’ and ‘allocation according to greatest need’ are two distinct ideas. Defining altruism ‘a non-self-interested concern for the interests of others’, he writes that

\begin{quote}
\begin{quote}
a wide variety of other regarding motives can be described as altruistic, such as a special concern for children, or the deaf, or the poor. “Altruism” does not have a specific application. It does not require—for example, that actions be motivated out of adherence to a greatest happiness principle or, saliently here, a greatest needs principle. Consequently, there need be nothing non-altruistic about conditional donation… It is not obvious that even the racist condition in the present case violates the rule that organs should be given altruistically; rather it looks like a mix of altruism towards whites and nastiness to nonwhites.\textsuperscript{307}
\end{quote}
\end{quote}

Wilkinson thus doubts the relevance of altruism to organ donation or allocation:

“Even when giving is altruistic, its value is overstated, since… the deceased… [do not] deserve the high praise given for donating.”\textsuperscript{308}

Before going further, we should note that Wilkinson’s definition may not cohere with his exposition of how altruism ‘works’. If taken in the strict sense, it may mean that, to quote Rescher, one “cares for the other’s welfare solely for its own sake, without reference to repercussions for oneself and one’s own interests”.\textsuperscript{309} However, if one has a ‘special concern’

\begin{footnotes}
\textsuperscript{305} Ibid:149.
\textsuperscript{306} Ibid:150.
\textsuperscript{307} Wilkinson. ‘What’s Not Wrong with Conditional Organ Donation?’ at 163.
\textsuperscript{308} Ibid:151.
\end{footnotes}
for say children, it may imply that one cares for their well-being such that promoting their welfare also directly or indirectly promotes one’s own. Regardless, expressing partial or ‘interested’ concern can be altruistic. This point will be emphasised in the course of discussion.

In the following section, I will discuss Saunders’s argument that most donations should not be characterised as altruistic.

6.3 Solidarity, Not Altruism

Saunders claims that “Altruism is often understood to involve some measure of self-sacrifice…” Since people have little or no use for their organs at death, deceased organ donors “seem to sacrifice little or nothing.” “This provides one reason to question whether donation is really altruistic.”

Crucially, he argues that most donations are motivated by solidarity rather than altruism since donated organs usually go to meet the transplant needs of fellow citizens rather than to “neediest people globally”. Before we examine Saunders’s view further, we should note that allocation of nationally collected organs to neediest people globally is most likely a non-feasible endeavour. Assuming that a global allocation algorithm can be devised, procured organs have a limited timeframe for transplant utility. Can organs be delivered or patients travel across the globe in time for transplantation?

Nevertheless, let us examine Saunders’s argument in the interest of the paper’s aim. Saunders claims that ‘altruism’ and ‘solidarity’ could be understood to refer to two distinct phenomena

\[\text{Saunders, “Altruism or Solidarity?”}, \text{p. 378.}\]
\[\text{Ibid.}\]
\[\text{Ibid.}\]
\[\text{Ibid.}\]
\[\text{Ibid.}\]
\[\text{I owe this point to Margaret Brazier.}\]
or to the same phenomenon. In referring to the same phenomena, solidarity could be thought of as “some limited form of altruism, even while falling short of full altruism”. Saunders states that they are usually regarded as distinct however. Common to definitions of solidarity is partiality: solidarity is “usually understood to involve feelings of group identity or some common project…” It is a “more restricted form of other-concern, limited to members of a particular group”. In contrast, “genuine altruism” is impartial and consequently globally extended in its concern for others, which makes it “weaker in its motivational force” than solidarity.

As Saunders argues, “if we accept the distinction… between group-focused solidarity and impartial altruism, then most donations fall short of altruism because the good is restricted to fellow members of a solidaristic community, such as a nation”. From this, he concludes that conditional donation is:

likely to appear more attractive to us once we recognize that most organ donation is not, and need not, be wholly altruistic. Even if we conceive of organ donation as a gift… it is often motivated by solidarity with a particular community. Placing too much emphasis on altruism may lead us to neglect ways in which organ donation can be increased. We should, instead, look for reforms that tap into widespread feelings of solidarity.

6.4 Wilkinson and Saunders: Similarity and Differences

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315 Saunders, “Altruism or Solidarity?”
317 Ibid.
318 Ibid.
319 Ibid:378
320 Ibid:381.
For Wilkinson, sacrifice is a condition for the moral value of altruism. For Saunders, sacrifice may be a condition for altruism itself. Wilkinson thinks that altruism can be partial or impartial (not tied to any specific principle), whereas Saunders thinks that impartiality in meeting the welfare of the neediest reflect genuine altruism.

I will state my view outright: I follow Wilkinson in his standpoint on how altruism relates to self-sacrifice and to impartiality. This does not mean that we should agree with his argument for the inflated moral value of altruism in donation. I deal with Saunders’s claim that genuine altruism is impartial altruism first.

6.5 No Support from Nagelian Altruism

Saunders asserts that “most authors… distinguish” solidarity from altruism by understanding solidarity as partial concern. 321 This implies that altruism is usually defined as impartial concern. Saunders only cites Nagel’s Kantian treatment of altruism as support. Nagel defines altruism as “not abject sacrifice, but merely a willingness to act in consideration of the interests of other persons, without the need of ulterior motives”. 322 By ‘ulterior motives’, Nagel means without the consideration of “one’s own interest” as well as the mediating factor of “one’s antecedent sentiments of sympathy and benevolence”. 323

Saunders takes Nagel to be saying that “altruism requires us to be motivated simply by consideration of others’ interests, and not by our own desires. Thus, someone who donated her organs because she wanted to help others would not count as altruistic in Nagel’s sense”. 324 “genuine altruism [for Nagel] should not depend on any desires of the agent”. 325

Moorlock, Ives and Draper read Nagel as saying that “altruism must be objective and

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323 Ibid:15-6
324 Saunders, ‘Altruism or Solidarity?’ at 378.
impartial, which means that acting in the interests of a friend *because* he is a friend is not altruistic*. These interpretations of Nagel are however contestable.

The first thing to note is that for Nagel, altruism is a *rational* idea, which is just to say that altruism *is in one’s interest in some way*. Nagel argues that when one considers selves and interests from an impersonal standpoint (i.e. bracketed from identification with particular persons), and considers their reality as vividly as one’s own, reasons to promote certain occurrences – for someone’s needs to be met – would be recognised as objective reasons; objective reasons are reasons that apply to everyone in relevantly similar situations. As Kekes explicates, “The impersonal standpoint [for Nagel] urges the questions upon moral agents: how would you like it if someone did that to you?” Nagelian altruism is thus connected to self-interest, though ‘self-interest’ does not refer to motivation for a particular act but as a “Kantian universalisable criterion of rational behaviour”.

For Nagel, objective reasons have motivational content. The objective reason that “someone else will benefit or avoid harm” by an action should in itself produce a desire to perform that action. Reason is thus the source or antecedent cause of a desire or inclination to help

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327 As Hiskes writes, “Self-interest remains pertinent to altruism for Nagel, but only as an allied concept, not as a motivation for altruistic acts. This sounds a bit vague, but gains clarity when placed into Nagel’s conception of what it means for altruism to be rational. Rationality for Nagel is the ability and propensity to support one’s actions with [objective] reasons that verify that any action is in fact in one’s interests in some way or another... Objective reasons are of the type that can apply to all persons, both in the sense that all persons can have them and they are arguments enjoining everyone to promote whatever it is they argue for.” (pp. 161-2). R. P. Hiskes. 1982. *Community without Coercion: Getting Along in the Minimal State*. Newark: University of Delaware Press.


330 Hiskes, *Community without Coercion*, p. 166. What this means, as Hiskes explains, is that “when acting altruistically, I am not acting out of my own self-interest, but in a preeminently and universalizably rational fashion, and this is always in my self-interest” (p.166).

others. However Nagel’s argument may be criticised, it suffices to say for the purpose of this paper that Nagel explicitly states that altruism is not necessarily effaced when an act is motivated by ulterior motives.

… without question people may be motivated by benevolence, sympathy, love, redirected self-interest… on some of the occasions on which they pursue the interests of others, but… there is also something else, a motivation available when none of those are, and also operative when they are present [italics mine], which has genuinely the status of a rational requirement on human conduct. There is in other words such a thing as pure altruism (though it may never occur in isolation from other motives).

One may desire to help someone out of love while at the same time recognising that there is objective or ‘pure’ reason for him to be helped, independent of oneself being impelled by love. What about if someone helps another only because of his desire to help the other? As mentioned, Saunders thinks that Nagel would not count this as genuine altruism. That is claiming too much for Nagel. Nagel’s goal in giving his definition of altruism is to rebut egoism, the idea that “the only source of reasons for action lies in the interests of the self”.

Nagel wants to argue that “an appeal to our interests or sentiments… [are] superfluous” in accounting for the possibility of altruism. If someone claims that he helps others only because of his desire to help – he denies any other reason for doing so – then we can, if we were to follow Nagel, only claim that he is irrational. Nagel’s idea of altruism concerns what we as rational beings have reason to do, not what we as concrete human beings should stipulate as to whether an action is altruistic or not.

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332 Pace Nagel, Liu (‘Moral Reason, Moral Sentiments and the Realization of Altruism’) argues that “Even if [objective] reason provides motivational content, it does not seem to have sufficient motivational power by itself. Reason cannot overcome such moral failings as procrastination, inertia, apathy, etc., which all lead to inaction. The causal efficacy of reason as motivation is highly questionable” (p. 97).

333 Nagel, The Possibility of Altruism, p. 80.


335 Ibid:80.
As one may interpret, Nagel is making a case for objectively important human needs as reasons in themselves for helping others. He states that “The demands of objectivity… will almost certainly include a requirement of straightforward interpersonal altruism, in matters of basic human need. We all have reason to help people [deprived of their basic needs] … even if they do not happen to be relatives, friends, or fellow countrymen”.\(^{336}\) Immediately following this, however, he writes that “despite the objectivity of reasons [which pure altruism engenders], an individual is justified in paying more attention to his own problems and to the needs of those close to him than to the problems of humanity at large”.\(^{337}\)

In Nagel’s view, allowing individuals, communities and nations to act on a preference to take care of their ‘own’ can be morally justified and impartial. Michelon clarifies for Nagel by distinguishing two senses of ‘partiality’\(^{338}\). In sense 1, one would be partial if one gives a certain weight to a reason for action in some situation but refuses oneself or someone else to give the same weight to the same reason in a similar situation. In sense 2, one would be partial if one gives weight to personal interests, desires and projects as good reasons to decide in one way than another. One can be impartial by not being partial in sense 1 while allowing one’s decision to be guided by partiality in sense 2. As Michelon explains, “This happens when an agent takes into account her own interests in deciding what to do in a particular circumstance while allowing that anyone else in a substantially identical situation should do the same. And, indeed, one may be justified in doing so if there are good agent-relative reasons supporting the action which yield distinct ends for different individuals”.\(^{339}\) The fact that one’s concern is group- or individual-directed and not globally extensive does not mean that pure rational altruism is not at work.

\(^{336}\) Ibid:133.  
\(^{337}\) Ibid:133.  
\(^{339}\) Ibid:61.
6.6 Altruism and Self-Sacrifice: Concept and Valuation

As we shall see, altruism at times needs to be constrained by impartiality to be exercised in a morally right way. But this does not mean that impartiality is part of the concept of altruism. Saunders seems to make the same mistake as regards altruism’s relationship to sacrifice. As De Wispelaere writes, “The need for self-sacrifice is often thought of as closely associated with altruism, but I believe this thought rests on a serious confusion between conceptual analysis and valuation”. 340 He holds the view that self-sacrifice is “not central but epiphenomenal to altruism: while… certain sacrifices rightly command admiration and commendation, to determine whether an act is more or less altruistic we only need to look at the motivation for furthering other people’s good”. 341 If De Wispelaere’s argument holds, then Saunders cannot appeal to donors’ lack of sacrifice (even if true) to support his case against altruism. Saunders might reply, as he asserts, that “whether donation is altruistic depends on how altruism is understood”, 342 and insist that ‘self-sacrifice’ could be part of ‘altruism’ under some definitions.

All altruism ‘asks’, in many definitions of altruism, is the possibility of willingness to sacrifice. 343 According to Campbell, however, self-sacrifice is a necessary condition for altruism in its original conception by Comte (who supposedly coined the term). 344 Comtean

341 Ibid:14-5.
343 As quoted earlier in the thesis (p.90), Williams (Problems of the Self:250) defines altruism as “a general disposition to regard the interests of others, merely as such, as making some claim on one, and, in particular, as implying the possibility of limiting one’s own project”. Rescher defines altruism as “Gives such weight to the welfare of others that their interests can in principle override his own within the framework of his own moral calculations”. Rescher, Unselfishness: The Role of the Vicarious Affects, p. 11. Bateson and Shaw define altruism as “a motivational state with the ultimate goal of increasing another's welfare. [Altruism] need not involve self-sacrifice. Pursuing the ultimate goal of increasing another's welfare may involve cost to the self, but it also may not. Indeed, it may even involve self-benefit and the motivation would still be altruistic, as long as obtaining this self-benefit is an unintended consequence of benefiting the other, and not the ultimate goal.” (p. 109). C. D. Batson & L. L. Shaw. Evidence for Altruism: Toward a Pluralism of Prosocial Motives. Psychological Inquiry 1991;2;107-22.
altruism can be understood as ‘living for others’ or “devotion to the welfare of others as a principle”. The purpose is to cement people as a collective to effect the flourishing of individuals and society. Essential to this project is the “condition of purification…the exertion of sympathy, which regulates individual existence by the family relations and these again by the civic”. In Campbell’s reading, “Comte thoroughly rejected any notion of individual rights as opposed to social duties, detested any form of liberalism as “modern anarchy”, and envisioned a Religion of Humanity, established by the State, whose function would be to train every citizen in altruism and discourage outbreaks of “personality”: “not only must feelings for others be promoted, any form of self-regard or positive self-evaluation must be discouraged”. Altruism requires a systematic disregard for self and interests in favour of other selves and their interests for the purpose of cementing society as a collective. As Campbell notes, Mill (a classical liberal), while endorsing altruism as part of morality, took issue with Comte’s degree of the standard of ‘devotion’. Mill writes:

The golden rule of morality, in M. Comte’s religion, is to live for others…To do as we would be done by, and to love our neighbour as ourself, are not sufficient for him: they partake, he thinks, of the nature of personal calculations. We should endeavour not to love ourselves at all. . . . All education and all moral discipline should have but one object, to make altruism (a word of his own coining) predominate over egoism

If by this were only meant that egoism is bound, and should be taught, always to give way to the well-understood interests of enlarged altruism, no one who acknowledges any morality at all would object to the proposition.

Campbell argues that Comtean altruism was watered down in light of such sentiments. In being a ‘purist’ about altruism’s original meaning, he argues that contemporary writers on

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345Rescher, Unselfishness: The Role of the Vicarious Affects, p. 11.
347Ibid:360.
altruism have been doing a bait and switch, sliding from “generalized living for others” to “low-cost forms of generosity as altruism”.  

6.7 THE IRRATIONALITY OF DEVOTION TO SELF-SACRIFICE

There is a good reason, however, not to regard self-sacrifice in the Comtean sense as constitutive of altruism: embedding self-sacrifice as a necessary part of being altruistic seems to make altruism an irrational principle of action so much so that it is hard to see why individual persons in general would endorse living for others.

As Schmidtz, the rationality of altruism starts from a reflective understanding of how nurturing and expressing concern and respect for others in low cost helpful behaviour enriches one’s lives and conduces to one's integrity – integration and commitment to others on one’s own terms. Self-sacrifice to the point of radical self-sacrifice (e.g. giving up one’s life for others) is rational if particular individuals “no longer have the option of acting as if [their] slate of commitments were blank” in a given situation. But, it is irrational “to nurture commitments that lead to self-sacrifice as a matter of course”.

The point here is that if ‘living for others’ is to be a humanly possible pattern of conduct, then it seems that altruism should be viewed as a motive that operates in mundane helpful behaviour and behaviour that incurs significant personal costs, and their in-between. In other

350 D. Schmidtz. Reasons for Altruism. Social Philosophy and Policy 1993;10:52-68. Schmidtz’s insight is contained in this passage: “Our reasons for acting as we do in a given situation stem from concerns we bring with us to that situation. Thus, the rationality of nurturing a given concern cannot turn on consequences it has as a reason for action in a particular case. The relevant consequences are those that follow from a certain concern being part of one's life. This is why the task of providing reasons for altruism is first and foremost the task of providing reasons for altruism of the more mundane variety. It is fine to consider whether it can be rational to give up one's life fighting for a cause, but in truth, the central cases are cases of simply lending people a hand in the ordinary course of events. We stop to give people directions. We push their cars out of snowbanks. We hold open doors for people whose hands are full. And we walk away from these mundane encounters feeling grateful for the chance to be helpful (p. 64-5).
words, there is no bait and switch in regarding ‘low forms’ of generosity as part of living for others.

6.8 Creative Altruism

Like Schmidtz, McBride and Seglow emphasises the importance of the “‘mutual, detailed’ altruism of everyday life”. 353 ‘Everyday’ altruism’ does not signify banality or unimaginativeness but creativity. Emphasising altruism as relating to others beyond the obligations of social roles (e.g. citizenship), Scott and Seglow suggest that altruism is “often creative behaviour… We form a connection with another person in our minds and make that connection real by thinking of what, here and now, we can do to help them… in acting altruistically, we show ourselves to be, at least for that moment, extrinsic persons connected to our fellow human beings through bonds stronger than those uniting any particular group” 354. As Monroe argues, altruism at its heart is a response to common humanity, which she delineates as a perspective that among other things “allows for a differentiation between the self and others and introduces a concern for how we connect and forge ties with “the other”. 355 Unlike Comtean altruism, altruism for Monroe does not demand individuals to submerge themselves into the collective and deny their personalities. Acting from altruism stems from and shapes what is important and meaningful to people as individual persons and as members of communities or groups.

6.9 Impartiality as a Constraint on Altruism

While altruism may be a creative response to those whom one connects with as fellow humans, it need not be expressed in a morally justified way. A case in hand is race-

355 Monroe, The Heart of Altruism.
conditioned donation. As de Wispelaere argues, altruism may suffer from “moral myopia”. In his view, the problem with beneficent actions that hinge on qualities like race, sex, age, blood etc. as the deciding factor is not that they lack altruism (which is consistent with Wilkinson’s understanding of how altruism may be expressed) or that they are necessarily morally wrong. It is that altruism in itself cannot tell us what might be morally undesirable in a person’s decision to help someone and not another. Based on altruism’s moral myopia, de Wispelaere argues that altruism needs to be embedded in moral impartiality. This raises the question of how altruism ought to be embedded in moral impartiality.

Saunders seems to think that altruism should be embedded in impartiality at the level of individual reasons for action. That need not be problematic in itself. However, he regards impartial expressions of altruism to be a wholly disinterested exercise. The implication of this is that altruism requires self-sacrifice of a Comtean kind.

6.9.1 The Demand of Moral Impartiality

To see why, a short discussion on what moral impartiality entails is required. Gert provides an influential account of the concept of ‘impartiality’: P is impartial in respect R with regard to group G if and only P’s actions in respect R are not influenced at all by which member(s) of G would benefit or be harmed by these actions. Thus, for an agent to act impartially, it is necessary to specify to which group his decisions ought to be impartial since a person belongs to many groups (e.g. family, ethnicity, Sunday football team etc.). It is also necessary to specify in what respect R the decisions ought to be impartial i.e. what considerations should and should not determine the agent’s decisions.

356 De Wispelaere, ‘Altruism, Impartiality and Moral Demand’ at 17. To say that “altruism suffers from a serious form of moral myopia” is to say that altruism as a moral perspective may not track important moral demands relevant to a specific situation because “the only thing that counts… is to advance the well-being of (some) other(s)” (p. 17).
As a concept, impartiality need not have anything to do with morality. It can apply to a football referee. Impartiality in that role demands that one does not favour the interests of any team or player in deciding fouls, free kicks or penalties and so forth; should a referee depart from such impartiality, criticism or sanction is rightly deserved. Importantly, the referee is not a member of the group he is required to be impartial. For impartiality to be moral, the group (e.g. all living persons) must also include oneself so that one’s interests are also included in deciding what to do by R.

So suppose R is ‘give equal and/or adequate consideration to relevantly similar interests’ and G is ‘all living persons globally’. Every time P wants to promote the welfare and working conditions of the migrant workers in his country, he has to consider, if he is to act morally, whether there are needier migrant workers elsewhere and if so, dedicate his resources there. His compassion for those particular migrant workers he encounter daily, and his wish to improve the moral texture of his country, should not be considered at all. Likewise, if P is thinking of donating a live kidney to his wife living on dialysis, he has to consider whether she is among the neediest persons in the world. (Granted that there are others in the world in need of a kidney transplant without access to dialysis, his wife is not likely to be.) His love and history with his wife should have no weight.

Saunders may argue that decisions to help those closer to us in the above and like situations are ethically acceptable because these decisions ought to be motivated by solidarity and not impartial altruism. If we accept his view that disinterested, impartial altruism just is genuine altruism, it implies not that genuine altruism is weak as a motive but that it will be virtually non-operant in most individual lives, to be designated for the most special of acts. We have to ask ‘how special?’ since even acts of sacrificing one’s life (e.g. throwing oneself on a
grenade to save one’s platoon mates) should not be included if they were motivated by concern or regard for some particular person or group.

6.9.2 First- and Second-Order Impartiality

Barry’s distinction between first- and second-order impartiality has been suggested as a plausible way to reconcile altruism and impartiality. Roughly, first-order impartiality relates to precepts or maxims for individual actions. Second-order impartiality refers to principles of justice and rules established for social cooperation that, as Barry writes, “capture a certain kind of equality: all those affected have to be able to feel that they have done as well as they could reasonably hope to”. As de Wispelaere argues, second-order impartiality established in social systems and institutions may justifiably eliminate a range of options for individuals to act partially, “thus countering overly partialist outcomes of actions initiated by altruists”. Nevertheless, these systems and institutions form a background structure against which individuals can voluntarily express particular concerns for self and others in a given society. One such system of course is donation tied to a national allocation policy in which allocation rules, guidelines and algorithm are typically based on the impartial principles of meeting clinical need balanced with utility. Such a policy aims to promote equity in access and optimal health outcomes.

Second-order impartiality constrains altruism so that its expression tracks the moral and social demands of a practice like donation, but what is the moral value of altruism to second-order impartiality? Mendus argues that partial concerns and impartial concerns should not be

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seen as necessarily conflicting.\textsuperscript{361} This is because it is in partial concerns – regard for our own interests and the interests of ‘relatives, friends, or fellow countrymen’ – that regard for non-kin and kith and recognition of objective human needs is rooted. And it is through an understanding of the motivational strength of partial concerns compared to concern for objective human needs that moral agents can recognise and endorse the need for second-order impartiality.

Altruism is always a response to common humanity – human needs and vulnerabilities – even if it is partial. Extrapolating from Mendus’s thoughts, the moral value of altruism for second-order impartiality in deceased organ transplantation is informing its impartial allocation such that its scope is in principle globally extensive. Thus, to motivate those whose own interests are at stake – donors, regulators, recipients and fellow citizens – to accept the constraints of impartial demands, impartiality ought to be grounded in the promotion of altruism as the fount of respect for the equality of all persons in need and accordingly an expansive sense of moral community.

\textbf{6.10 NHS Blood and Transplant Allocation}

To give a concrete example, let us consider the workings of the NHS Blood and Transplant, the authority responsible for ensuring the integrity of organ donation and allocation of donated deceased organs (as well as non-directed living donated organs) in England and the rest of the UK.

Under the Department of Health Directions issued by the Secretary of State for Health, two broad groups of patients – Group 1 and Group 2 – may receive donated deceased organs at

Group 1 status depends not on nationality but on residence in the UK, or residence in countries with defined reciprocal agreements with the UK. Group 2 patients are those who do not fall into the categories of persons listed in Group 1. They cannot receive an organ if there is a clinically suitable person in Group 1. Not entitled to NHS funded treatment, they have access only to the resource of organs, mainly livers whose quality are regarded to be too low for NHS patients.

Following allegations in the media that organs from NHS donors were being given to non-UK EU residents (possibly as private patients) annually, an independent report was commissioned by Health Secretary in 2009 to clarify the rules on organ transplants for NHS patients and non-UK EU residents. The report recommends that Group 2 patients should not be eligible for transplant with organs from deceased donors in the UK. Of relevance here is the rationalisation. It states that under a situation of continuing shortage, “organ donation cannot be realistically be interpreted as an act of globally focused compassion”. In this context, there is an assumption by “people concerned to help others... that organs will be given to people on the NHS waiting list. This is not to say that donors would have any objection to helping other potential recipients once their fellow citizen’s needs had been met...” And that:

…we would surely want to argue for a system that would allow for spare organs to be used and not wasted once all people on the UK waiting list had benefited appropriately. For example, if a child with a rare blood group dies and parents consent to donation, that child’s liver would only be suitable for a recipient of the same size and blood group. If no child on the UK waiting list is a suitable match and a recipient could be identified

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further afield, then it is right that it should be offered across borders, rather than be wasted.366

An ethic of universalisable beneficence is promoted, which depends on promoting altruism (as discussed here) in donation in the UK.367

6.11 Donation: Altruistic and Solidaristic

Let us now examine Saunders’s claim that donation is motivated by solidarity and not altruism “because when a given individual donates her organs, they will usually go to fellow citizens, with whom she shares some common bonds”.368 Let us direct this claim to the UK context, and regard solidarity to be directed towards those residing in the UK entitled to NHS treatment. Between April 2012 and March 2013, 10 Group 1 non-UK resident EU patients and 18 Group 2 patients received a liver transplant.369 In that same period, over 700 liver transplants from DOD took place.370 It is thus a fact that most donated deceased organs go to and will continue to go to UK residents under a significant organ shortage situation.

Regardless, it is unclear why the fact that donated organs would usually be allocated to fellow UK residents shows that most NHS donors are motivated by solidarity rather than altruism. It

367This is a line of thought consistent with Titmuss. He states that his book ‘The Gift Relationship’ (R.M. Titmuss. 1970. The Gift Relationship: From Human Blood to Social Policy. London: George Allen and Unwin.) “was an attempt to provide a concrete illustration” of the view that “some forms of social policy are based on the notion of moral progress… to be found “in the growing power of altruism over egoism” brought about by a fusion of intelligence and concern for social justice and equality”. (p. 212). “Traditionally… social policy in its universalist role recognises no human boundaries or mad-made laws of residence and race”. (p. 191). The ideal of universal provision assumes of course that resources are abundant and not high and persistent in shortage. See Alcock et al, eds. Welfare and Wellbeing.
368Saunders, ‘Altruism or Solidarity?’ at 378.
is not clear in the first place whether most donors know how organs are allocated. In addition, there are at least two sets of agents here: donors and those involved in procurement and allocation. The actions of the latter ought to be regulated by impartial allocation rules and guidelines to ensure that organs go only to the specified group of people – Group 1 and Group 2 patients. As for donors, they are not asked to regulate their concern and direct it only to Group 1 patients, even if they can assume – not necessarily consciously when they register for donation – that most donated organs would go to fellow UK residents.

To be sure, some people may be motivated to donate because their fellow UK citizens are in need. Others, upon seeing a child on TV waiting for a suitable organ, may be spurred to registration for donation in the desire to help children rather than on their identification with them as fellow citizens. Some may decide to donate out of concern for their particular ethnic group because of the low donation rates among their ethnicity. Given the NHSBT’s framing of donation as an act that would “save and transform the lives of desperately ill people”, some people may be motivated to donate on the reason that those whose welfare are at stake – members of that group of people in need of a transplant – might significantly benefit from their donation. Importantly, all donate anonymously, and do not and cannot specify that their organs go only to fellow UK residents or to any subgroup. Under such conditions, the relationship between self and those that one intends to help can be as ‘tenuous as mere common humanity’.

An act may be directed to a narrow or broader group. Yet, this does not mean that altruism is not operant, if we accept the idea of altruism as creative in nature. If we accept altruism as a creative force, then most donations could be regarded as being motivated by altruism and solidarity (not necessarily with the same group) at the same time. Whether it is fellow citizens

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371 NHS Blood and Transplant. Organ Donation (homepage)
or residents, children, or fellow Chinese that one identifies with, the basic common bond is a human being in need. Pace Saunders, it is a false dichotomy to regard altruism and solidarity as either referring to the same phenomenon or to two distinct phenomena. Altruism and solidarity may be two aspects of the same motivational phenomenon: a response to the needs and vulnerabilities of some group one identifies.

The following sections will address Wilkinson’s argument that the moral value of most donations is overstated. Three main lines of argument will be made against Wilkinson. First, pace Wilkinson, it is not true that donors do not sacrifice. Second, it is unclear whether calling altruism generous is high praise. Third, what is of moral import is that altruistic donations have genuine moral value that fosters social relations.

6.12 Lack of Sacrifice?

Wilkinson’s rejection of attributing generosity to most donations is heavily influenced by den Hartogh. His claim that “Many people do not care what happens to their organs after they die” is a paraphrasing of den Hartogh’s: “With regard to the value as far as the giver is concerned, many people attach no personal importance whatsoever to what happens to their organs after their death, provided that these organs are treated with respect” (italics mine). Respect is not just about having individual consent that expresses a ‘yes and no’ to procurement. To show respect, organs procured should be used to help others in need of a transplant, as donors had intended, and should therefore not be sold for profit or used for other purposes like public display. Thus, if people care that respect be shown to their deceased organs, they care about what happens to their organs after they die. Wilkinson’s claim is therefore questionable.

According to Wilkinson, only those “who may be strongly inclined not to donate, say for religious reasons, but nonetheless donate for the sake of the potential recipient… could be more accurately described as generous than those… who fit either den Hartogh’s description or those who die never having given serious thought to organ donation at all.”\textsuperscript{375} Religious reasons against donation typically focus on the importance of preserving bodily integrity. So care may not pertain to what happens to one’s deceased organs per se but to one’s remains which can be specified as care for the value of posthumous bodily integrity, the loss of which is where sacrifice is located. Due to the lack of empirical evidence (at time of writing), Wilkinson speculates that most people who register for donation do not care for their remains and thus would not incur sacrifice in becoming donors.\textsuperscript{376}

Likewise, I cannot find direct empirical support for the claim that most people who register for donation do not care for their bodily integrity. Perhaps it can be substantiated indirectly. Studies have shown that concern for the afterlife consequences of loss of bodily integrity or concern for bodily disfigurement in itself are key factors for a negative attitude towards donor registration.\textsuperscript{377} As Saunders claims, ‘great sacrifice’ – loss of bodily integrity – is usually used by people “to justify their refusal to donation, rather than to emphasize the altruism of their donation”.\textsuperscript{378} Plausibly, those who sign up for donation are largely those who do not care much about loss of bodily integrity.

It is rare though to hear people who had helped or are going to help others even at significant personal costs to emphasise how much they had sacrificed or will be sacrificing to ‘emphasise their altruism’. Avoidance of such emphasis may be an

\textsuperscript{375} Wilkinson, \textit{Ethics and the Acquisition of Organs}, pp. 149-150.
\textsuperscript{376} Ibid:167.
\textsuperscript{378} Saunders, ‘Altruism or Solidarity?’, p. 378.
expression of moral modesty. It may also be socially strategic (which need not require one to be conscious of employing the strategy): to avoid any cynicism over one’s motives. Whatever good will one has in helping others, it seems to be brought into the shade of egoism if one emphasises one’s sacrifice. To emphasise his altruism, A who drove B whose car ran out of petrol to an en route petrol station may say that carrying a passenger eats up petrol, and he is someone to whom cost-savings matter a lot. But this seems to show how calculative and not how altruistic A is.

Paradoxically, to ‘emphasise altruism’ and its genuineness, it is often the case that one provides what may be called ‘anti-altruism’ reasons, such as the belief that the act is one’s duty (which seems to negate altruism, given its association with supererogation); or self-regarding motives to explain or justify one’s behaviour. Wuthnow for example finds that people who dedicate themselves to volunteerism often emphasise the ‘payoff’ of self-fulfilment as a reason for their dedication, while simultaneously appealing to self-fulfilment to account for the ‘purity’ of their motives.379

Live stranger organ donors have also been reported to come to the same conclusion. Kendall, who donated a live kidney to a stranger, asserted that “I don’t consider myself altruistic because I have got so much out of it too. It transformed someone’s life, but it also made me feel really good about me.”380 It is unlikely that such donors do not value their organs and their bodily integrity. Their decision might come about despite sacrifice. As Schmidtz, “however painful it feels, one is not sacrificing oneself when one sacrifices a lesser value for the sake of a greater value, and this is what altruism often

amounts to for other-regarding agents.” Sacrifice does not deter because the value to those helped and the value of helping others outweigh any disvalue in becoming a donor.

Alternatively, people might choose to donate despite self-sacrifice because doing so fits into their idea of what Monroe calls ‘canonical expectations’: “the actor’s expectations about what should occur in the normal course of human behavior and by his or her sense that such normal behavior is right and proper”. Monroe found that such ‘expectations’ are common among those considered to be ‘altruistic’, including those whose actions incurred high personal costs or risks and whom we regard as moral heroes.

In sum, the fact that those who registered for donation did not express ‘sacrifice’ does not mean that they do not regard their posthumous bodily integrity as valuable or important. And the fact that they might feel embarrassed by high praise – which den Hartogh and Wilkinson seem to think that it matters as to whether high praise is warranted – may be because they feel that they gain more than what they will lose, or because they believe that donation is the right thing to do even when it goes against their important interests.

6.13 High Praise and True Laudability

To support his view, Wilkinson also cites den Hartogh describing the altruism of a donor as “similar to the motorist seeing a fellow driver whose car has run out of petrol standing at the roadside and taking him to the nearest petrol station, which he has to pass anyway. It is rather excessive to praise this to the skies, and a true altruist will be the first one to feel a trifle embarrassed by such praise”. Den Hartogh adds that “[A]ltruism is only truly laudable if

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382 Monroe, The Heart of Altruism, p. 11.
383 Den Hartogh, Farewell to Commitment, p. 39.
the altruist makes a sacrifice to help others; it becomes more commendable in proportion to
the magnitude of the sacrifice” 384

As we can see, den Hartogh slides from ‘high praise’ to ‘true laudability’ in discussing
praise for altruism. If we regard ‘true laudability’ as a signal of genuine moral value,
then there may be cases of altruistic actions that because of the degree of the sacrifice
do not warrant high praise, but are still truly laudable. 385 There may also be cases of
altruistic actions that need not depend on sacrifice to be truly laudable.

As Heyd writes, “Praise can be acquired only through public recognition and the
favourable attitude of others… Praise is motivated by reasons of various types, which
may change from time to time, and from person (society) to person (society)” 386 In a
society in which picking up stranded drivers to drive them to the nearest en route petrol
station is not socially or morally expected, and performance of this act is relatively rare,
this action may be highly praised. In a society in which the same act is expected and
common, it may suffice socially for the person that was helped to say ‘thank you’ to his
helper. He might even say “Thank you. You are too generous.” This need not be
interpreted as high praise but social hyperbole. It should be recognised that hyperbole
has social value: to express social recognition and encourage such acts more. One might
argue that those involved in acquiring organs ought to praise individual donors or donor
families as generous in order to encourage more people to donate.

Swap has an interesting study relevant to our discussion here. Studying the ‘rules’ by
which people attribute altruism and praiseworthiness to others’ prosocial actions, Swap
hypothesized that “actors should be viewed as most altruistic when they or their kin do

385 I owe this point to Soren Holm.
not receive benefits, or when their help results in personal sacrifice [italics mine]; when the victim is needy and receives useful help; and when the behavior is performed outside a normal helping role or represents supranormative behavior”.\textsuperscript{387} Analysing responses to a wide variety of situations, he found support for these hypotheses. Swap’s analysis also revealed that attribution of altruism and praiseworthiness are powerfully influenced by evaluation of the act as one of intentional helping (as opposed to help that occurs as an accidental effect). ‘Sacrifice’ appears to be but a variable in concrete judgements on whether and to what degree an act is altruistic and socially praised.

Thus, high praise may be given for donation even if donation is not self-sacrificial. Wilkinson might respond that “we should not confuse the importance of the gift to the recipient with its value to the giver”.\textsuperscript{388} But it is not simply the fact that recipients receive life-changing help that warrants the praise. Donors also helped recipients without any ulterior motives – no personal advantage gained. They are also not required to help, and will not suffer any penalty for not helping. As third parties, we might join in the praise – which need not be publicly expressed for we can simply think very well of donors – if we imagine how grateful we would be if someone were to help us if we found ourselves in the circumstances of those waiting for a transplant.

Even if donation does not deserve high praise, it has moral value of an important kind. One basis for such value is the moral worth of an act. An act of helping others in need has moral worth if his motives or reasons for helping were expressive of a good will. In the spirit of Comtean altruism, it is this good will that helps foster social integration. Probably the first


\textsuperscript{388} Wilkinson, Ethics and the Acquisition of Organs, p. 149.
person who propounded the idea of ‘altruism’ as a creative force—driven by love and the idea of being a ‘good neighbour’. Sorokin states that “Great altruists alone cannot supply even the very minimum of love and mutual help necessary for any surviving society...it is furnished by thousands and millions of our plain “good-neighbors”.

In the context of bodily material donation, altruistic donations as expressions of good will supports, as the Nuffield Report argues, a solidaristic approach for the purpose of meeting vital health needs. As such, altruistic donations are genuinely laudable for a good reason.

6.14 Altruism Verification: A Non-Problem

A defender of Wilkinson might argue that tying evaluation of laudability to motive strengthens the case for the irrelevance of altruism to donation. As Wilkinson writes, “The system cannot possibly check people's motives and does not try to at all in the case of dead donors. If someone wants to donate an organ, the system does not ask whether his reason is selfless concern for others or to spite his family.”

This is a restatement of the verification problem.

This argument has implications that we may find hard to endorse. It would mean that donating to Oxfam’s cause of fighting poverty or to fund its humanitarian aid should also not be regarded as genuine moral value of a significant kind because Oxfam does not check people’s motives and people’s motives could be anything other than altruism. Of course, people may donate money to Oxfam to spite their own family (denying them an inheritance) or for other morally bad reasons, but this, as in the case of donation, is unlikely to be reasons most people donate for.

392 Wilkinson, Ethics and the Acquisition of Organs, p. 151.
The root problem with Wilkinson’s argument is thinking of the *motive* of altruism as a reason or an internal subjective state that prompts some action, rather than a term used to speak or think of to justify, explain or interpret actions for some social purpose. As noted in the introduction, Moorlock, Ives and Draper and the Nuffield Report also understand altruism in the causal, psychological sense. Consider, however, Mills’s conception of a motive:

As over against the inferential conception of motives as subjective “springs” of action, motives may be considered as typical vocabularies having ascertainable functions in delimited societal situations. Human actors do vocalize and impute motives to themselves and to others... Rather than fixed elements “in” an individual, motives are the terms with which interpretation of conduct by social actors proceeds. This imputation and avowal of motives by actors are social phenomena to be explained.\textsuperscript{393}

Scandroligo et al’s study on attitudes towards donation in Spain showed that the main motives of those favourable towards DOD are ‘To save other people’s lives’; ‘solidarity’; ‘The thought that I might need organs from others one day’; ‘To avoid the futile destruction of organs’; and ‘moral duty’.\textsuperscript{394} These are the typical ‘vocabularies of motives’ used to account for donation, which need not be what actually caused people to donate. Some motives are not moral in nature. ‘The thought that I might need organs from others one day’ could express prudential reasoning (supporting the system so that one may benefit), or reciprocity (doing one’s part as a response to a good that may be received) which could be regarded as a moral response. Regardless, they are morally neutral or permissible reasons and their mixture with moral reasons (see below) do not undermine good will.


\textsuperscript{394} Scandrolgio et al., ‘Analysis of the Attitudes and Motivations of the Spanish Population towards Organ Donation after Death’.
Some of the motives correspond to reasons that make donation a right act: to save lives, and not to destroy things that could otherwise be vital to saving or improving others’ lives, which can account for why donation has moral worth.\textsuperscript{395} To be clear, evaluation of moral worth – the extent to which an act is expressive of good will and thus truly laudable – is difficult if it depends on evaluating the extent to which the act was responsive to moral reasons. It is difficult to sort out the extent to which a person who signed up for donation after seeing an advert for the need for organs was responding to others’ suffering and humanity or by a need to relieve his own distress. For the purpose of this chapter, it suffices to say that good will is not the same as altruism and need not be guided by altruism.

What might make the reason of saving others motivating –by resolving its motivational conflict with say, loss of posthumous bodily integrity – is a devotion to living for others. As Wuthnow writes:

\begin{quote}
Doing good, engaging in prosocial behavior, volunteering, helping our neighbors, constructing accounts of the worth of such actions—these are not examples of altruism; they are only made possible by the idea of altruism, by our conception of it as a more pure, higher existence to which we can only aspire.\textsuperscript{396}
\end{quote}

The moral significance of altruism in deceased donation therefore need not hinge on the evidence that people’s motives (what actually moves or prompts them to act) for the discrete act of registering for donation are actually motivated by altruism. Through the ‘perspective’ of a common humanity, altruism’s central moral value lies in its social function of directing people from a preoccupation with their own interests to a concern

\textsuperscript{395}According to Arpaly, the moral worth or praiseworthiness of an action is a function of its responsiveness to moral reasons: “For an agent to be morally praiseworthy for doing the right thing is for her to have done the right thing for the relevant moral reasons—the reasons for which she acts are identical to the reasons for which the action is right.” (p. 72). N. Arpaly. 2003. \textit{Unprincipled Virtue: An Inquiry Into Moral Agency}. New York: Oxford University Press.

for others’ interests – to give weight to their interests such that one is willing to incur sacrifice for their sake – as an ideal of the good life.

6.15 Conclusion

Moorlock, Ives and Draper note that “problems of arbitrary justice seem to have arisen” with the requirement that donation be altruistic: “The charade that donation must be altruistic to be acceptable is revealed by the distinction between ‘altruistic living donation’ [that is, non-conditional living donation, that is, donation to strangers] and ‘living-related donation’. The latter has continued apace despite general recognition that there are usually self-interested reasons for wanting to save the life of a loved one.” This argument is an outgrowth of understanding the concept of altruism (equated to other-regarding motives) as ‘springs’ of particular actions. Pace Moorlock, Ives and Draper, organ donations – live or deceased – are not characterised as altruistic or non-altruistic insofar as they fit neatly into categories of actions consisting of either self-regarding or other-regarding motives. Unconditional living or deceased donation is characterised as altruistic because altruism is a concept that is concerned with shifting individual persons from a “domestic attachment to universal benevolence”.

Thus, even if altruism has been ‘watered down’ in its demand for disinterested concern for others from Comte’s conception, its character and purpose remain essentially the same: living for others as a maxim of the good life. This does not suggest that altruism in itself is incompatible with conditional donation. As discussed, altruism, both within and outside of the context of donation, is likely to be a phenomenon that is partial and self-interested as altruism is ‘creative’. Nevertheless, altruism, in its contingent, practical connection with

397 Moorlock, Ives & Draper, ‘Altruism in Organ Donation: An Unnecessary Requirement?’
398 Ibid.
399 Wuthnow, ‘Altruism and Sociology’ at 344.
impartial allocative principles of meeting need and utility, supports values like social (and potentially universal) inclusion and solidarity in organ provision, and maximisation of the transplant benefits of procured organs through unconditional donation. It is these broader values that stand at odds with conditional donation, not altruism per se. As Scott and Seglow write, “Altruism… is a fundamentally simple idea (but perhaps for that reason) its implications and its association with morality, are far from simple”.400 Thus while altruism may be morally valuable in itself, its social-moral value and significance are primarily of an instrumental kind in deceased donation: the promotion of altruism helps support other values important to the context of organ transplantation. The DoH’s ‘fundamental principle that organs are donated altruistically and should go to patients in the greatest need’ can be regarded as expressing this understanding.

Opponents of markets in organs should therefore make clear just what sort of values they think altruism is supporting in organ donation. If these values were limited to social inclusion, solidarity, and utility maximisation, then opponents of organ markets should recognise that they should be fundamentally opposed to conditional donation (or other means of increasing donation that undermines the allocation principles and associated values) and not an organ market per se. Organs received through a market could still go to a common pool and be allocated based on need and utility.401 Certainly, opponents of organ markets may regard altruism as supporting values like human dignity which might be undermined so long as donation is financially incentivised.402 Regardless, the point here is that in employing altruism as a concept to consider the ethical acceptability of means to increase donation, altruism’s moral significance does not depend on whether it can be empirically verified that donation is in general prompted by other-regarding reasons (or more by other-regarding

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401 As suggested by Erin & Harris, ‘An Ethical Market in Human Organs’.
402 They may oppose an organ market based on human dignity whether or not they think human dignity is maintained by altruistic donation.
reasons than self-regarding reasons), but by considering what moral values might be undermined if people in general no longer regard or endorse meeting common human need as a maxim of action in organ donation.
CHAPTER 7

7. Article 3: Altruism and Motivational Compatibility in Deceased Organ Donation

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7.1 Abstract

Acts of helping others are often based on mixed motivations. Based on this claim, it has been argued that the use of a financial reward to incentivize organ donation is compatible with promoting altruism in organ donation. In its report Human Bodies: Donation for Medicine and Research, the Nuffield Council on Bioethics uses this argument to justify its suggestion to pilot a funeral payment scheme to incentivize people to register for deceased organ donation in the UK. In this article, I cast a sceptical eye on the above Nuffield Report’s argument that its proposed funeral payment scheme would prompt deceased organ donations that remain altruistic (as defined by and valued the report). Specifically, I illustrate how this scheme may prompt various forms of mixed motivations which would not satisfy the report’s definition of altruism. Insofar as the scheme produces an expectation of the reward, it stands diametrical to promoting an ‘altruistic perspective’. My minimal goal in this article is to argue that altruism is not motivationally compatible with reward as an incentive for donation. My broader goal is to argue that if a financial reward is used to incentivize organ donation, then we should recognize that the donation system is no longer aiming to promote altruism. Rewarded donation would not be altruistic but it may be ethical given a persistent organ shortage situation.
7.2 Introduction

According to Childress,

[on]ce we recognize that motives are often, and perhaps usually, mixed and that the procurement system does not require pure altruism as the [organ] donor’s sole motivation, then we can begin to consider not only how the society could remove disincentives to donation, but also how it might provide incentives—i.e., additional motivating reasons—without replacing a moral sense of altruism.  

In its report Human Bodies: Donation for Medicine and Research (hereafter the Nuffield Report), the Nuffield Council on Bioethics employs a similar argument to ethically justify its proposal for the National Health Service Blood and Transplant (NHSBT) to pilot a scheme offering to meet the funeral expenses of those who register for deceased organ donation (DOD). It defines an altruistic action as ‘one that is primarily motivated by concern for the welfare of the recipient of some beneficent behaviour, rather than by concern for the welfare of the person carrying out the action’. A funeral reward scheme would prompt DOD registration that can be characterised as altruistic in this motivational way.

This paper casts a sceptical eye on the Nuffield Report’s claim that its proposed funeral reward scheme would prompt DOD of an altruistic nature as defined and valued by the report. Specifically, it illustrates how this scheme may prompt various mixed motivations which would not satisfy the report’s definition of altruism. An account of altruism – what may be called the ‘altruistic perspective’ – is then sketched out and linked to a sense of social responsibility for the needs of strangers based on an identification of self and others as part of a common humanity. The aim here is to argue that altruism is not motivationally compatible

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404 Nuffield Council on Bioethics, Human Bodies: Donation for Medicine and Research. The Nuffield Report proposes this funeral reward scheme in a broader context of considering how arrangements to encourage donation of bodily materials for medical treatment and research should move forward, taking into account the range of issues and concerns relating to different types of materials.
405 Ibid:231.
with reward as an *incentive* for donation. Reference will be made to Titmuss, who applied this idea of altruism to his defence of altruism in blood donation in his often-cited book *The Gift Relationship*.\(^{406}\) The broader argument is that if a financial reward is used to *incentivise* DOD, it should be acknowledged that the system no longer aims to promote altruism as the motivational basis of DOD. The paper concludes with the remark that one must recognise the limits of altruism in tackling a persistent organ shortage.

### 7.3 Why Maintain Altruism?

As Steinmann writes, ‘[f]or decades, Titmuss’s model of medical donation as a charitable, altruistic giving has served as the dominating model.’\(^{407}\) Titmuss has been interpreted as arguing that donation of blood and other bodily materials should be based purely on altruism.\(^{408}\) Authors like Epstein have, however, been scathing of altruism as a foundational ethical principle and value for organising organ donation, when around the world supply of organs is persistently short of meeting need.\(^{409}\) As Satel puts it, while some people are capable of ‘supreme acts of generosity’ and would donate their organs to strangers, ‘reliance on generosity makes for woeful public health policy’.\(^{410}\) Organ policies should therefore depart from ‘the doctrine that altruism should count as the sole legitimate impulse behind

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\(^{408}\) See, for example P. Sykora, 2009.


\(^{410}\) S. Satel. ‘The Waiting Game’. 
Like many critics of altruism in bodily material donation, Satel traces this doctrine to Titmuss’s arguments for blood donation as ‘a gift relationship’.

Contra Satel, altruism should not be thought of as arising from impulse or spontaneity in the context of bodily material donation. Altruistic donation is framed and produced by the organisation responsible for procuring and allocating the material: its ability to produce the social environment of giving – a ‘community of participation’ – is a factor in its effectiveness in getting people to donate. This is how Titmuss understands altruism in blood donation, as emphasised by Healy.

In addition, Titmuss recognises that blood donation under a gift system or ‘voluntary community donation’ cannot be a disinterested act. In his analysis of the motivations of British blood donors in his time, he concludes that “[n]one of the donors’ answers was purely altruistic…There must be some sense of obligation, approval and interest… what was seen by these donors as a good for strangers in the here-and-now could be (they said or implied) a good for themselves—indeterminately one day.’ This reason may also underpin or motivate DOD. In their study on public attitudes and motivations toward DOD in Spain, Scandroglio et al. found that among those favourable towards DOD, ‘knowing they might someday need a donation’ was a main motive.

Titmuss also does not appear to regard altruism as the only legitimate motivation for blood donation to be ethical. He employed terms like ‘reciprocity’ and ‘to obtain some

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412 As Titmuss writes, ‘[n]o donor type can… be said to be characterized by complete, disinterested, spontaneous altruism.’ Titmuss, The Gift Relationship, p. 89.
413 Healy. Last Best Gifts.
414 Titmuss, The Gift Relationship, 311.
415 Scandroglio et al. ‘Analysis of the Attitudes and Motivations of the Spanish Population towards Organ Donation after Death’.
416 Titmuss, The Gift Relationship, p. 228. ‘Reciprocity’ for Titmuss includes what Schmidtz calls ‘transitive reciprocity’, that is, not to make a return gift to the original benefactor (in this case, some anonymous person(s) who had donated blood that one used) but to pass on that gift of health to others. D. Schmidtz. 2006. Elements of
benefit to characterise some of the donor motives. Benefits sought included tangible and intangible kinds, such as free health checks and social status. Some blood donors could not distinguish a single or predominant motive. In Titmuss’s view, ‘[t]he vividness, individuality and diversity of these responses add life and a sense of community to the statistical generalities.’ Why then argue so strongly for altruism if donation can be non-altruistic but not ethically unacceptable since it need not undermine a sense of community? How else may the importance of altruism be understood? Kekes writes:

One may hold that altruism must be one of the ideals accepted by any justifiable system of morality. This interpretation does not commit one to holding that no action has moral worth unless it is altruistic. Rather, it supports the claim that one of the grounds upon which moral worth depends is altruism. Thus a nonaltruistic action may have moral worth... But it follows from it that other moral claims may take justifiable precedence over the claim of altruism.

Moorlock, Ives and Draper appear to interpret the Nuffield Report as holding altruism to be ‘a necessary as opposed to desirable component of ethical donation’. This goes too far. Like Titmuss, the report recognises that ‘donation unaccompanied by altruistic intent is not necessarily unethical in itself’. Its rationale for promoting altruism in bodily material donation can be interpreted as broadly aligned with Titmuss: to support ‘a solidaristic approach to health care’. The Nuffield Report defines solidarity as the idea that ‘we’re all

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*Justice*. Cambridge: Cambridge University Press:83. It also includes being motivated by a desire to support the system based on the belief that one or a family member might need blood someday. Such motivation might however be better understood as a utilitarian reason of a prudential kind. As Schmidt writes, reciprocity, as a principle or reason for action, is primarily ‘about how to respond when someone else has made the first move’. *Ibid*: 82. Or, as Becker puts it succinctly, ‘Reciprocity is a recipient’s virtue.’ See L. Becker. 1986. *Reciprocity*. London: Routledge and Kegan Paul:93.

420 Kekes. ‘Morality and Altruism’ at277.
in this together”, with an implication of mutual obligations and mutual support within a definable community (based, for example, on geography or on shared interests)’. 424 According to the report, ‘altruism has much in common with solidarity: an altruistic basis for donation helps underpin a communal, and collective, approach to the provision of bodily material for others’ needs, where generosity and compassion are valued.’ 425

As Schmidtz writes, ‘[t]he point of distributing according to need is not to prove our hearts are in the right place, but to meet the need.’ 426 Still, the ‘right heart’ may need to be promoted to preserve, to quote the Nuffield Report, ‘a communal commitment to the provision of materials needed by others for the preservation or improvement of their health’. 427 As the report states, altruism in bodily material donation should be understood with reference to motivation: the ‘internal psychological states that produce behaviours’. 428

7.4 Ethical Acceptability of Financial Rewards

Nevertheless, the need to save or improve lives of those waiting for an organ transplant calls for more efficacious ways to increase donation rates. Sale of and commerce in organs are strongly opposed; reward schemes, on the other hand, have been proposed as an ethically acceptable means to incentivise organ donation, particularly for deceased organs. 429 Financial

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427 Ibid:139.
428 Schmidtz, ‘Reasons for Altruism’ at 166.
430 The Nuffield Report defines ‘purchase’ or ‘sale’ as ‘payment in direct exchange for a ‘thing’ (e.g. a certain amount for a kidney)’ (p.70); ‘commercial dealings’ as ‘[t]he giving or receiving of payment that brings profit to the parties involved, typically involving the purchase of an item for which the market sets a price’; and ‘reward’ as ‘material advantage gained by a person as a result of donating bodily material, that goes beyond ‘recompensing’ the person for the losses they incurred in donating’. Ibid: 70 and 232. For this purpose of this paper, I do not differ from these definitions. It may be added that based on these definitions, a reward scheme for DOD seeks to avoid the commodification of organs. Commodification may be regarded as ‘the effect on the characteristics of a product or activity of supplying it exclusively or predominantly on commercial terms rather than on some other basis – such as informal exchange, mutual obligation, altruism or love, or feelings of service of obligation’. F. Hirsch. 1976. Social Limits to Growth. Cambridge, MA: Harvard University Press:87.
rewards suggested in the literature include cash payment; income or estate tax benefits; medical-related benefits; charitable contributions; and coverage of funeral or memorial service expenses.\textsuperscript{430}

A systematic review of the literature on financial incentives for organ donation (both live and deceased organs) reveals a general public preference for models that appeal to altruism or rely on removal of incentives to motivate people to donate, although there is an acceptance of some forms of financial reciprocation; public support for coverage of funeral expenses for DOD, for example, can range between 4–81\%\textsuperscript{431}. A recent survey finds that the Canadian public largely supports financial rewards for DOD, with reimbursement of funeral expenses receiving the strongest support.\textsuperscript{432}

Public support for rewarded DOD does not equate to its ethical acceptability.\textsuperscript{433} An Ethics Committee convened by the American Society of Transplant Surgeons (ASTS) provides some criteria.\textsuperscript{434} An ethically acceptable reward/incentive should preserve voluntariness; respect the human body; honour the deceased; serve the ‘public good by maintaining the current public perception of organ donation as good’; not lead to the justification of organ sale; convey gratitude; ‘preserve the concept of the organ as a donated gift; and not ‘subvert or diminish’ altruism.\textsuperscript{435} Based on these criteria, the committee concludes that, depending on the amount provided, payment of funeral expenses could be an ethically acceptable incentive. Unlike the Nuffield Report’s proposed reward scheme, this payment is to be offered to

\begin{footnotesize}
\begin{enumerate}
\item I thank an anonymous reviewer for the suggestion to include a discussion on what constitutes an ‘ethical donation’.
\item Ibid:1363. The ASTS Ethics Committee also considers charitable contribution determined by the donor family to be potentially ethically acceptable.
\end{enumerate}
\end{footnotesize}
families to incentivise them to consent to the donation of their dead kin’s organs rather than to individuals to incentivise them to give explicit consent for DOD.  

DOD is an ethically complex process which involves the consent of individuals and/or their next of kin. Factors that may affect consent include ‘positive altruistic motives and negative psychological responses [such a lack of empathy for the distress of the family]’ produced by the donation process. The ASTS Ethics Committee’s criteria above illustrate the need to take into account the various social and existential aspects of DOD to consider the ethical acceptability of introducing financial rewards to incentivise DOD. The focus here is on the decision-making process, specifically the motivations that are likely to be produced by a financial reward scheme for DOD. Titmuss’s idea of altruism will be contrasted with the Nuffield Report’s definition to argue against the claim, as the Nuffield Report holds, that promoting altruism is compatible with the use of a funeral coverage reward to incentivise DOD to justify the ethical acceptability of this reward.

7.5 Motivationally Mixed Yet Altruistic

As the Nuffield Report claims, while ‘solidarity may indeed by [sic] undermined by the offer of rewards in return for donation’ in some circumstances, it is ‘possible to imagine circumstances in which individuals make decisions to promote the health of others based on a combination of genuine altruism and personal enrichment’. In addition, ‘an altruistic basis

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436 In fact, the Nuffield Report rejects offering the funeral payment reward to families as it would clearly constitute a ‘non-altruist-focused intervention’. See Nuffield Report on Bioethics, Human Bodies: Donation for Medicine and Science, p.174. An ethical analysis of the difference in approach falls outside the scope of this paper.


438 I thank the same anonymous reviewer indicated for making this point. The phrasing is adapted from the reviewer’s comment.


440 Ibid:145.
for donation does not necessarily exclude other approaches: systems based on altruism and systems involving some form of payment are not mutually exclusive.\textsuperscript{441}

To support these claims, the Nuffield Report points out that ‘in reality many decisions that help others [including bodily material donations] have mixed forms of motivation lying behind them’.\textsuperscript{442} From this, the report does not ‘think it important from an ethical perspective that altruism [in bodily material donation] is thoroughly ‘pure’’.\textsuperscript{443} To reiterate, the report defines an altruistic act as one that is ‘primarily motivated by concern for the welfare of the recipient of some beneficent behaviour, rather than by concern for the welfare of the person carrying out the action’. An act would not just be ethical but genuinely altruistic even if it is motivated by self-regarding concerns, including a reward motive, as long as concern for others is the primary motivation. Accordingly, DOD registration incentivised by a funeral coverage reward could be altruistic insofar as it is primarily motivated by concern for the welfare of others.

\textsuperscript{441} Ibid:156. The Nuffield Report defines ‘payment’ as a ‘generic term covering all kinds of transactions involving money, and goods with monetary value, whether those transactions are understood as recompense, reward or purchase’. See p. 70.
\textsuperscript{442} Ibid:145.
\textsuperscript{443} Ibid:139.
Before the Nuffield Report is critiqued, its ethical framework, and how it justifies a funeral reward scheme, should be explicated. With altruism as an organising idea, the report presents an intervention ladder for ‘analysing the justification required for different means of encouragement and persuasion to donate’.

Interventions can be sorted in ascending order, from the ‘altruist-focused’ to the ‘non-altruist-focused’. Altruist-focused interventions ‘act to remove disincentives from, or provide a spur to, those already inclined to donate’, while for non-altruist focused interventions, ‘the reward offered to the potential donor is intended alone to be sufficient to prompt action’.

In line with the previous discussion of altruism as a non-essential component of ethical donation, the report emphasises that ‘the ladder should not be seen as moving from ‘ethical’

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444 Strathern & Wright., p. 192.
446 Ibid.
actions to ‘unethical’ actions, but rather from actions that are ethically straightforward to those that are ethically more complex’. Interventions to promote donation are only forms of ‘input’: ‘how individuals respond to such inputs will clearly vary from person to person, and indeed inevitably there will be some degree of overlap in how people respond to neighbouring ‘rungs’.’

The report justifies the funeral reward scheme by its unlikelihood of undermining the common good, ‘since a very similar system exists for covering cremation costs of those who donate their bodies to medical science’. Importantly, it argues that the scheme would still prompt altruistic DOD. It claims that the funeral payment reward might, in terms of people’s responses, constitute rung 4 of the intervention ladder: for those already inclined or disposed towards donation, the reward would be a final spur for them to act, ‘with the added altruistic feature that others, and not the donor themselves, would benefit’. Alternatively, the reward might constitute a rung 6 intervention: for those not disposed or inclined towards donation, the reward would serve as the primary motivation. Nonetheless, their action still has an ‘altruistic component’ as it aims to benefit relatives or those who would otherwise bear the costs of their funeral. The funeral reward scheme therefore amplifies altruism or retains an element of it in prompting DOD registration.

7.7 Motivationally Mixed but Not Altruistic

The Nuffield Report’s view of altruism and its argument that its proposed funeral payment reward would be consistent with promoting altruism in DOD have been cited

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448 Ibid.
449 Ibid. The Nuffield Report also justifies the scheme on the claim that donors cannot be physically harmed.
451 Ibid:175.
approvingly. Nevertheless, Moorlock, Ives and Draper argue that while the report’s definition of altruism is more precise than ‘the account of altruism seemingly endorsed by organ donation policy and guidance in the UK’, it remains problematic for determining the ethical acceptability of means to prompt donation, since it may not ‘ever [be] possible to be certain [from an external viewpoint] what a person’s motives are, let alone what their primary motives might be’. The argument here is that even if primary motives can be ascertained, the Nuffield Report’s claim that the funeral payment reward would prompt donation of an altruistic nature (as defined and valued by the report) is questionable.

The Nuffield Report argues that even if the funeral payment reward prompts people with no inclination to donate organs to register for DOD, such registration would still have an altruistic component. Sun Life Direct (a life insurer in the UK) characterises the protection of family and friends from the burden of one’s funeral costs as a selfless act. But selflessness or self-sacrifice does not necessarily constitute altruism, even though they may contribute to its understanding. (I will discuss more below on the relationship between self-sacrifice and altruism.) This does not discount the possibility that acting to benefit one’s relatives could be regarded as altruistic, and thus we can broadly accept the report’s claim. But we can doubt


453 It should be noted that while Price (who died in 2012) expressed his own views in the above posthumously published article, he was a member of the Working Party on the Nuffield Report.


455 Ibid:4. One may add that even if DOD registrants were to give their reasons for donation under the reward scheme, their answers may be influenced by social desirability bias, i.e. the tendency of people to provide responses that will be viewed favourably by others in self-reports. Thus, whether a funeral reward scheme for DOD would still prompt altruism, or whether it actually maintains, increases or undermines altruism compared with current non-rewarding approaches, would be hard to prove or disprove empirically.


458 As Campbell and Christopher write, ‘How you define altruism is, more than anything else, a function of the way you think of the self and of self-interest. If your interests terminate at your epidermal layer, then virtually anything you do for friends and loved ones, let alone marginal acquaintances or strangers, qualifies as altruistic behavior.’ R.L. Campbell and J.C. Christopher. Beyond Formalism and Altruism: The Prospects for Moral Personality. Developmental Review 1996;16:108-23.
the relevance of the altruism prompted, as the report holds that altruism in bodily material donation is to be valued for its crucial role in supporting solidarity in health care provision. If people were primarily motivated by the funeral payment reward to register for DOD just to benefit their relatives, the act would be better characterised as ‘seeking a benefit for one’s relatives’. Altruism, as such, does not seem to have ‘much in common with solidarity’.

Let us now examine the Nuffield Report’s argument that the funeral coverage reward would amplify altruism in DOD if it spurs those already disposed or inclined towards DOD into registering for it. Let us assume that this disposition or inclination stems from a concern towards those in need of a transplant. In being spurred to DOD registration by the reward, however, concern for these others may not be the primary motivation. Hence, the act may not be altruistic as defined by the report. The report sometimes regards ‘primary motivation’ as a motive that is sufficiently strong to move one to act, and, elsewhere, as ‘a reason for action on its own’. Thus, the report likely regards reasons for donation as motivating reasons.

The issue here is that the Nuffield Report seems to assume that as a final spur for those disposed towards DOD, the funeral payment reward would not be a sufficient motive in itself for them to register for DOD.

How the scheme motivates depends on its value. The Nuffield Report likens its proposed funeral reward scheme for DOD to existing payment arrangements for the funerals of those

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457 The Nuffield Report writes that ‘“non-altruist-focused interventions’… are targeted at potential donors who have no strong motivation to help others through the donation of their bodily material’ (p. 5) and that ‘the incentive [the funeral reward] might seem sufficiently strong for someone to decide to register as a donor simply to spare their relatives the financial burden of a funeral’. (p. 175). Nuffield Council on Bioethics, Human Bodies: Donation for Medicine and Science. These statements suggest that the report sometimes understands ‘primary motivation’ as a sufficiently strong motivation.

458 This is suggested by the Nuffield Report’s definition of a non-altruist intervention as an intervention in which ‘the reward is calibrated with the aim of providing a reason for action on its own’. Ibid:141.

459 As suggested by the Nuffield Report’s distinction between ‘token incentives’, where the value or nature of the incentive would be insufficient to provide anyone (regardless of income level) with a primary reason for donating, and incentives that seek to provide that primary motive’ Ibid: p. 5. ‘Motivation’ and ‘reason’ are often distinguished philosophically, however. For example, one could recognise a normative reason for doing something which does not motivate (because of some failure in rationality). See D. Parfit. Reasons and Motivation. The Aristotelian Society 1997;77: 99-130.
who donate their bodies to medical science. Payment for the latter is usually limited to simple funerals or memorial services. In addition, as a survey conducted in the Netherlands shows, motivations for body donation to science are commonly underpinned by a negative attitude towards funerals.\textsuperscript{460} As the authors observe, ‘[t]he respondents choose to donate their body, not so much because of a positive decision but rather because they are averse to other methods of body disposition.’\textsuperscript{461} There may a significant difference, in terms of monetary worth and how people value the reward, between the offer of funeral coverage for DOD and typical funeral coverage for body donation to science if the former were to incentivise DOD and increase the donation rate.

To preserve the idea of rewarded DOD as an altruistic gift, the majority of the ASTS Ethics Committee suggests that payment for funeral expenses be kept ‘intentionally small’ to USD$300.\textsuperscript{462} Bryce et al.’s survey among Pennsylvania’s households showed that most found this amount to be too little to offer to donor families.\textsuperscript{463} Plausibly, the same would apply if this financial reward were to incentivise more individuals to sign up for DOD. To incentivise more DOD registration in Sweden, Omar, Tinghög and Welin propose that the state contribute up to €5,000 towards the funeral expenses of donors.\textsuperscript{464} Such a reward ceiling (possibly a higher one\textsuperscript{465}) may be needed for the Nuffield Report’s proposed reward to

\textsuperscript{461} Ibid:72.
\textsuperscript{462} Delmonico, ‘Ethical Incentives—Not Payment— for Organ Donation’.
\textsuperscript{465} According to the ninth annual report \textit{Cost of Dying Survey} commissioned by the life insurers Sun Life Direct, the average basic cost for funerals in the UK is about £3,284 in 2012. The report found that 17% of respondents struggled to meet funeral costs; this suggests that 90,000 people in the UK might have difficulties paying for funerals, given that around 552,000 deaths occur in the UK every year. According to the report, the Department for Work and Pensions awards £1,241 on average to those who apply for Social Fund Funeral Payment (which only individuals in receipt of particular welfare benefits are eligible to claim). The report also found that despite lower incomes, spending on non-discretionary costs, for e.g. memorials, flowers etc. has increased. Assuming all services (which would include non-discretionary, discretionary and estate administration costs) were used, the average cost of dying in the UK was £7,114 in 2012. Sun Life Direct, \textit{Life Direct Cost of Dying Survey} 2012.
incentivise and increase DOD registration in the UK – the main reason for introducing the reward scheme in the first place.

Indeed, funeral costs in the UK are rising, even as money becomes tighter for many with the on-going global economic situation. There is also a trend for funerals to reflect or celebrate the personality or lifestyle of the deceased, which results in higher funeral costs. Given the socio-economic context of funeral organisation in the UK, the offer of funeral coverage – assuming a payment ceiling scheme were used – would likely become a sufficient motivation for DOD registration even for those already inclined towards DOD, and one that is self-regarding to some extent, revealing a desire to ensure one’s preferred funeral. The individual might not differentiate this desire from concern for the welfare of relatives paying for one’s funeral. As the report notes, ‘altruism is only one among several values that motivate relatives to do things for one another: between kinsfolk – and in other close relationships – self-interest and other-interest are closely entwined’.

The funeral payment reward may thus prompt ‘over-determined’ actions: both the inclination to help those in need and the reward (underpinned in part by self-concern) would be motives for registration, with each motive alone sufficient for one to act. The inclination to help others would likely not be a sufficient motive for most people in the first place; if it were, non-rewarding interventions to encourage DOD registration should be explored further, rather than trialling the reward scheme. Registration for rewarded DOD may thus be a ‘hybrid’ action: neither the inclination to help those in need nor the reward alone is sufficient for one to act, but together, as distinct motives, they would prompt registration. Motivations may also become so intermingled that donation is best characterised as determined by a

single yet complex motive, making it meaningless to separate concern for oneself, concern for relatives, and concern for those in need of a transplant in the psychological state that prompts DOD registration. These motivational structures – over-determined, hybrid, and single yet complex – do not seem to fit the report’s definition of an altruistic action.\footnote{469}

7.7.1 Altruistic Intent

Now it may be argued that the psychological state the Nuffield Report is interested in maintaining is ‘altruistic intent’. As the report states, ‘systems based on altruism and systems involving some form of payment are not mutually exclusive… because some forms of reward (monetary or otherwise) may in fact coexist with altruistic intent’.\footnote{470} The report does not explain what is meant by ‘altruistic intent’. Intent or intention has been distinguished from motive as the goal or end of our action, rather than what prompts or moves us to act per se;\footnote{471} ‘intent’ reflects exercise of choice or deliberation over one’s behaviour or action, which in turn may reflect one’s cares and commitments. For intent of an act to be characterised as altruistic, it should not be equated to mere intent to benefit or promote the welfare of others. While the latter intent may suggest altruism, it could simply be understood as a beneficent intent. Many social psychologists – and the Nuffield Report – believe that altruism is based on concern for others, taking the form of empathy, sympathy and other vicarious

\footnote{469} These ideas of mixed motivations were raised and discussed in relation to understanding and evaluating what Kant means in claiming that an action has moral worth only if it is done from duty, particularly in view of the fact that, as Herman writes, ‘It is quite common for us to have more than one motive for what we do, and even more than one motive that by itself would be sufficient to produce a particular action.’ B. Herman. On the Value of Acting from a Duty of Motive. Philosophical Review 1981;90: 359-82:359-60. On ‘over-determined’ and ‘hybrid’ actions, see Herman (as just cited) and M. Baron. 1995. Kantian Ethics Almost Without Apology. Ithaca: Cornell University Press. On the notion of a single yet complex motivation, see N.J.H. Dent. Duty and Inclination. Mind 1974;83:552-70.

\footnote{470} Nuffield Council on Bioethics, Human Bodies: Donation for Medicine and Science, p.156.

\footnote{471} According to Heyd, for e.g. ‘altruistic intention [which means that the act must be conceived as benefitting another person or persons] should not… be confused with altruistic motive. While intention forms only part of the description of the act, the motive is only the ‘feeling’ which moves us to do it’. D. Heyd. 1982. Supererogation: Its Status in Ethical Theory. New York: Cambridge University Press:137.
The source of an act is not necessarily the determinant of its character. As Rescher writes, ‘The determinative consideration with respect to… altruism… is not just that a person is concerned for the well-being of others but why he is so – namely because their welfare is at issue. A person’s values become the pivotal consideration here.’

In attempting to prove (using social psychological experiments) the existence of altruism as a motivation not reducible to egoism, Bateson hypothesises that altruism arises from empathic concern for individuals perceived to be in need, and together with colleagues, identifies the valuing of their welfare (as an end in itself) as an antecedent cause of empathic concern. He defines altruism as a motivational state in which ‘the ultimate goal is to increase another’s welfare’. Plausibly, altruistic intent can be understood in this sense. According to Bateson, ‘“Ultimate” does not here mean “cosmic” or “most important”; it simply refers to the [valued] state or states a person is seeking at a given time... It is the ultimate goal that defines a motive.’ Accordingly, the Nuffield Report can hold that so long as a person’s intent or ultimate goal in DOD registration is altruistic – that is, he seeks the valued state of promoting another’s health – it matters not whether his motivations were over-determined, hybrid or singularly complex, as prompted by the reward.

Many real-life actions can be and are regarded as having an altruistic intent even if they are well rewarded. The Nuffield Report states that ‘someone who is paid well for charitable work

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474 Batson, ‘Empathy: A Source of Altruistic Motivation for Helping?’
may undertake this work for a combination of reasons, including a genuine desire to assist others and a desire to improve their own quality of life. Their altruism remains genuine here, for it might explain why they choose charity work as a career rather than some other (potentially better paid) job.\textsuperscript{478} If the funeral reward scheme were to be piloted, those considering DOD registration would have only these action options: no donation, unrewarded donation and rewarded donation. They would not have a better-paying option within the UK. Furthermore, judgements on altruism in relation to a career in charity work are more judgments on conduct or character by considering various actions taken or not taken over the course of one’s life. Even if the DOD registrant is a regular bodily material donor, we are judging whether the intent of an act of DOD registration as prompted by the funeral payment reward is altruistic. Consider below (A) a common-enough case of a rewarded altruistic action, and (B) how the funeral coverage reward might prompt DOD registration.

(A) Tom, a cab driver, finds a large sum of money in his cab and returns it to the passenger who left it there. Passenger gives a cash reward to Tom, which Tom accepts because it will help his family financially.

(B) Alan feels concern for people waiting for an organ transplant after seeing a TV campaign informing him of their plight and the scarcity of organs. Nevertheless, Alan did not register for DOD. Surfing the net on DOD in the UK one day, he comes across the information that donors’ funeral expenses would be taken care of. Incentivised by the reward, Alan registers for DOD.

The intent of some act or behaviour may be described in various ways. To keep the argument simple, let us assume that Tom and Alan’s intent is to realise the valued welfare of the passenger and those in need of a transplant respectively. However, there is a potential difference. Alan expects a reward as an outcome of registering his intent to help those in need of a transplant, or successfully donating his organs at death. Unlike Alan, Tom may not expect his reward. If so, Tom’s intent or ultimate goal is to promote

\textsuperscript{478} Nuffield Council on Bioethics, \textit{Human Bodies: Donation for Medicine and Science}, p.139.
the welfare of the passenger, without being conditioned by a reward outcome. The reward is an unintended consequence of his intent to benefit the passenger. Now it may be pointed out that it is quite normal in a lot of societies to get a reward or a finder’s fee for returning valuables that one finds. If so, Tom, whether consciously or unconsciously, would be expecting a reward. There is a difference, however, between an expectation of a possibility of some reward pay-off and full expectation of a specific reward as a pre-calculated outcome of performing a helpful act.

As the Nuffield Report argues, a reward, if it is to incentivise effectively, aims to alter individuals’ perceptions of costs and benefits, but this alteration does not by itself make the incentive ethically objectionable. However, it arguably does affect the characterisation of the act of donation. As Bateson argues, behaviour directed by altruistic goals may involve a “hedonic calculus” (a relative benefit analysis). However, in altruism, this calculus occurs such that the actor is considering the extent of the costs to oneself in relation to the valued benefit to the other. Beneficence is still directed solely to the other in reaching a favourable cost-benefit analysis. Individuals considering DOD registration with the funeral payment reward acting as an incentive are likely to be directed to balancing the benefits to those in need of a transplant with the benefits to self/relatives against costs to self. If one does register based on a favourable relative benefit analysis, the ultimate goal would be to contribute to the welfare of those in need of a transplant and that of self/relatives. Such intent seems to fall into the category of mutual or collective welfare promotion, rather than altruism.

479 Ibid: 141.
7.8 The Perspective of Altruism

The above objection to the Nuffield Report may be viewed as merely terminological, as altruism can be defined in many ways. In support of expansive understandings of altruism to negotiate the ethical dilemmas of bodily material donation, Steinberg coins the term ‘predominant altruism’ to characterise ‘intentional and voluntary acts that aim to enhance the welfare of another person that come with a reward of a relatively trivial nature’. Lavee et al. uses the same term to justify Israel’s policy to provide priority points for organ allocation for those who had been the DOD registry for at least three years prior to placement on the waiting list (their first degree relatives would also receive priority points): altruism predominates, however, because reception of the reward is improbable and not that it is trivial.

Other ‘impure’ definitions can be formulated to reconcile altruism and reward incentives. As Saunders writes, however, ‘[w]here apparently ‘altruistic’ behaviour is conditional on others reciprocating [to oneself or to the particular groups one feels attached to], this is no more than extended self-interest: you scratch my back and I’ll scratch yours.’ It is not the contention here that decisions to help others prompted by a financial reward should be reduced to self-regarding motivations of a mere quid pro quo kind. The point here is that the promotion of altruism and the use of reward

482 As they write, ‘most people who sign an organ donor card will never need an organ themselves and in all likelihood will ultimately receive no material reward for their promised donation and therefore although they might not be purely altruistic, they remain predominantly altruistic’. Lavee, ‘A New Law for Allocation of Donor Organs in Israel’ at 1132. See also J. Lavee. Ethical Amendments to the Israeli Organ Transplant Law. *American Journal of Transplantation* 2013;13:1614. The priority scheme also applies to live donors.
483 Steinberg also proposes the term ‘possible altruism’ to categorise donation ‘[w]hen it is unclear whether the border between predominant altruism and commercialism has been crossed’. (pp. 251-2). For Steinberg, oocyte donation prompted by compensation of USD $10,000 could be categorised as such. This to me is an extreme example of trying to reconcile altruism with financially incentives for bodily material donation. See ‘Altruism in Medicine: Its Definition, Nature, and Dilemmas’.
484 Saunders, ‘Altruism or Solidarity?’ at 377.
incentives to prompt donation are not compatible. In this section, I sketch out the social-moral psychology of altruism that a ‘Titmussian’ gift model seeks to promote.

As the Nuffield Report says, ‘Altruism is widely understood as entailing a selfless gift to others without expectation of remuneration. For several decades, this understanding of altruism has been presented as the basis of blood and organ donation in the UK.’ In examining reasons for maintaining the altruistic model in bodily material donation, it considers that altruism maintains the communal virtue of ‘a general disposition to be moved to self-sacrifice by the health needs of others’. Presumably, this disposition provides a (the?) link between altruism and solidarity.

Saunders argues that unrewarded DOD in general should not even be characterised as altruistic as most people who actually register for DOD do not regard themselves as making a significant sacrifice if at all, presumably because they see no use for their organs once dead. Altruism is however not the same thing as self-sacrifice, although it implies the possibility of the latter. More precisely, an altruistic intent is not intent to be self-sacrificial. Like other actions, an altruistic action will involve personal costs, but they are borne as a matter of following through the intent to increase another’s welfare, and are regarded as self-sacrificial ‘only when the agent prefers the value forgone to the value gained’. Thus the lack of a sense of self-sacrifice in one’s psychological state as one pursues the goal of helping another does not mean that one is not acting altruistically.

However, ‘no expectation of reward’, or the absence of a calculation of a reward whether tangible or intangible, as a precondition to help another, seems integral to the

485 Nuffield Council on Bioethics, Human Bodies: Donation for Medicine and Science, p.120.
486 Ibid:144.
487 Saunders, ‘Altruism or Solidarity’ at 378.
488 Schmidtz, ‘Reasons for Altruism’ at 65.
psychology of acting altruistically. As Monroe argues, altruism is best explained by having a certain perspective, which refers to one’s worldview and identity, and which involves ‘canonical expectations’, i.e. what is normal and right to do in some given situation:

The altruist sees the world differently. The behaviour results from the recognition that the actor is human and therefore required to act in a certain way, and that the needy person is human and therefore entitled to certain treatment. Humanity plus need: this is the only moral reasoning, the only calculus for altruism.

The intent to increase another’s welfare as a function of altruism thus arises from the identification of self and other as part of a common humanity, in which one feels that one must help another in need. Altruism is thus underpinned by a perspective in which concern for another’s need directs one’s action as an imperative to help. This perspective is the essence of the Titmussian gift relationship.

As commentators on Titmuss have noted, the gift relationship is a ‘stranger’ relationship, rather than a ‘face to face’ one (particularly, ‘the reciprocal rights and obligations of family and kinship’).

In promoting helpfulness to social strangers as its central concern, a collective provision policy for therapeutic bodily materials seeks to foster social integration: ‘to build the identity of a person around some community by which...

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489 Monroe, *The Heart of Altruism*, p.14. To quote Monroe at length: ‘Perspective provides the critical component, particularly the altruist’s perception of self in relation to others. Earlier studies on altruism have failed to identify this critical explanatory variable, focusing instead on the many different factors that may precipitate or encourage the development and growth of this altruistic perspective. This perspective provides a feeling of being strongly linked to others through a shared humanity and constitutes such a central core to altruists’ identity that it leaves them no choice in their behavior when others are in great need. It is this perspective that best distinguished altruists from traditional rational actors.’ (p. 234).

490 Ibid:212.


The stranger (recipient) is likely to be a fellow citizen; he or she is certainly a fellow human being. The gift system thus seeks to build identification within a community of an inclusive, universalisable kind. Identification with others has been theorised as the foundation of a commitment, to quote Sen, ‘concerned with breaking the tight link between individual welfare (with or without sympathy) and the choice of action (e.g. acting to remove some misery even though one personally does not suffer from it). Sen writes:

If the sense of identity takes the form of partly disconnecting a person’s choice of actions from the pursuit of self-goal, then a noninferior outcome [in the coordination of interests] can well emerge even without any formal contract and enforcement. One of the ways in which the sense of identity can operate is through making members of a community accept certain rules of conduct as part of obligatory behaviour toward others in the community. It is not a matter of asking each time, What do I get out of it? How are my own goals furthered in this way?, but of taking for granted the case for certain patterns of behavior toward others.

Identity forged by shared rules or norms stands, in contrast to goal- or welfare-maximizing calculation, as the foundation of voluntary actions to serve the common good. In the context of voluntary blood donation, identity or a sense of a community is framed by these rules: ‘absence of tangible immediate rewards in monetary or non-monetary forms; the absence of penalties, financial or otherwise; and the knowledge among donors that their donations are for unnamed strangers without distinction of age, sex, medical condition, income, class, religion or ethnic group’. Such rules apply to

DOD in the UK. The recent NICE guidelines on DOD state that ‘Organ donation should be considered as a usual part of ‘end-of-life care’ planning’. Framing DOD as such may violate certain philosophical definitions of altruism, but this is just what is needed to foster the ‘altruistic perspective’.

As noted by Farrell, ‘Titmuss largely focused on donors in the context of the donor-recipient relationship: their characteristics, their recruitment and motivation. In contrast, the patient-recipient was minimally sketched and largely depicted as a passive and necessarily trusting individual’. Whether or not Titmuss depicted recipients thus, there is a rationale for his focus on donors: to promote – in view of a lack of an ethical

498 Following the Ashworth case in the UK, in which the Human Tissue Authority (which makes the final decisions on organ donation) denied the wish of Laura Ashworth (a registered deceased organ donor) to donate a kidney to her mother at death because her wish was not formally recorded, the Department of Health amended its guidance on deceased organ donation such that ‘in certain exceptional circumstances, the requested allocation of an organ to a specified relative or friend may be permissible.’ UK Health Departments. Requested Allocation of a Deceased Donor Organ. Moorlock, Ives and Draper take issue with departure from unconditional donation as a fundamental principle of DOD, pointing to its inconsistency with some philosophical accounts of altruism that take impartiality as a necessary condition of altruism to support their argument that altruism is a confusing and ultimately unnecessary requirement to guide organ donation. See Moorlock, Ives & Draper, ‘Altruism in Organ Donation: An Unnecessary Requirement’. As I argue here with reference to Titmuss’s thinking, however, the promotion of altruism in the donation of bodily materials like transfusion blood and transplant organs is linked with fostering universal inclusiveness, which is not the same as impartiality in allocation between citizen and non-citizen, kin and non-kin etc. Impartiality is a concern of justice. As Schmidtz argues, justice is about considering how elements like need, reciprocity (including to our intimates), equality and desert could fit to guide our actions and practices. See Schmidtz, Elements of Justice. So while I agree with Moorlock, Ives and Draper that we should recognise the limits of altruism in organ donation, I differ from their views in that altruism is not that confusing a guide.


500 Moorlock, Ives and Draper argue that making DOD ‘‘usual’ may make it ‘part and parcel’… of the social role of dying people’ (Ibid: 5) which would turn DOD into an non-altruistic act if we apply Miller’s definition of altruism as ‘behaviour that is intended to meet the needs of others… where there is no institutional requirement that one should’. D. Miller. Are They My Poor? Critical Review of International Social and Political Philosophy 2002;5:106-27. It is unclear to me why even if making DOD usual or normal to do did turn it into a social role of dying people that this role is an institutional requirement on dying people. The NICE statement appears under the heading ‘Identifying patients who are potential donors.’ The statement relates to those involved in procurement. Making organ donation a usual part of end-of-life planning need not violate Miller’s account of altruism.

501 Promoting altruism in DOD thus comes close to promoting, as Williams defines altruism, ‘a general disposition to regard the interests of others, merely as such, as making some claim on one, and, in particular, as implying the possibility of limiting one’s project’. Williams, Problems of the Self, p. 250. (cited previously in this thesis at p. 90 and p. 109.)

or legal foundation for patients to claim others’ bodily parts as a right – a sense of social responsibility for the needs of other members of society.\(^5\) According to Titmuss, that most donors’ expressed reasons for blood donation, as found by his survey, could be categorised as ‘Altruism’ (expressed in general terms as a desire to help), ‘Duty’ and so forth suggests a high sense of social responsibility among British people in his time.\(^6\) Such an inference may not be warranted, but it is the desired social-moral psychology as underpinned by the altruistic perspective that the rules of the system aim to foster.

### 7.9 Reward and Social Responsibility

It is hard to say whether the introduction of a funeral payment reward rule would undermine or subvert a sense of social responsibility for the needs of strangers in the context of DOD; the funeral reward scheme could be trialled for a period and then compared to a post-trial, no-reward period in terms of willingness to donate, actual donation rate etc. As social responsibility may depend on many factors, the possibility that such subversion might not occur does not undermine the claim of this article that the promotion of an altruistic perspective is not compatible with a scheme that aims to incentivise behaviour through offering a substantial reward for self/kin, even if that perspective may be compatible with some self-regarding reasons for donation.

However, this is not to say that a reward scheme cannot be compatible with the promotion of altruism. In Singapore, immediate family members of deceased organ donors may receive a subsidy towards medical expenses incurred at government hospitals, effective for five years following donation.\(^7\) This discretionary reward is not part of the transplant industry and

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\(^7\) B. Teo. Organ for Transplantation: The Singapore Experience. *Hastings Cent Rep* 1992; 21:10-3. Under Singapore’s Human Organ Transplant Act, prohibition of buying or selling of blood or organs ‘does not apply to any scheme introduced or approved by the Government granting medical benefits or privileges to any organ or
relevant health professionals’ communicative norm – it is not offered to donors or relatives to prompt them to agree to donation. (This is partly because the donation system is an opt-out system, in which the taking of organs may be enforced unless the person has prior to death formally objected to DOD.\textsuperscript{506}) The system therefore does not create much, if any, expectation of reward in the calculative sense. (What may prevent people from opting out is that dissenters would be given lower priority on the waiting list should they later be in need of a transplant.\textsuperscript{507}) The reward thus lies in the ‘background’, with the central role of expressing social appreciation for the contribution of donors and their families to the common good. Similarly, a funeral coverage reward can operate in the background, but it may have little effect as an incentive and, thus, on increasing the supply of transplant organs.

In any case, the Nuffield Report does not propose a background reward. It states that the offer of meeting the costs of funeral expenses for those who register for DOD would ‘effectively [provide] a funeral benefit to the deceased’s estate or to those who would otherwise bear the costs of the funeral’.\textsuperscript{508} Not only would DOD registrants and their relatives expect the reward as a direct and specific outcome of the act of registration, it would appear that the relatives could actually demand the reward as part of the deceased’s agreement with the NHSBT. If so, this would in effect make a donor’s transaction with the NHSBT a statutorily enforceable agreement akin to a contract.

\textsuperscript{506} Conflicts between relatives and healthcare professionals (with police officers called in to handle the situation) have arisen in Singapore over the procurement of organs from the dead. See G.Q. Koh. 2007. Scuffle for Organs Sparks Donor Debate in Singapore. \textit{Reuters 28 February}. Available at: http://www.reuters.com/article/2007/02/28/us-singapore-organs-idUSSIN17324120070228 (accessed 13 May 2013).

\textsuperscript{507} This disincentive has been justified on the grounds that those willing to be part of the common pool of potential kidney donors should be the first ones to benefit from the pool. See Singapore Parliamentary Report. Vol. 48 at Col. 886. 9 Dec 1986. (Tan Cheng Bock).

7.10 Conclusion

Like the Nuffield Report, Peters argues for the continued promotion of altruism in financially rewarded DOD. Arguing for a death benefit (USD$1000) to incentivise family consent to donation of a deceased kin’s organs, Peters states that ‘We should not lose sight of the good of altruism, and we should promote it to an even greater extent.’ In response, Pellegrino argues that such a scheme creates ‘a deliberate conflict between altruism and self-interest’ which ‘reduce[s] our freedom to make a gift to a stranger. This, as Titmuss shows in his study of the commercialization of blood donation, has serious destructive effects, ethical and non-ethical, on the whole of society’.

We need not agree with Pellegrino that a financial reward system reduces our freedom to gift to strangers per se, or would produce serious destructive effects. But, as this article has hopefully shown, Pellegrino is essentially right: the promotion of self-interested reasons of a reward-seeking kind is incompatible with promoting altruism with respect to donation to strangers. To be sure, no procurement system ‘produces’ only one form of motivation. Donation, rewarded or not rewarded, can be regarded as social, moral, charitable, helpful, sense-making, identity-forming, self-interested, or all at once. To paraphrase Veatch, some individuals and organ procurers may also consider themselves to be participating in altruistic gifting under a financial reward scheme.

In introducing a reward/incentive for DOD – whether directed at individuals or at their relatives – as a means to increase donation, it should be recognised however that the system

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511 This point was drawn from the comment of the same anonymous reviewer indicated in n.31.

512 ‘Veatch. *Transplantation Ethics.* In response to the use of payment of USD $300 for funeral expenses to incentivise family consent to DOD, he writes, ‘[t]he participants—the family as well as the organ procurers—may actually fool themselves into believing they have remained in the gift-giving mode.’ (p. 159).
would be departing from an altruistic gift framework. This understanding lies at the heart of recognising the limits of altruism in fighting a persistent organ shortage. The focus on preserving altruism as a criterion of ethical acceptability not only undermines the serious consideration of relatively substantial financial rewards to incentivise DOD. It also distracts from the consideration of and debate on other elements of the reward scheme. The Nuffield Report writes that ‘[t]he precise way in which such a scheme might operate – factors such as… whether expenses should be covered if in fact the person's organs prove to be unsuitable for transplant – would be key questions for such a pilot scheme to determine.’ Childress argues that making a reward for DOD conditional on organs procured makes the reward equivalent to a purchase/sale. In his view, reward should be a response to the act of donation itself: ‘[s]uch a practice of conveying gratitude would express communal solidarity with the deceased and the bereaved who donate or do not block donation.’ Ethical acceptability lies in the details of the scheme.

514 Childress, The Failure to Give, p. 11.
CHAPTER 8

8. Article 4: Organs as Inheritable property?

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(Note on authors’ contribution: I conducted the literature review, wrote the first draft and revised the paper in response to the journal reviewers’ comments (I did approximately three quarters of the writing). Professor Holm proposed the idea for the paper, and revised the paper.)

8.1 Abstract

It has been argued that organs should be treated as individual tradable property like other material possessions and assets, on the basis that this would promote individual freedom and increase efficiency in addressing the shortage of organs for transplantation. If organs are to be treated as property, should they be inheritable? This paper seeks to contribute to the idea of organs as inheritable property by providing a defence of a default of the family of a dead person as inheritors of transplantable organs. In the course of discussion, various succession rules for organs and their justifications will be suggested. We then consider two objections to organs as inheritable property. Our intention here is to provoke further thought on whether ownership of one’s body parts should be assimilated to property ownership.
8.2 Introduction

Most jurisdictions allow people to donate but not sell their solid organs for use in transplantation. A persisting shortage of transplant organs worldwide has however led many to advocate for organ trading.\textsuperscript{515} Nevertheless organ trading is resisted partly because of the view that the human body should be accorded special respect: it should not be treated like “our disposable property, our car, house or CD collection.”\textsuperscript{516} A counterview is that body self-ownership should be assimilated to liberal property ownership of material possessions or assets. Claiming that individuals should be as free to dispose of their body parts as their expendable clothing, Steiner, for instance argues that “the transfer of my body parts, whether by sale or donation, is an exercise of my self-ownership right – just as my sale or donation of anything else I own is an exercise of my other ownership rights.”\textsuperscript{517}

As Munzer writes, “It is a commonplace to think of property as something one may use during lifetime and then upon death transmit it to others by will or intestate succession to others.”\textsuperscript{518} If organs are to be considered tradable property for transplantation purposes, should they also be inheritable property? The idea of the human body and parts as inheritable property has been considered and dismissed before.\textsuperscript{519} It raises the issue of freedom in “bodily testaments”, and whether and how it should be balanced against the claims of the family and of the state to succeed to property interests in the body and its parts. As body parts are not property – and even if they were – respect for autonomy of the person over the body or her posthumous interests provides a basis for rejecting those claims.

\textsuperscript{515} See, for example Cherry. \textit{Kidney for Sale by Owner}.
\textsuperscript{517} Steiner. ‘The Right to Trade in Human Body Parts’ at 190-91.
\textsuperscript{519} Sperling. \textit{Posthumous Interests: Legal and Ethical Perspectives}; Wilkinson. \textit{Ethics and the Acquisition of Organs}.
This paper argues that organs should be inheritable if they were to be socially and legally recognised as tradable property. It also seeks to contribute to the idea of organs as inheritable property by providing a defence of a default position of the family of a dead person as the inheritors of transplantable organs. In the course of discussion, various succession rules for organs – which might exclude the right to destroy and waste transplantable organs – will be suggested. Lastly, we consider some objections to organs as inheritable. Our intention in this paper is to provoke further thought on whether ownership of one’s organs should be assimilated to property ownership.

8.3 Body Ownership and Property Ownership

8.3.1 Assimilating Body Ownership To Ownership of Property

As Banks write, “Those who oppose a market in human organs argue … that the human body deserves much greater respect than to be classified as property to be sold on the open market. The determination of the status of the human body, as property or life, is a major hurdle which may need to be resolved before a market in human organs is legalized.”

Jurisprudentially, property is usually understood as a bundle of rights held by an individual or a group. (Rights here can refer to various normative modalities like claims, powers, immunities, liberties and privileges.) Such a view is congenial for arguing that bodily ownership should be assimilated to private property ownership of material possessions and assets in as much as sufficient likeness can be found between the bundle of rights relating to one’s body parts and the bundle of rights relating to material possessions. Quigley, for example, argues that body self-ownership can and should be extended into most if not all property rights associated with full liberal ownership to promote the value of individual

Self-ownership as a basis for one’s body and parts as property has been heavily criticised. Consider Ryan’s objection:

[T]he rhetoric of self-ownership is self-destructive because it first relies on the ordinary understanding of property to argue that since our bodies are our property, we (but not other people) may do anything we like with and to them—which is not the ordinary view—and then relies on the ordinary view of our relationships with our bodies to argue that since our bodies are property, we must extend to all property the tenderness that we extend to rights of bodily integrity, privacy, and the like.

Implicit in the passage is the view that bodily self-ownership and property ownership are different normative ideas. The human body and parts are intimately connected with humanness, or implicate human dignity. Such a view informs “body exceptionalism” – the view that human body and parts should be treated differently from other material resources. Bodily exceptionalism may be informed by the moral concern that because property rights are rights to “things” (understood primarily as mere resources), the recognition of rights to organs as property rights would lead to people being wrongfully objectified in terms of having their autonomy or subjectivity (one’s experience and feelings) denied in the acquisition of their organs. As Wilkinson writes, “The core ethical problem [with the acquisition of organs to resolve the shortage issue] is that the organs are within people, who are not just raw material.”

524 Eyal. “Is the Body Special?”.
525 Wilkinson. *Ethics and the Acquisition of Organs*.
8.3.2 Thinghood and Alienation

The relationship between the legal ideas of property and ‘thinghood’ needs to be explicated to see the force of the above moral concern. Property law defines things by way of assigning interests in tangible or intangible objects to persons (or entities), and conferring on them control and protection of the objects vis-à-vis the right of exclusive use, which is enforceable against the world at large.\(^{526}\) As Penner writes, “The analogy of property with the relation one has with one’s body is grounded on the fact that both involve exclusive use… The distinction between the two is that an owner is not necessarily connected to, but is separable from, the things he holds as property.”\(^{527}\) As he argues, property rights are “personality-poor”, that is, they are separable from the owner in the sense that the identity of the rights remains essentially the same even if the identity of the owner changes with the transfer of those rights. In other words, if a person P’s property ownership of an object O is (fully and validly) transferred to another person Q, Q would acquire the same normative relations to O as P.

Certainly, freedom in alienation by sale or otherwise is often regarded as the distinguishing mark of property relations given the historical links between liberal ownership and free trade in the market societies most of us live in. Nevertheless, as Penner argues, it is because property rights are rights to a thing, that is, rights separable from some person that the rights can be freely alienable. Because separability underpins and cannot be reduced to transferability, he suggests that “the better test of the property status of our right to our kidneys [might be] to ask, not whether we may sell them, but whether they can be removed and sold by our trustee in bankruptcy to pay our debts.”\(^{528}\)


\(^{527}\) Ibid:121.

\(^{528}\) Ibid:117.
The point here is that legal recognition of objects as property engenders normative possibilities of their modes of alienation and transmission, including those which do not follow from the choice, will or interests of the individual person. It also opens up the possibility of the legal recognition of the survival of the property rights and their inheritability after the death of the source/owner, even if those rights are intimately bound with her person.

For example, in many US states, the right of publicity (the right of an individual, usually a celebrity, to control the use of her persona for commercial purposes), in being recognised as a property right, is recognised as capable of surviving the death of the person and as descendible. A celebrity may become a social recluse in the years before she dies. But her family could market her image after her death if they inherit the right of publicity over her persona, and would have strong incentives to do so if the market value is substantial or if ownership is taxable.

Indeed, in examining the notion of bodily materials as property, Gold discusses the right of publicity to illustrate how normative reasoning in property law tends to be dominated by economic considerations even when moral concerns relating to personal identity, self-determination and relationship to society are acknowledged in court. In many jurisdictions, it is not necessary for the person to have commercially exploited his attributes during his or her life time for them to be descendible and marketable. Similarly, it need not be necessary for a person to have commercially exploited his bodily parts for them to be recognised as inheritable. Given this threat of property law, Andrews proposes a ‘quasi-property’ approach: while people can treat their own body parts as “objects for possession, gift, and trade”,

“[t]here will be no means for a tax man or physician to put a lien against a person’s body parts. Nor can relatives choose to sell a person’s parts after his or her death.”

Nevertheless, a property regime for organs need not be one that leads to the treatment of people as mere bodily resources. “Sticks” of liability for seizure of organs to satisfy debt or tax can be taken out from the bundle of rights that constitutes organs as property. A property regime for organs need not be one that permits – as many have advocated as policy or argued philosophically for – state enforced redistribution of organs from the dead to the living in need of a transplant. Rights to organs need not survive the owner’s death for them to be property rights or be succeeded automatically by his relatives. A person may also be given the right to extinguish future valuable interests in his organs as provided by directions contained in her will. What property rights and relations should attach to organs is a normative question to which the legal idea of property cannot provide a definitive answer. Whether organs should be inheritable if they were recognised as property is the subject of the next section.

8.4 Organs as Tradable Property, Organs as Inheritable Property?

As Clarke and Kohler write, whether human body parts should be treated as property ultimately depends “on certain views on the efficacy (be that in practical, moral, ethical or whatever terms) of making them subject to such a regime.” In line with such consequentialist thinking, Björkman and Hansson argue that different bundles of rights can be constructed for different bodily material to optimise social advantages for their originators,

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recipients and society at large. They do not argue however that the bundles should constitute liberal property ownership.\textsuperscript{533}

One social advantage of recognising ownership of organs as liberal property ownership would be to increase individual freedom and control over organs as transplant resources. An equally important advantage would be to increase efficiency in supply-demand coordination. Iran’s regulated organ trading system – the only legalised system in the world – has been lauded as the way forward for addressing organ shortages. However, sale is limited to a live kidney; a kidney foundation coordinates meetings between the patient at the top of the waiting list with a potential seller and if this patient is not ready for a transplant, the next patient on the list will be arranged to meet the seller and so on.\textsuperscript{534} To promote more efficient transfers and individual freedom, a legal regime can be established in which people have more extensive exclusion/sale rights over their organs as their property. Sale can take place during life, or posthumously in the form of future (life-time binding or yearly renewable) contracts: individuals can contract to receive a payment now, or for the payment to be provided to the family or other assignee after their deaths in return for supplying their deceased organs.\textsuperscript{535} Thus, deceased organs have to remain as property so that agreements on posthumous sale would be respected. What should happen to transplantable organs that remain in the dead that have not been transferred by or designated for sale or donation? As Beckert writes, “Everyone who owns property leaves it behind [when he or she dies]. But whom does this property belong? All societies that recognize individual property rights need rules to reallocate property upon the owner’s death.”\textsuperscript{536}

\textsuperscript{533}Björkman & Hansson, ’Bodily Rights as Property Rights’.
\textsuperscript{534}Fatemi. ‘The Regulated Market for Kidneys in Iran’.
Succession – transfer of property on death – occurs mainly by testamentary and intestacy rules. Allowing testamentary disposition of organs would promote personal control over one’s dead body and possibly increase deceased organ donation, particularly if one could designate specific individuals or individuals from specific groups to receive one’s organs, which is currently not allowed in most countries. (A UK case in which a mother was denied by the relevant authorities to receive a kidney from her dead daughter despite the latter’s expressed intention led commentators to call for the propertisation of organs to protect persons’ intended direction of their organs for transplantation.537) Prima facie, organs should be disposable by testation for similar consequentialist reasons underpinning their recognition as tradable property.

Just as not many people make a will for the distribution of their external possessions and assets for whatever reasons, not many might make a will for their deceased organs. In setting out who will inherit one’s organs in the absence of a valid will, specific rules of intestacy will minimise conflicts. In his comparative study on the development of inheritance law in the US, France and Germany, Beckert found that all three jurisdictions have long defended inheritance rights as an extension of individual property ownership. According to him, jurists from both positive law and natural law traditions have justified intestacy rules “as the presumed last will of the testator… and not from the moral functions of the family or from the common good.”538 One could argue that absent a will, family disposition of deceased organs would not be substantially different from testamentary disposition.

Justifying familial inheritance of body parts as an extension of respecting private property ownership may be questioned, however, because of disanalogous

538 Ibid:52.
consequences between disrespecting wills for bodies and disrespecting wills for material assets. As Wilkinson argues, one reason for respecting wills is the desirable consequence of “reassuring people or giving them an incentive to pass resources to subsequent generations rather than go on a pre-death consumption splurge… It is hard to believe that, in a society without rights of bequest over one’s body, people would go on a pre-death consumption splurge of their organs.”  

While people would not “consume” their organs in the absence of succession rules for their organs based on respecting their (explicit or presumed) will, we can imagine that respecting their will might incentivise people to maintain their health and keep their organs transplantable so as to maintain their posthumous value for their family. On this view, the family of a deceased person should be permitted to succeed to property interests in her transplantable organs such that they could sell the organs to derive income or pay off the deceased’s debts including hospital bills incurred prior to death. Or, they could offer the transplantable organs in lieu of or to offset inheritance tax or estate duty.

Of course, family relations may be strained or estranged, and the will of the dead might omit relatives or distribute the estate contrary to what a family member might expect. As Beckert observes, the normative structure of that development in all three societies reflects not “an increasingly individualistic orientation” but “embedded individualism”: testamentary freedom is to be balanced against family claims (and claims of the state). Although the institution of inheritance has been criticized for making possible the acquisition of assets without individual merit, it has been defended for promoting intergenerational family preservation and continuity. Inheritance of organs could be similarly defended. Natural rights and common law jurists might agree to some extent.

\[540\] Beckert. *Inherited Wealth*, p. 82.
For example, it is argued, from a Lockean perspective, that rights of bequest and inheritance should be limited by a duty to provide for a deceased’s dependents. Family members could thus be recognised as “natural successors” to the dead’s bodily estate as justified by the social good of intergenerational family preservation. The extent to which the family’s interests in inheriting organs should limit bodily testaments may be based on or inspired by the existing inheritance rules of a society. Macy, Alan’s estranged daughter, needs a kidney transplant but dead Alan had willed all his organs to a transplantation organisation. In England and Wales, the Inheritance (Provision for Family and Dependants) Act 1975 could be expanded to provide for people like Macy to apply in court in an expedited way for an organ, if it is suitable to be transplanted in her, from Alan. In civil law systems like France, Alan’s kidney could be recognised as Macy’s *legitimaportio*: her hereditary right to her father’s bodily estate. Alan might however have three children in need of a kidney transplant. Equal distribution would not be possible even if he left two transplantable kidneys. Deviation from inheritance regimes with codification for compulsory equal shares among descendants may therefore be necessary in the case of organs.

8.5 Anti-Waste

Family members may, however, have an interest in possession of all organs, despite their economic value, in order to preserve the integrity of the body for funeral disposal purposes. Respecting their right to dispose of all organs and thus the body as a whole may allow them to maintain a connection, or accord with the person’s will or with what they consider as respectful disposal. Such respect would, however, lead to the destruction and ‘waste’ of otherwise life-saving or significantly life-improving resources. Should relatives have the right to destroy valuable body parts?
The right to destroy property has long been a part of our thinking on what it means to own property. Strahilevitz observes, however, a trend of curtailing owners’ right to destroy valuable property, especially in the testamentary context, in American case law.541 Courts rule against testators’ wish to destroy valuable property, such as historic homes, for two related reasons: society should not tolerate destruction and waste of valuable resources, and that damage to third parties’ interests, both economic and social, justifies curtailing the wish of the testator. In favour of such curtailment, Sax argues that owners should not have the right to destroy property of cultural significance.542 McCaffrey argues that the right to destroy/waste (in either form of dissipation or inefficient use) property, unless it attaches to permanent assets, is out of place in modern economic workings and property ownership.543 As he claims, “the right to waste emerged as part of an absolute conception of ownership developed largely in the context of an agrarian economy where waste referred to the dissipation or destruction of a permanent physical asset, paradigmatically land. The right was seen as both a necessary and a nonproblematic, because self-limiting, aspect of the absolute conception of ownership, which was itself desired for other reasons, such as wealth maximisation.” (p.77). In other words, societies’ shift towards private property systems had an anti-waste rationale: individuals in general are expected to seek and be the better judge on the optimal use of resources as their property.

One can argue that the same anti-waste stance should be taken when assimilating bodily ownership to property ownership: deceased transplantable organs have great human value and significance (arguably more so than real property of cultural significance);

they are not permanent resources; and waste of transplantable organs in dead bodies might not be a self-limiting problem even in a property regime as people and their families may prefer to dispose the dead body as a whole as a social norm of dealing with death. There is therefore good reason not to include within the property bundle the right to dispose organs wastefully. Hence, one could argue there should be no individual and thus no inheritable right to designate transplantable organs for funeral disposal should they be suitable and needed for transplant. However, there is a danger of equivocation between two different concepts of waste, an economic concept and a moral concept, and it is not clear which of these does the work in this argument. In the next section, we consider two objections to organs as inheritable property.

8.6 Reasons Against Inheritability

First, as Brazier observes, most people would reject the idea of the body of their deceased kin as their property that they could dispose at will, such as auctioning off their body parts for exhibition purpose.544 “The sense of continuing relationship, of still being parents, sharply distinguishes their child, or their husband, from their house or their car. The interests which families perceive centre on the integrity and welfare of the family of whom the deceased is still a part.”545 The moral relational function of the family thus serves as a reason for rejecting organs as inheritable, tradable property. However some families might want to sell, for instance those at or near the poverty level. Their interests, while pecuniary, might not be that divorced from preserving the integrity and welfare of the family. And some not so poor families might want to sell because they believe it to be the wish of the deceased.

545 Ibid:32.
The right to sell organs as an inheritable right might be constrained or rejected for more pragmatic reasons. Although preservation technology has improved tremendously, deceased organs do not stay viable for transplantation for long. By the time the estate could be settled, the organs will be useless. And even if we considered the dead body as a “going concern” that continued trading while the estate was settled, the time taken to find individual buyers might render the organs useless. It would therefore be unwise to let family members try to find buyers or bargain on price whether with other individuals or with hospitals and government agencies. Thus, transferred to the family, the right to sell could be limited to sale to the state for a fixed price. However, conflicts between family members on whether to sell or not or to donate could still arise with this rule. The organs could pass to the state for distribution if the family could not (or would not) decide how to transfer the organs within a reasonable time frame. Escheat laws should not apply here since there are family members capable of inheriting the organs as property. The State would be appropriating property, and should therefore provide “just compensation” to the family, which could function as a solatium at the same time.

Second, it could be argued that pace Ryan, the body and parts should still be treated with “tenderness” even if they were property. They are not personal possessions that mean nothing to the typical person. The body symbolises one’s existence and, for most, would stand in greater significance to oneself than, for example a wedding ring that one identifies with and would like to bring intact to the grave. On such a view, Sperling argues for the right to bodily testaments on the ground of protecting one’s “symbolic existence”, which represents “the real or abstract existence of the person whose existence it is/was.”546 He rejects, however, the family’s proprietary control of the dead body:

546 Sperling, *Posthumous Interests: Legal and Ethical Perspectives*, p. 41.
【T】he custom of burying the decedent with her personal belongings and society’s deterrence from wearing the decedent’s clothes are evidence of society’s avoidance of controlling the deceased’s personal property representing her extended identity. The existence of the deceased through her belongings, notably her body, is symbolic and should receive full legal protection… acknowledgement of the relatives’ proprietary interests in the body of the deceased ignores the decedent’s symbolic existence through her body… The subordination of one’s sole form of existence as a member of the human community to relatives’ control amounts to slavery, whereby the identity and symbolic existence of the slave is extinguished and alienated to its master.547

Sperling goes too far with likening family’s control of one’s body to slavery. Family’s control of a dead person’s body would probably not be regarded as slavery if the relationship between them is one of intimacy and of trust that the body would not be abused with succession of ownership. According to Sperling, our symbolic existence usually exists in the memory of surviving family members and not just in our belongings: inheritance and use of Alan’s deceased body by surviving family members might be promoting Alan’s symbolic existence. Just as I could inherit and use my blind dead grandfather’s walking stick in his memory, I could inherit and use his deceased organs in his memory: I could, for example donate them in honour of his generous nature, or sell them in memory of him as a hardnosed businessman. In our case the family’s control over one’s body would not amount to slavery and all its wrongs since their control relates to decisions over organs for transplantation purpose, rather than to control over chattel subject to their whims.548

While it may be a social norm to funerally dispose of a person’s belongings, the law might find it beneficial to go against that norm even if the disposition follows from a will. In Mekras Estate, the court ruled against a will instructing the burial of personal

547 Ibid:240.
valuables with the deceased person because of the increased risk of the negative externalities of grave robbery and related welfare loss to the family. Respecting testaments to bury transplantable deceased organs would not attract bodily grave robbery, given their perishability. The point here is that third party interests can be given more weight than testamentary destruction even for personal belongings. Granted that interests of great human significance exist on both sides, the moral question is why one’s bodily testaments and symbolic interests wishes should be given more weight than the interests of third parties? Are bodily testaments really a function of symbolic interests, an expression of what a person really identifies with or values?

If organs were tradable property, a rule could be established that balances respect for one’s bodily testaments and one’s symbolic (or religious) interests and others’ interest in the use of one’s organs. Strahilevitz proposes an innovative “safe harbour” property rule: the law would honour bodily testaments if the owner had marketed future interests in her deceased organs, and had rejected the highest bid, which signals that she values the destruction of her organs more than anyone else values their preservation for transplantation. According to Strahilevitz, courts are more willing to entertain living owners’ destructive acts but are hostile to destructive instructions contained in wills because of the view that only living owners will suffer the consequences of their acts, and it must (almost by definition) be in their interests if they (provided they are sane and rational) choose to do so. The act of forgoing the best market value of a future interest in one’s property which the owner or her descendants would otherwise enjoy provides evidence that she genuinely care that her organs be disposed in and with her dead body.

550 Strahilevitz. ‘The Right to Destroy’.
As Strahilevitz argues, such a rule “might serve an educational function for potential donors and their heirs …and help society differentiate between those who sincerely want their cadavers to remain intact and those whose preferences are weak or driven by the default [consent] rule.”\textsuperscript{551} A possible social disadvantage, which Strahilevitz does not consider, is costs that might be imposed on individual owners. The owner might be required to pay for marketing the interests – including health tests to demonstrate the value of the future interests – if the futures market is filled by many insincere sellers. That could be the price to pay for having one’s symbolic or expressive interests respected in a property regime for organs.

8.7 Conclusion

Price remarks that “It is not necessary for such items [human tissue, including solid organs] to be treated synonymously with other inheritable personal property” (p.295) if a society were to shift to a property regime for bodily material.\textsuperscript{552} Nevertheless such rights can and perhaps ought to be part of the property regime to protect individuals’ wish to leave at least something of value to their family, and also to protect the family’s interests in the organs. The consideration of organs as inheritable property can be taken as a \textit{reductio ad incommodum}, to show the potential unpalatable results of advocating bodily ownership as property ownership. Or, it might be taken as plausible and pragmatic, for those who want to maximise the use of organs in the dead. We have no issue with readers taking either perspectives, and only aim to provoke thought on how far one is committed to rejecting body exceptionalism in arguing for body parts as tradable property.

\begin{flushright}
\textsuperscript{551} Ibid:852.
\textsuperscript{552} Price, \textit{Human Tissue in Transplantation and Research}, p. 295.
\end{flushright}
CHAPTER 9

9. CONCLUSION

9.1 Introduction

With the number of people on waiting lists for a transplant organ in countries worldwide (see ‘Problem’ chapter), central to the practice of organ transplantation is finding and agreeing on ethically acceptable ways to increase organ donation in a given society. Given this, and shaped by my personal experience, I was predisposed to adopt the approach of arguing for or against some scheme or intervention to increase organ supply when writing on the subject matter. Indeed, this thesis in its early stage sought to justify the use of some payment to increase organ donation.

In the course of research, however, I was intrigued by the use of ‘altruism’ to consider the ethical acceptability of some intervention to increase donation rates. Altruism is an ingrained principle of the model of voluntary and unpaid donation – typically known as the gift model – that has been established in many countries, and so appeal to the concept was unsurprising. As noted, the Nuffield Council of Bioethics, in its report Human Bodies Donation to Medicine and Science (the Nuffield Report), has even constructed an ‘Intervention Ladder’ – with altruism as a central concept – as a tool to determine the ethical acceptability of different interventions to increase various forms of bodily material donation. What is intriguing, as we

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553 I have worked on the topic of organ donation and transplantation for some years. My induction was an invitation to write an article for a medical journal which examines various strategies to increase organ supply. As research assistant, I was tasked to assist with the literature review for a book chapter ‘Body Futures’ in The Body in Bioethics (Campbell), in support of its position against organ trading. I was also asked to draft a response to the Singapore Ministry of Health’s solicitation for feedback on proposed amendments to the Human Organ Transplant Act (Chapter 131A), which include amending the Act so as to allow a fixed sum compensation for live organ donors. (These proposed amendments were prompted by the first prosecution of organ trading in Singapore, and to my knowledge, the first prosecution of a buyer and his seller in the world.) The response did not support this compensation proposal, based on the fact that it contravenes international guidelines, which the Ministry intended to follow, in addition to its various ethical and legal problems in the context of Singapore. (The Act was not amended to allow this proposal.)
have discussed, is that while some appeal to altruism and its value(s) to categorically reject any form of payment for increasing donation, others justify the ethical acceptability of these schemes on account that they are consistent with preserving donation as altruistic and the value(s) it engenders. Yet others ‘problematis’ the role of altruism in the evaluation of means to increase donation by arguing that it is ethically unimportant or outright irrelevant to organ donation. Different definitions of altruism are used in these different positions. At times, altruism is not defined. Thus, it is difficult to evaluate the merits of these positions. If there is a ‘standard’ moral account of altruism and its value(s) not limited to the context of organ donation, it should help with the evaluation of the positions, or to qualify them at least. Making a case for this ‘standard’ could help move the discussion forward on the ethical justification of means to increase organ donation. Due to this, and also the amount that had already been written to justify payment for donation, the focus of the thesis shifted to an explication of a standard moral account of altruism to evaluate claims regarding altruism and payment for donation (see below).

Another major concept that has been used to consider the ethical acceptability of means to increase donation is ownership, or more precisely ownership of organs as individual property, which is often advanced to supplant or extend the gift framework. The thesis focused on arguments for organs as tradable property based on the ‘body non-exceptionalism’ claim: body parts (whether live or deceased), including solid organs, should not be treated as unique things; rather, their control should be similar to or just like individual control of material assets as private property. The normative implications of rejecting body exceptionalism so as to treat the body and its parts as individual tradable property have not been thoroughly explored. One implication is that organs should be descendible or inheritable—this has either been discussed briefly or dismissed by others. Article Four of the thesis ‘Organs as Inheritable Property’ argued that if organs are individual tradable property, then they should
also be inheritable. However, an inheritance regime may be one in which disposition, including sale, of body parts ought to be controlled by family members, rather than by their individual ‘owners’, as a default succession rule. The article provided reasons for this regime, and responded to possible objections.

In sum, this thesis examined two major concepts used to consider the normative parameters of means to increase organ donation. It provides (hopefully) a clearer and deeper moral understanding of altruism and its value; and the possible implications of arguing for organs as tradable property based on a conception of ownership that rejects body exceptionalism. The thesis thus contributes to the project of justifying the ethical acceptability of payment for organ donation by elucidating when and why altruism and its promotion is incompatible with payment for donation, and what might be justifiable (and legitimate) way to dispose deceased organs if organs were assimilated to private assets in their treatment.

The coming sections will revisit and expand on the thesis’s response to the three views or claims on altruism that were discussed in the previous chapters: ‘Altruism-Payment Incompatibility’, ‘Altruism-Reward Compatibility’, and ‘Moral Insignificance’. I will then discuss further the notion of altruism as common humanity: this will set the backdrop for rounding up my thoughts on ‘Altruism-Reward Compatibility’, the central claim that the thesis grappled with given extensive appeal to the claim to support payment for donation. Reference will be made to Titmuss’s views on ‘altruism’ and the related concepts of ‘gift’ and ‘community’ (see Article One ‘The Social Rationale of the Gift Relationship’) for the purpose of discussing ARC. Following this, I will relate my interpretation of the Titmussian gift relationship to arguments for organs as individual property. Possible future research directions will be outlined before the conclusion.
9.2 Altruism-Payment Incompatibility

Altruism-Payment Incompatibility: As an integral element of the ‘gift’, altruism is mutually exclusive with any form of payment for bodily material donation, including organ donation.

As noted in ‘Philosophical Approach’, this understanding of altruism has been traced to Titmuss’s arguments for blood donation as a gift relationship. In view of its alleged lineage, the thesis discussed ‘Altruism-Payment Incompatibility’ with respect to the Titmussian gift relationship and its idea of altruism. By situating Titmuss’s thinking on the gift relationship within his moral-political outlook, the thesis offered the novel and plausible interpretation that the gift relationship is not in principle opposed to payment for bodily material donation (see Article One). What the gift relationship aims to protect is ultimately individual welfare and liberty in the sense of having the effective power to pursue one’s own ends. In this regard, the gift relationship aims to foster a sense of social responsibility (elaborated below) among the citizenry towards those in need of some bodily resource through the collective and free provision of the resource to those in need. While the Titmussian gift form is principally opposed to a commodity form for organs because it undermines social responsibility (see elaboration below) and collective provision, it is compatible with financial payment to encourage donation under some conditions.

9.3 Altruism-Reward Compatibility (ARC)

Altruism is compatible or can co-exist with a reward motive for helping others.

As we have discussed, the Nuffield Report relies on ARC as a premise to justify payment in the form of a social/financial reward for deceased organ donation. Given the report’s attention to altruism as a concept to evaluate the ethical acceptability of interventions to increase bodily material donation, the thesis responded (in Article Three ‘Altruism and
Reward: Motivational Compatibility in Deceased Organ Donation’) to its argument that offers of reimbursement of funeral expenses for those who register for deceased donation and subsequently become donors would prompt altruistically motivated donation. As the Nuffield Report states and I agree (since it follows from the primary social value of altruism), altruism’s primary role in bodily material donation is to support a solidaristic or collective approach to meeting health needs. Nevertheless, the thesis argued that the report’s ‘motivation-focused’ justification vis-à-vis altruism is not convincing. As an incentive, the reward either would not prompt altruism (even on the report’s definition), or it would prompt altruism of a kind that does not support solidarity.

9.4 Moral Insignificance

Altruism should play little or no role in the ethical evaluation of interventions to increase deceased donation.

This is a fairly recent argument which is used to support the in-principle ethical acceptability of conditional deceased donation. Altruism has been argued as having little moral significance to the matter of whether to allow conditional donation because (a) most deceased donations are motivated by partial concern, and hence by solidarity, rather than impartial concern, which is the essence of altruism. Or, (b) most deceased donations do not express any significant moral value because of the lack of self-sacrifice. As discussed in ‘Philosophical Approach’ and Article Two ‘The Moral Insignificance of Altruism to Deceased Organ Donation: A Response, Saunders advances (a), whereas Wilkinson advances (b). Altruism’s moral significance is also questioned because of the ‘verification problem’, namely, that donors’ motives are not verified and cannot be verified accurately. To my knowledge, no one has rebutted (a) and (b) or address the verification problem. The thesis provided counterarguments to (a) and (b). In sum, the thesis argued (in Article Two) that deceased
donation can be altruistic and partial, and has the moral value of expressing a good will that supports a solidaristic approach to meeting transplant needs. As for the verification problem, it does not pose a significant problem to those who uphold the moral importance of altruism in deceased donation. This is because the moral value of altruism as a motive lies primarily in being a maxim for a pattern of the good life, rather than motivation (a subjective causal state) for some isolated action. Donating our organs at death to help others is part of a pattern of life of living for others or being a good *human* neighbour, which altruism directs us to.

Article Two also examined Wilkinson and Saunders’s definitions of altruism – ‘non-self-interested concern for others’ and ‘impartial altruism’ respectively – which they use to support their case against altruism. This examination serves as a platform for delineating altruism as a notion of common humanity, and its expressions as ‘creative’ responses to promoting others’ welfare. On this understanding, the thesis argued that while altruism is not in itself incompatible with conditional donation (that is, conditional donation can be altruistic), it is the complex of values such as social inclusion, solidarity and utility maximisation produced by altruism’s embedment in moral impartiality (viz. rules of allocation) that is at odds with allowing conditional donation. Overall, Article Two provided an account of the moral role and value of altruism as regards the rejection of conditional donation.

In what follows, I will discuss further the notion of altruism as common humanity in relation to the rejection of ARC.

### 9.5 Devotion to Humanity

The altruist is the do-gooder; the person who gives to Oxfam, shovels their neighbour’s front yard or rescues the drowning child. This is not incorrect but…it is the motivation that powers the action, and the possible sacrifice it entails, that is important to altruism. Altruism, then, is also a
perspective… well captured by Monroe’s notion of a common humanity… [which] conjures up a world where individuals are all members of the human family, the bonds that exists between them being inestimably more important than the surface differences of race and creed. A person with this perspective sees the human in every person they encounter (just as the rescuers of Jews in the Second World War saw Jews not as subhuman or as especially worthy, but simply as needy human beings)… a common humanity… [urges] us to attend to the spark of the human in each person, their needs, vulnerabilities and predicament at the specific time we meet them…  554

I do not think I can say it better than the above passage in explicating altruism as a notion of common humanity. I will add one point, and relate it to organ donation. As Article Two argued, altruism is a concept that spans from low cost mundane acts of helpfulness to high cost, sacrificial helpful behavior such as living liver donation. But the basic idea of altruism remains the same: a devotion to the interests of others on the notion of a common humanity.  555

To re-quote Monroe, “Humanity plus need: this is the only moral reasoning, the only calculus for altruism”.  556 This is an important point because it captures the idea that altruism is a broader idea than having other-regarding motives. Devotion is a key element, which is why altruism entails the possibility of self-sacrifice or selflessness. A concrete example would be helpful.

Sally laments to Tim (her husband) that her mum, who had just gone for surgery, would be all alone at home today. Both Sally and her brother, who lives with their mother, would be working. Thinking how miserable Sally’s mother might be, Tim tells Sally that he will pop over to her mother’s, with their toddler Ellie in tow. Sally asks Tim ‘Are you sure?’ because she knows Tim has a deadline to meet for work. Tim assures Sally, giving the reasons that her mother would be cheered by Ellie’s

554 Scott & Seglow, Altruism, p. 131.
555 Monroe writes that “Altruists exhibited a worldview that can best be described as universalistic… This universalism was evident in the extent to which altruists commented on the value of nonhuman life [such as animals]…” (see Monroe, The Heart of Altruism, p. 200). Thus altruists typically also include care for non-human as part of their ‘canonical expectations’. Nevertheless, as a distinctive moral perspective, the promotion of altruism is centrally concerned with meeting the need of fellow human beings.
presence and that he has to look after Ellie anyway; bringing Ellie to her grandma would also make it easier for him (which is not the case because Tim had planned to bring Ellie to his dad to be looked after). Tim assures Sally by saying he can work after putting Ellie to bed.

Actions like Tim’s could be said to express a devotion to the interests of others. As Monroe writes, the altruistic “perspective” “provides a feeling of being strongly linked to others through a shared humanity and constitutes such a central core to altruists’ identity that it leaves them no choice in their behavior when others are in great need. It is this perspective that best distinguished altruists from traditional rational actors”. As Nuyen suggests, we tend to think that altruism lies “in the order of reasons”: “altruistic acts are a matter of choice”. But “Altruism is the condition of subjectivity, not the other way around.” Tim can of course choose not to visit his mother-in-law, but in doing so he will be denying himself at that particular moment: his altruistic-moral subjectivity.

One – an observer or Tim himself – can of course give multiple self-regarding reasons for Tim’s action: his relationship with Sally and his mother-in-law will be enhanced; he will feel good about himself, and so forth. Altruism as common humanity is however not undermined simply by traces of self-regarding reasons or motives, but by how self-regarding reasons motivate. In this regard, there is much insight in Wuthnow’s distinction between:

- doing something for a utilitarian reason and doing something for a calculated reason. A utilitarian reason acknowledges that one may benefit from caring, but that one does not necessarily foresee this benefit specifically. It merely happens, or it may be desired unconsciously, but one does not plan ahead or try to figure out the balance between costs and benefits. Calculation, in contrast, suggests that one engages in caring with

557 Ibid:234. Quoted also in Article Three, at footnote 485.
559 Ibid:37.
the full expectation worked out ahead of time that one will receive a specific benefit.\textsuperscript{560}

In his study on ‘acts of compassion’, Wuthnow finds that those involved heavily in volunteer work often provide mixed motives to account for their behaviour. At the same time, they would work through the motives to arrive a dominant reason. Wuthnow explains why: “If one can think of a dozen equally plausible reasons for doing something, then what exactly is the status of reasons at all? And even if one can narrow the field to a few reasons, how does one find a plausible way to put them together?”\textsuperscript{561} “We need ways to account for our motives that allow us to be both pluralistic and pure—to give multiple accounts and yet to give them in a way that does not diminish their importance.”\textsuperscript{562}

For the volunteers, they found ‘purity’ in the motive of self-fulfilment: “The fact that we emphasize fulfillment means we still respect the purity of caring”.\textsuperscript{563} According to Wuthnow, emphasising fulfilment as the reason for one’s care for others is reflective of being embedded in a culture (such as in the US) that sees individualism as a definitive value, and in a society permeated by utilitarian vocabularies of motive. Thus, fulfilment is a way to reconcile and integrate individualism and altruism: altruistic actions are expressions of one’s individuality. As Article Two discussed, ‘altruism’ seems to have moved from the Comtean idea of suppressing and thus ‘purifying’ one’s personality so as to live for others. Rather, purification lies in patterns of living for others that shape and express one’s personality and fulfilment. It is this fulfilment that gives us a ‘taste’ for helping others as a pattern of life. In this regard, the moral value of altruism has to be seen more broadly than a motivation for act-tokens but

\textsuperscript{560} Wuthnow, Acts of Compassion, pp. 79-80.
\textsuperscript{561} Ibid:59.
\textsuperscript{562} Ibid:63-4.
\textsuperscript{563} Ibid:116.
as a motive for act-types,\textsuperscript{564} both for the self and for society. As we shall see, Titmuss also views altruism in this way.

\textbf{9.6 Altruism and Other-Regarding Motives}

Sen writes that the “popularity of \textit{quoting} Smith seems to far exceed that of \textit{reading} him”.\textsuperscript{565} The same appears to apply to Titmuss.\textsuperscript{566} As noted in ‘Philosophical Approach’, he has often been regarded as an unrealistic ‘purist’ on altruism in the sense that for him, donation must be based on pure altruism to be ethical. However, to reiterate, Titmuss stated that no donor’s motives under the British donation system could be depicted as purely altruistic: the utilitarian (in the sense just discussed) reason of possibly benefiting from free blood supported their donation. Nevertheless, Titmuss may be criticised in another way. In his survey of then British donors, less than 30\% of donors reasons were placed under the category of ‘altruism’, denoted as ‘a desire to help’.\textsuperscript{567} Why emphasise the importance of

\textsuperscript{564} An act token refers to some particular act performed by a particular person under particular circumstances, such as donating one’s organs to a stranger in response to the latter’s appeal on the internet. It stands in contrast to ‘act types’ such as helping others in great need. Donating one’s organs to a stranger in response to his appeal is an instantiation of the act-type of helping others in great need. As a moral concept, altruism is primarily concerned with act-types such as helping others in great need, being a good neighbour and so forth. The distinction between act token and act type comes from A.L Goldman. 1970. \textit{A Theory of Human Action}. Englewood Cliffs, N.J., Prentice-Hall.


\textsuperscript{566} There is another parallel. According to Sen, Smith is often portrayed as “the guru of the market economy: a one-idea man propagating only the excellence and self-sufficiency of the market” (Ibid: 52). In the context of bodily material donation, Titmuss is often portrayed as a one-idea man on the excellence and self-sufficiency of the unilateral gift. Unlike Smith, Titmuss’s one idea is increasingly portrayed as flawed. In the wake of the AIDS epidemic, it has been argued that blood safety and quality should depend on proper governance, demographic selection and up-to-date testing technology than, contra Titmuss, the simple idea of whether donors are paid or not. See A.M. Farrell. 2006. Is The Gift Still Good? Examining the Politics and Regulation of Blood Safety in the European Union. \textit{Medical Law Review} 2006;14:155-79. Farrugia, Penrod, and Bult claim that Titmuss was against paid donation because ‘paid blood is inherently unsafe as the financial motive makes people in high-risk groups for certain diseases lie about their status to get money” (p. 203). A. Farrugia, J. Penrod & J. M. Payment, Compensation and Replacement: The Ethics and Motivation of Blood and Plasma Donation. \textit{Vox Sanguiinis} 2010;99:202-11:That is an uncharitable interpretation. As Titmuss writes, “in the present state of medical knowledge [italics mine] he [the doctor] cannot know…whether the gift is a good one. In determining the circulation of gifts, he depends in large part on and has to presume the honesty and truthfulness of the giver”. Titmuss, \textit{The Gift Relationship}, p.70. It seems to me that Titmuss did not claim that paid blood is inherently unsafe or that paid blood would be inferior to unpaid blood under all circumstances.

\textsuperscript{567} Titmuss, \textit{The Gift Relationship}, p. 226.
altruism to blood donation if donation is not purely altruistic or not usually motivated by ‘altruism’?

Much like the resolution of the verification problem, this puzzle may be solved by understanding that altruism’s primary role and value as a moral motive is a maxim for a pattern of life. There is ground for attributing this understanding to Titmuss. For sure, he raises this sense in his discussion on the relationship between unilateral transfer as a type of or class of actions and altruism. Drawing on Sorokin’s idea of creative altruism, he states that “…actions carrying no explicit or implicit individual right to a return gift are forms of ‘creative altruism’… in the sense that the self is realized with the help of anonymous others”. And this class of actions may be sustained by the recognition that it is, as Titmuss cites Grice, an ‘ultra obligation’: what one ought to or have reason to do from altruistic motives as an element in one’s fulfilment. As Grice writes, “the concept of ultra obligation was introduced by speaking of a man’s fulfilment consisting in devoting himself to others [as a mode of life]…” This understanding of altruism as a moral concept is not at odds with some accounts of what morality is for. Kekes writes:

Different people conceive of the good life differently. But they all want it. My view is that the object of morality is to teach them how to get it. Its role is to identify the virtues and ideals, the types of conduct, and the ways of treating others that are most likely to help everyone to live a good life...

If Titmuss did hold that altruism’s primary role and value as a moral motive is as a maxim, then he could have been more careful with how he used the term. A desire to help could be an element of altruism and thus an ‘altruistic’ motive, but should not be

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568 Ibid:212.
570 According to Grice, “To adopt a mode of life is to do characteristically, though not necessarily with occasional omissions, actions of a certain class or classes”. Ibid:169.
571 Kekes, ‘Morality and Altruism’ at 277.
equated to altruism even when it relates to particular actions. As I found in the course of research, equating expressed motives or psychological elements like ‘a desire to help others’ to altruism has led to a few unwarranted conclusions on altruism’s ‘presence’ and promotion in deceased donation.\textsuperscript{572} I focus the point here with respect to ARC. As discussed, the Nuffield Report argues that while the offer of reimbursement of funeral expenses might \textit{sufficiently} prompt people to register for deceased donation (in the sense that they are not inclined to help those in need of a transplant), their action retains an ‘altruistic intent’, namely to benefit their relatives or those who would otherwise take care of their funerals. As such, their action can be characterised as altruistic. Moorlock, Ives and Draper take issue with such claims:

Although there may be an altruistic element to a donation decision in this instance, it would seem incorrect to deduce from this that the donation is altruistically motivated. Although [Nuffield Report] acknowledge[s] that real-life may present situations where motivations are mixed, the altruistic nature of a donation is secured only when ‘concern for the welfare of others is a genuine motivator’\textsuperscript{573}.

The reasoning here is that while there might be an ‘altruistic’ intent, what motivates the action might not be ‘altruistic’. As I have argued, what might actually move one to register for

\textsuperscript{572}For example, in their study on why families agreed to deceased donation in some US states for example, Siminoff, Graham and Burant denote altruism as “a desire to help others”. (See Siminoff et al, ‘The Reasons Families Donate Organs for Transplantation’.) They found that very few families gave ‘altruism’ as their only reason. Most combined ‘altruism’ with other reasons such as ‘it is the right thing to do’; “knowing that the patients wanted to donate”; and “donation as a coping strategy” (with the loss of a loved one). From this, Siminoff, Graham and Burant claim that mixed motives “cast doubt concerning [altruism’s] primacy in the decision-making process”. (p. 977). Accordingly, they conclude that “the study indicates that volunteerism does not rest within the ethos of altruism alone” and recommend the “continuing to educate the public concerning the value, rather than just the need, of organ donation should be a priority”. (p.978). If we take altruism as a maxim for types of conduct, then the data could plausibly be interpreted as showing the primacy of altruism instead. Agreeing to donate a deceased kin’s organs may be extension of a commitment to helping others in need, which is why the vocabulary of ‘rightness’ was employed; a continuation of the identity of the deceased, constituted by some pattern of expressing concern for others and affirmed by their expressed wish for donation; and a continuation of doing good for others, and finding peace, meaning and fulfilment in doing so, guided by some conception of self-fulfilment.

\textsuperscript{573}‘Moorlock, Ives & Draper. ‘Altruism in Organ Donation: An Unnecessary Requirement?’
donation is concern for one’s own funeral. In this regard, I find Rescher’s distinction between ‘other-regarding’ and ‘altruism’, and their conceptual opposites, useful.  

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<tr>
<th>Actions/Dispositions</th>
<th>Motivation</th>
<th>Contrary/Opposites</th>
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<tr>
<td>Other-regarding</td>
<td>Prizes (cares genuinely for) the welfare of others</td>
<td>Other-discounting (or purely self-interested)</td>
</tr>
<tr>
<td>Altruistic</td>
<td>Gives such weight to the welfare of others of others that he is prepared in principle to subordinate his own welfare to that of others, setting his own welfare aside in the interest of theirs in certain circumstances.</td>
<td>Egoistic</td>
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Plausibly, if implemented, a funeral reward as suggested by the Nuffield Report could prompt other-regarding actions. Or, it might prompt what Rescher calls “interestedly other-regarding” actions: actions motivated by the consideration that one’s welfare is so bound up with others that the promotion of their welfare is indirectly a means for promoting one’s own.  

Such motivations and actions are not unethical. Whether or not the scheme would promote a solidaristic approach to meeting transplant needs is however another matter. I will return to this point.

9.7 Community and Compatibility

According to Waldby and Mitchell, Titmuss’s opposition to the commoditisation of bodily material “reflects…the tradition of a ‘Kantian discourse of dignity [intrinsic worth of the human body]…’ I have doubts about placing Titmuss in the Kantian tradition of those who

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574 Rescher, Unselfishness: The Role of the Vicarious Affects, pp. 9-11.
576 Waldby & Mitchell, Tissue Economies, p. 23. Although Kant did object to sale of body parts (even hair) because of probable conflict between motivation for sale and ethical duties to oneself, it is contentious what
view things as either with dignity or with price. Titmuss’s one reference to Kant concerns the suggestion of Kant’s idea of ‘duty’ as a mode of ethical evaluation of policy choices, such as a private market in blood, and its effects on human conduct. Given that Titmuss’s opposition to a private market is highly political (integrated with his defence of the welfare state), Arrow is more likely to have hit the mark in pointing out “the spirit of Kant’s imperative or Rawls’s theory of justice” in the gift relationship.577 (Titmuss read John Rawls’s A Theory of Justice only after the publication of The Gift Relationship; he proclaimed it as “one of the most important books published in the field of social philosophy for the last twenty-five years…”578)

Consistent with Arrow’s interpretation, I placed Titmuss within the tradition of those who subscribe to a social justice liberal perspective on how basic structures of society ought to be shaped to ensure human welfare (see Article One). Kantian thinking may provide support of this tradition with the Kantian notion that “all people are equally worthy, equally deserving of a good life…”579

As Anderson writes, “You get a much sharper understanding of any political theory by focusing on what it is opposing.”580 As noted by Waldby and Mitchell (see also Article One), the ‘enemy’ of the gift relationship for Titmuss is not payment for donation per se but the juridical laws Kantian dignity would prescribe for the treatment of body parts in their different states (separated, non-separated, healthy, diseased etc.); in light of their utility in saving or improving human lives; and when their originators are dead and devoid of autonomy, moral and personal. See I. Kant. 1996. The Metaphysics of Morals. M.J. Gregor, trans. & ed. Cambridge University Press, Cambridge (original publication 1797). See p. 177. With the claim that Kant’s central concern is with the alienation of body parts integral to the normal functioning of persons as embodied rational-moral agents, Munzer argues that sale of a body part offends Kantian dignity by selling it for a reason that is not proportionate to the nature of the part sold, as a person who sells a live kidney to buy an iPad may be morally charged; Kantian dignity can provide only a qualified case rather than a categorical objection against trade in human body parts. See Munzer, ‘An Uneasy Case against Property Rights in Body Parts’.

577 Arrow, ‘Gifts and exchanges’ at 349.
579 Fleischacker, A Short History of Distributive Justice, p. 74.
spread of neo-liberal market rationalism in policy making in his time, which seeks to model every policy and social relations on producer-consumer relations.

The Titmussian gift relationship may thus be said to be fundamentally opposed to the organisational effects of what Frow calls the commodity form: the assimilation of use to strategic exchange; the channeling of production – regardless of the qualities of the resource – towards profit maximisation; and the transformation of “previously or potentially common resources (raw materials and final products) into private resources”. The ‘total effects of the commodity form on all spheres of human life and cooperation threaten a principal concern of social justice liberalism: to promote positive freedom understood as effective power to pursue one’s own ends and the good life by having access to vital resources, in this case critical health resources. Internal to the marketplace is the pressure to exclude those with no or insufficient exchange power, not just without the ability to pay but without the ability to provide blood to receive blood.

In contrast to the commodity form, the gift relationship as a social policy is a structure for fostering community so as to maintain a collective provision approach to health resources. However, for Titmuss, the measure of success for social policy is not, as I have argued against Archard’s interpretation in Article One, the extent to which it effects qualitative improvements of human relations but “by the degree to which individuals are persuaded to make unilateral transfers in the interests of some larger group or community”. In light of his broader moral-political thinking, Article One concluded that the gift relationship is not in principle opposed to financial payment for vital bodily material under a prolonged shortage


582 One example is what Titmuss calls the ‘family credit donation’: giving blood annually to insure that oneself and family have access to blood annually. See Titmuss, *The Gift Relationship*, p. 82.

situation, provided that the system maintains a voluntary community approach to procuring the material; ensures needs-based redistribution; and safeguards social justice concerns like protection of the socially disadvantaged.

9.8 Social Responsibility without Altruism?

In a broad sense, social responsibility refers to the notion that individuals and organisations ought to act in ways that promote the interests of society at large.\footnote{584} Altruism plays a role in this regard, in countering egoism or preoccupation with one’s interests through the notion of a common humanity. But altruism does not seem necessary to having a sense of responsibility, or to a collective commitment to the welfare of those in need. As noted in Article One, community for Titmuss is enlivened by diverse individual motivations that express ‘social responsibility towards the needs of other members of society’. Article Three argued that social responsibility would not be undermined even if some financial incentive for organ donation is introduced. Plausibly, social responsibility can be compatible with other-regarding or interestingly other-regarding motives, which a scheme for rewarded donation may produce and foster.

Substantiating this point is outside the scope of the thesis. What I hope to convince readers is the point that if financial incentives for organ donation were introduced to increase donation rates, then organ donation can no longer be reasonably described as based on the promotion of altruism. There are many institutions – such as Oxfam or the Red Cross – whose operations are premised on encouraging altruism, and individual patterns of life that inspire us to live for others beyond kith and kin. The social cost of losing an altruistic culture in organ donation for bodily material donation in general or for society at large is thus unclear.

\footnote{For a discussion on ‘social responsibility’, see A.S Rossi, ed. 2001. Caring and Doing for Others. Chicago: University of Chicago Press.}
Article Three pointed out however that a financial payment could possibly be compatible with altruism if the payment operates in the ‘background’: not publicised and not offered to incentivise donation but given post-donation in the spirit of expressing social appreciation. It is in this way that payment does not promote calculative reasons – the antithesis of the altruistic perspective – for donation.

9.9 Gift, Altruism and Body Exceptionalism

Article One argued that the most morally problematic individual freedom or right for Titmuss is not the right to give for material gain but the right to control whom to give to. The Titmussian gift form, as voluntary community donation, ensures that donations “are for unnamed strangers without distinction of age, sex, medical condition, income, class, religion, or ethnic groups”.\(^{585}\) As an ethical notion, the gift expresses, as also noted in Article One, a commitment to a needs-based distribution. From a legal perspective, the ‘gift’ may impel a different understanding on rights to control one’s own body parts. I quote Mason and Laurie at length on this point.

[In lay terms, the notion of ‘gift’ has strong normative appeal, not least because it is seen to be a laudable act, demonstrating the virtues of altruism and beneficence and being untainted by the twin evils of self-interest or exploitation. In practical terms, it serves considerable utility for the donee, in that gifts are normally unconditional.

[But] the reliance on the language of ‘gift’ implies property and ownership– for ‘gifting’ is simply one of a number of means of transferring ‘property’ – but gift also entails the surrender of all residual interest in property. It has been our tendency until now to focus on this latter aspect of gift, rather than the former, and such a result-based approach has served the dual purpose of justifying the gift paradigm, while fuelling the inconsistencies that beleaguer our current system [with respect to “the true status of body parts” and “the nature of any claims that we might have to ourselves”].\(^{586}\)

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\(^{586}\) Mason & Laurie, ‘Consent or Property?’ at 735-6.
To be clear, Mason and Laurie are arguing for the legal recognition of our bodies as individual property so as to better protect the rights and interests of sources of bodily material than a mere consent regime. For example, a property regime may provide persons the power to direct their organs as they prefer, and provide donees with recourse in the event that organs intended for them are misappropriated or deliberately damaged.

A property regime would extend individual rights and powers over their own body parts, thus assimilating their control closer to control over material possessions as private properties. With respect to the paragraphs cited above, Mason and Laurie’s critique of the gift as an ethical notion misses an important aspect, at least for those who appeal to it to resist payment for organ donation: organs should not be taken or used without individual consent, and individuals should also not treat their organs as objects of commerce because of the intimate or constitutive nature of bodies and parts to being human persons. As one may argue, it is in these two constraints that a society “acknowledges a profound ethical imperative to respect the human body as the physical and temporal expression of the unique human persona”.

Accordingly, as Campbell (a defender of the gift) writes, the body should not be seen as “one’s real ultimate estate” but as a “source of connection with others – be they relatives or strangers.” Plausibly, defenders of the gift often advocate altruism – devotion to common humanity – as the only or ideal motive for bodily material donation due to this metaphysical conception of the body and its parts as *sui generis* material things.

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587 Cronin and Price argue for such a property regime for transplant organs. See Cronin & Price, ‘Directed organ Donation: Is the Donor the Owner?’ See *Colavito v New York Organ Donor Network*, which is often cited to support this argument.

588 See Nwabueze, ‘Donated Organs, Property Rights and the Remedial Quagmire’.

589 Expressed by Justice Mosk in his dissenting opinion against the majority view against recognising Moore’s ownership interests in his bodily material in *Moore v Regents of the University of California* 793 P.2d 479 (Cal. 1990); at 515. See Chapter ‘Legal Approach’ for the discussion on the case. He was in favour of allowing Moore to derive profits from his bodily material despite making this assertion. In response, Justice Arabian, in his separate concurring opinion with the majority view, asked whether allowing individuals like Moore to use their body parts as objects of commerce would “uplift or degrade the “unique human persona”” (at 497-98).

In any case, we have seen (in ‘Legal Approach’ and Article Four) that there are proponents of organs as market-alienable property that reject body exceptionalism, the view that bodily materials are a special resource that ought not to be assimilated to individual control of private property like cars or houses. Article Four examined the question of whether and how organs ought to be inheritable if they are freely alienable property. If organs were inheritable property, it may be argued that individual posthumous rights to destroy, gift, bequest, or sell one’s organs should be restricted in recognition of the interests of family. In other words, family should have some claims to one’s dead body parts for their own use. Tradability and inheritability “are both sticks in the [private property] bundle, and supposedly “go hand in hand.” As Horton argues, tradability and inheritability do not always go hand in hand: inheritance of a freely saleable object can be legitimately denied. Nevertheless, the suggestion here is that to resist inheritability, we have to ultimately appeal to the idea of body exceptionalism. But if we uphold body exceptionalism, then it seems that tradability should also be denied.

9.10 Future Research

Article Three concluded that justifying the ethical acceptability of a financial reward for organ donation on the ground that they would still preserve or promote altruism undermines their overall ethical justification. To ethically justify a particular financial reward (be it donor funeral reimbursement or tax relief), the focus should be on the details of the scheme, such as the terms and limitations of the reward for donor and/or family, with regard to safeguarding values like solidarity, community, and justice.

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591 As used by Eyal, ‘Is the Body Special?’
592 Horton, ‘Indescendibility’ at 34.
We may note further potential problems with the Nuffield Report’s proposal, a problem that may arise for any deceased donation programme that seeks to apply it. To give an example, as noted on p. 37, the report does not recommend offering donor funeral reimbursement to relatives to prompt them to consent or permit deceased donation as it may raise the charge of violating the dignity of the dead in treating them as mere means. However, not extending the reward offer to relatives as such may lead to a form of unequal treatment: while relatives of those who register and become deceased donors may benefit from the funeral reward, relatives of those who become donors by means of the former’s consent may not. Such unequal treatment is problematic for the ‘community’ of organ donation because it seems to signal a lack of respect for the contribution of the dead to meet transplant needs. Furthermore, if strictly observed, the lack of parity in the reward structure might discourage relatives of non-registrants from giving permission. Article Three noted Childress’s suggestion that reward should be given in response to the act of deceased donation (that is, given even if organs are not procured) so as to express solidarity with the deceased and their bereaved families. Possibly, this may help alleviate ethical conflicts or tensions the reward scheme might produce. I do not suggest this as the definitive solution but as possible ground for research and argument.

Details of the scheme would also include the moral language used to frame the practice of rewarded deceased donation. The moral framing of rewarded donation is important not just because it may impact on the social acceptability of the scheme and the translation of that acceptability into actual donation. It is also important to produce a non-dissonant and morally meaningful experience for individuals as donors. This point could be better appreciated by those who advocate for a shift to rewarded donation. For example, based on their systematic review on proposals for financial incentives for

593 Unless the relatives refuse the reward, which they would have the choice to do so as the Report emphasises.
organ donation, Hoeyer, Schicktanz and Deleuran argue for a shift from a focus on ‘incentives’ to ‘reciprocity’ as their “the findings… indicate that financial means are preferably seen as means of communication in reciprocal relationships after organ donation has been decided on, rather than as incentives motivating donation in the first place.” Whether a financial reward is ‘reciprocity’ or ‘incentive’ in meaning cannot, however, just depend on the fact that it is given after donation has been agreed to. If a reward is of significant value and well-publicised such that most people know about it, then that reward is likely to serve as an incentive for donation even if it is offered post-consent. The distinction between ‘incentive’ and ‘reciprocity’ would then be a distinction of no real substance.

As Tutton notes, the ‘gift’, as a ‘policy keyword’ (i.e. a term used by policymakers to define a public policy problem and to promote a particular social arrangement to address it) for bodily material donation, invokes “the values of social equality, altruism and community”. To the extent that this is so, the ‘gift’ may no longer be appropriate to frame the practice of using financial rewards to incentivise organ donation. Possibly, some notion of civic or public service could be applied to describe the prosocial nature of the act in a given society. Once again, this is for future research.

9.11 Conclusion

I have endeavoured in this thesis to provide an account of how altruism ought to be understood as a moral concept and motive: devotion to others’ interests as a maxim in life based on the ‘perspective’ of a common humanity. On this account, the thesis defended altruism against criticisms of its moral significance to deceased organ

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595 Tutton, ‘Notes on Policy, Language, and Human Tissue’ at 53.
donation. Also, based on this account, the thesis considered ARC as a claim to justify some social/financial reward to incentivise donation. It argued that such a claim – which follows from an inadequate understanding on what altruism engenders as a distinctive moral perspective – would undermine the overall justificatory account of a financial reward incentive due to its implausibility. As such, ARC should be jettisoned.

The thesis also examined the extent to which one would be committed to the rejection of ‘body exceptionalism’ to argue that organs should be treated as private property so as to support payment for donation, and suggested an inheritance regime to ‘test’ our commitment to body exceptionalism, if any. At a personal level, the task ahead is to consider the ethical acceptability of interventions, not necessarily of a financial kind, to increase organ donation on ethical, social and legal grounds in a given society based on what I have understood about altruism and ownership/property as discussed in this thesis. It is hoped that others would also find this understanding useful as they make their own case for ethically acceptable interventions to address the chronic shortage of organs to save lives and reduce human suffering.
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APPENDIX

PUBLISHED PAPERS

1. Published in Journal of Medical Ethics:

2. Published in Bioethics:

3. Published in Journal of Medical Ethics:
The social rationale of the gift relationship

Teck Chuan Voo1,2

ABSTRACT
This paper argues that, for Richard Titmuss, the rationale of the gift relationship (TGR) as a national blood policy is to reconcile liberty with social justice in the provision of an essential health resource. Underpinned by a needs-based distributive principle, TGR provides a social space for a plurality of values in which to engage with and motivate people to voluntarily give blood and other body materials as a common good. This understanding of TGR as a value pluralistic framework and its implications will be used to discuss the issue of using economic mechanisms to increase the supply of body materials or goods, including organs for transplantation. It is argued that, while TGR excludes a policy in which body goods are treated as private commodities and distributed primarily on the basis of achieving market efficiency, it is not in principle opposed to the use of material rewards, including financial ones, to motivate people to donate.

INTRODUCTION
Richard Titmuss’s arguments for the procurement and distribution of blood as an ‘anonymous altruism’ system, which he terms ‘the gift relationship’ (TGR),1 seem to have a deep influence on the regulation of human body material donated for therapeutic or research purposes. For instance, the EU Tissues and Cells Directive states that donors should be altruistic and remain anonymous to recipients in tissue and cells application programmes.2 Nevertheless, Titmuss’s arguments for the administrative and medical benefits of TGR as being superior to a commercial system have been considerably qualified—if not undermined—since his time. For example, while he might have been right then in claiming an intimate link between blood quality and the form of the procurement system (ie, whether commercialised or not), this essence of its socioethical rationale. This paper argues that TGR should be interpreted as a framework that allows a plurality of values in which to engage with and motivate people to voluntarily contribute body materials or goods as a public service. As a value pluralistic framework, TGR is not fundamentally concerned with safeguarding altruistic motivations as a source of positive social effects in the procurement of a good such as blood. Rather, the role of altruism in TGR is to constrain competitively self-seeking behaviour by structuring the individual agency (procurers and donors) towards a collaborative pursuit of providing blood as a common good or welfare resource that is to be distributed primarily on a needs-based principle of justice.

To support this interpretation, some background on Titmuss’s idea of a social policy (as used in opposition to a market-driven policy) will be provided. As a social policy, TGR aims to reconcile liberty—defined here positively as the freedom to act on one’s values as a member (or citizen) of a society—with social justice in the provision of blood or other essential health goods. Seen in the light of ‘social justice liberalism’ as its fundamental orientation, TGR is more flexible towards the use of economic mechanisms than what the strong interpretation holds. It is not in principle opposed to the use of material incentives, so long as the values of individual agents for supplying or giving a body good are tied up with the value of distributing it based on common need as the ethical direction of the gift. Thus, a system that rewards individuals for BMD besides blood, including live organs, despite significant differences in donor risks and sacrifices.6 (p 32)

In appealing to TGR for how BMD should be regulated, we should at least be clear about the essence of its socioethical rationale. This paper argues that TGR should be interpreted as a framework that allows a plurality of values in which to engage with and motivate people to voluntarily contribute body materials or goods as a public service. As a value pluralistic framework, TGR is not fundamentally concerned with safeguarding altruistic motivations as a source of positive social effects in the procurement of a good such as blood. Rather, the role of altruism in TGR is to constrain competitively self-seeking behaviour by structuring the individual agency (procurers and donors) towards a collaborative pursuit of providing blood as a common good or welfare resource that is to be distributed primarily on a needs-based principle of justice.

To support this interpretation, some background on Titmuss’s idea of a social policy (as used in opposition to a market-driven policy) will be provided. As a social policy, TGR aims to reconcile liberty—defined here positively as the freedom to act on one’s values as a member (or citizen) of a society—with social justice in the provision of blood or other essential health goods. Seen in the light of ‘social justice liberalism’ as its fundamental orientation, TGR is more flexible towards the use of economic mechanisms than what the strong interpretation holds. It is not in principle opposed to the use of material incentives, so long as the values of individual agents for supplying or giving a body good are tied up with the value of distributing it based on common need as the ethical direction of the gift. Thus, a system that rewards individuals for BMD besides blood, including live organs, despite significant differences in donor risks and sacrifices.

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SOCIAL JUSTICE AND SOCIAL POLICY

Titmuss is not considered a social justice theorist, although his idea of social policy aligns with the central tenets of social justice liberalism which includes the view that every individual is due certain goods regardless of character or social contribution. Following the ethical socialism of his contemporaries such as Richard Tawney, Titmuss is committed to the idea that liberty is dependent on egalitarian social structures. In his view, social policy is fundamentally concerned with distributive justice to support the welfare of each and every citizen. To achieve this objective, the essential goods of life such as those relating to health should be provided as a common resource and distributed according to need. According to Titmuss, social policy is exemplified by TGR. The rationale or justification for TGR should thus be located within his broader concern with social justice liberalism.

Titmuss also states that social policy should be concerned with economic values and objectives. He emphasises, however, that it should be based on ‘ethics first and economics afterwards’. In other words, the principles of social justice liberalism should be foremost in regulating the provision of essential goods. Policy making for blood should not therefore be reduced to or dominated by mere economics analysis, especially when it is underpinned by a ‘crude’ utilitarian theory. However, in Titmuss’s view, some economists in his time relied on this theory to advocate for the then UK blood system to shift to a market-driven system, which essentially follows the principles of a free market, to address shortages in blood. Accordingly, their key assumptions are that: (1) the pursuit of welfare is the pursuit of utility viewed as individual desire fulfilment (utility can be measured monetarily by what Anderson calls the ‘compensating variation’ of the individual—the maximum one is willing to pay to receive the benefits of a good such as blood or the minimum one is willing to accept); (2) giving and receiving of blood is descriptively and normatively a reciprocal exchange for individuals to maximise their own utility (in other words, the relationship between donors and recipients should be regarded as merely instrumental); (3) welfare realisation by a blood system should be solely or primarily evaluated by its efficiency in maximising utility calculated by the sum total of individual utilities; and (4) since compensation for both the choices of giving and receiving blood is subject to the variable valuation of each individual, such efficiency will be best approximated by a system that leaves individuals as free as possible to exchange blood via the price mechanism. Blood is thus treated as a private commodity to be competed for in both supply and demand.

Against these economists, Titmuss argues that shifting to a market-driven blood system would impact negatively on liberty, welfare and other values that concern us. To find empirical evidence to support his case, Titmuss examined the then partially commercialised US system, which showed that blood was supplied mainly by the poorest and most vulnerable in society, particularly those at high risks of transmitting blood-borne diseases. This reveals a key ethical problem with instituting a market-driven system: it structures agency and choice that contravene the objective of beneficence. On the one hand recipients would be exposed to the choice of receiving blood with increased risks (for which they may have to pay a higher price) while, on the other, individuals who are poor and vulnerable would be given the freedom to sell their blood even if there are existing risks to their health which would be exacerbated in their being bled beyond acceptable medical standards. Nevertheless, in order to be efficient, procurers of blood in a market-driven system would tend to seek such donors so long as their compensation variation is the lowest for undertaking its risks and burdens.

Furthermore, Titmuss’s study of the US system revealed that blood was distributed mainly to higher socioeconomic groups. From the perspective of crude utilitarianism, such a social state may be evaluated as efficient and ‘right’ if the sum total of individual utilities has been maximised. In addition, given that the criteria for rational action is focused on maximising utility which is up to each individual to pursue, it is not a function of a market-driven system to ensure that those who are not in a position to compete financially can meet their need for blood. As Titmuss argues, policy-making for blood or other essential goods should be sensitive to distributive equity as disparity in access between the poor and the rich would produce conflicts and eventually social disintegration. Blood policy for Titmuss should thus be ‘social’ rather than merely economic by incorporating the objective of community building.

COMMUNITY AS EMOTIONAL INTEGRATION

For Titmuss, interactions within market-driven systems cannot by themselves produce over time the normative reasoning and behaviour needed for social life. Such systems should therefore not serve as the fundamental mechanism to coordinate voluntary cooperative behaviour in the provision of every good. As a proponent of social justice, Titmuss is unique in his emphasis that distributive systems for essential goods can at the same time function as mechanisms for shaping exercises of liberty that help individuals in society to integrate as a community. Within the framework of TGR it is clear that key to this communitarian objective is the organisation of a social space for altruistic giving. As Titmuss writes, ‘[t]he ways in which society organises and structures its social institutions … can encourage or discourage the altruistic in man; such systems can foster integration or alienation’. For Titmuss, the form or design of the procurement system—for example, how it structures the choice and meaning of giving—would ‘foster or destroy the individual expression of altruism and regard for the needs of others’.

However, Titmuss does not provide a theoretical framework that explains the concepts of community and altruism or their exact relationship. This puts into question the kind of economic mechanisms that can be accommodated within TGR. In addressing this theoretical lacuna, Archard proposes that community for Titmuss has much to do with ties of emotion to others in society while altruism, in line with the common definition mentioned earlier, is a voluntary act of giving solely or primarily motivated by selfless care or concern for others. In this light, TGR is a system that distributes not just a health good but also the good of affectional togetherness with others that we can experience—even if we do not interact face-to-face or relate at some personal level—by means of the selfless gift of blood. As Archard argues, TGR is concerned with building and sustaining emotional bonds across the distance of society which, unlike the impersonal nature of market relations, have a humanising effect; TGR is hence charged with the role of indirectly shaping our socioethical personalities by contributing to the fulfilment of our need for emotional identification or integration with anonymous others with whom we share a social space.
According to this reading, using material rewards—particularly financial ones—as a means to incentivise donation would conflict sharply with the communitarian agenda of TGR as it would undermine selfless concern or altruism as the motivational source. The introduction of financial incentives into the system would reduce the force of altruistic motivations by impoverishing their meaning, as the value of acting from selfless altruism is reduced to acting for individual utility or monetary value. As Archard argues, this helps to explain Titmuss’s opposition to a partially commercialised or mixed system which provides donors with the options of giving for material gain and giving gratuitously; gratuitous giving would be reduced or driven out because of the denudation of its meaning. This philosophical analysis seems to be supported by the empirical findings of the economist Frey in his seminal work on the ‘crowding out’ effect (which is discussed more fully later). Proponents of TGR often appeal to this effect to argue against the use of economic mechanisms: they would likely reduce rather than increase supply given that the motivation for BMD is generally to express selfless altruism. (p 45)

COMMUNITY, ALTRUISM AND VALUE PLURALISM

Interpreting the communitarian agenda of TGR as emotional integration opens its justification as a public policy to serious doubt, however. For example, we can doubt whether altruistically motivated donations have any concrete effect on facilitating emotional integration among citizens. There seems to be no way in which we can prove or disprove their link or show that a society with an altruistic blood system is more selfless or caring than one with a market system because of the altruistic system. (p 21)

In addition, such a communitarian project would render TGR a highly illiberal policy. Implicit in this project is a value hierarchy of liberty. Given that the social goal and value of TGR is emotional integration, the freedom to give gratuitously is ranked as a more valuable form of liberty than our freedom to give for material gain. This seems to imply that, even when the rate of donation of a body good like organs for transplantation is persistently inadequate to meet patient needs, individual citizens should still be turned away from their personal value hierarchies and asked to align their rational agency with achieving the common good of emotional integration. On the supply side, all potential living donors would be directed towards properly (ie, altruistically) motivated exercises of liberty—eventhough concerns about their rationality will tend to be raised if they are indeed so selfless—over non-altruistically motivated exercises that may in fact be ethically acceptable in a given society. Conversely, on the demand side, transplant patients—who could be placed low on the waiting list for posthumous donation and whose intimate relations could be medically unsuitable for donation—would be channelled towards valuing certain qualities of relations with social strangers over their well-being and other goods, including those tied to intimate relations. With such a prioritisation of the value of altruistic motivations, the rationale of TGR seems to diverge significantly from the modern liberal social justice ideal of respecting ‘reasonable pluralism’ in public reason and policy-making, which implies preserving as broad a social space as is reasonably possible for individuals to live and cooperate with each other based on their varied axiological sets and priorities.

There are, however, good textual reasons not to read Titmuss’s account of community as social integration of an affective kind. Importantly, altruistic giving in TGR should not be grounded in any form of motivation—selfless altruism or otherwise. Indeed, Titmuss writes that the term ‘supplier’ should replace ‘donor’ to describe those who give blood, as the act of giving need not imply an ‘altruistic motive’. (p 71) In his survey of these ‘suppliers’, Titmuss notes the social and ethical complexity of their motivations. Some people did give blood purely out of care for others. Others were prudentially motivated by the fact that it is good for them to keep the system going by giving. However, more than a few were motivated by the reciprocal benefits—including free health checks and other material considerations. Although these behaviours are utility or materially motivated, Titmuss remains non-judgemental. Accordingly, he concludes: ‘None of the donors’ answers were purely altruistic. They could not be for … no donor type can be depicted in terms of complete, disinterested, spontaneous altruism. There must be some sense of obligation, approval and interest; some feeling of “inclusion” in society …’. (p 238) In his view, the ‘individuality and diversity’ of motivations ‘add life and a sense of community’. (p 235)

TGR therefore functions like a market system with regard to liberty because it provides individuals with the freedom to give and cooperate with each other based on their own values, including non-moral ones. As Titmuss writes, altruistic giving may be valued as expressions of individual fulfilment or self-love. (p 212) However, he emphasises that the reason for such a choice may simply be giving life to others with no further reductive explanation. He argues that, despite their different or mixed motivations for giving, there is an ethical rationale that binds most givers—namely, ‘a high sense of social responsibility towards the needs of other members of the society’. (p 236) Due to this sense, Titmuss refers to gifting in traditional communities to frame his idea of altruism because it structures the phenomenology of pursuing the good as the phenomenology of acting from obligation towards others, which in these communities is based on reciprocal rules. Nevertheless, he makes it clear that TGR is different from traditional gift frameworks because it instils an element of choice and rationality that is unilateral. The needs of anonymous strangers can be valued by individuals as a good in itself, independently of links to their utility or fulfilment. Titmuss’s idea of altruism can be read as akin to Bernard Williams: ‘[T]o regard the interests of others, merely as such, as making some claim on one, and, in particular, as implying the possibility of limiting one’s project’. However, while Williams discusses altruism in the context of non-organised personal moral behaviour, Titmussian altruism relates specifically to impersonal cooperation with an institution whose telos is to meet a common need. Under this context, Titmussian altruism does not denote selfless modes of motivations. Rather, it denotes a commitment to a needs-based distribution that individuals can value and endorse as a constraint on their voluntary giving other than those that would promote their interests (whether self- or other-regarding), which has deep implications for how we understand liberty and justice in at least some domains of our cooperative activities for pursuing welfare.

Titmuss’s idea of community should thus be delinked from an affective account. He hints at this by stating that TGR signifies ‘the notion of “fellowship” which is[ ]… conceived of as a matter of right relationships which are institutionally based’. (p 242) In the same paragraph he states that TGR is an example of a social policy that facilitates a fellowship of equality and liberty between individuals. If I am right about the significance of interpreting the rationale of TGR as based on social justice liberalism, we can interpret Titmuss as saying that our sense of
community with social strangers depends on institutions that base cooperative behaviour on mutual respect for liberty and a shared sense of justice in which human equality is tied to responsiveness to common need rather than to individual merit or worth. TGR respects the equal liberty of individuals to give or not to give based on their personal set and order of values. At the same time it ensures their equal liberty (or right) to receive blood based on need. The common good of blood is thus supplied without prescribing or mandating cooperation and distributed in a way that is free from reducing ethics to a moral logic of reciprocit: blood allocation should not be based on reciprocation of social or economic contribution. According to Titmuss, ‘[s] tructurally and functionally, the [then UK] Health Service is not socially divisive; its universal and free access basis has contributed much ... to the social liberties of the subject in allowing people the choice to give or not to give blood for unseen strangers’.1 (p 225) In other words, each citizen is affirmed as part of a moral community that can be trusted to look after one’s essential good in fair consideration with others, even if one does not share the same socioethical behaviour or affective identity. It is this communitarian sense that TGR aims to facilitate to help integrate a pluralistic society and inject a non-alienating quality into our relations with social strangers. Value pluralism rather than emotional integration is therefore the central concern of TGR. What Titmuss wants to show with his arguments for TGR is that the social fact of value pluralism in modern societies can be negotiated by systems other than a market which, with a monistic account of value as utility, transfixes our evaluative standards for social relations, rational action and welfare on efficiency in exchange, and dispenses with other criteria with equity in distribution.

In sum, TGR is a form of mutually beneficial social cooperation that, to use Sen’s words, ‘accommodate[s] unilateral obligations that we may acknowledge because of our power to achieve social results that we have reason to value (without necessarily benefiting from those results)’.18 The meaning of altruistic giving in TGR should be understood as an expression of our freedom to contribute to the social result of a needs-based just distribution. Altruism, as Titmuss writes, is ‘a fusion of intelligence and concern for social justice and equality’.11 (p 212)

**MOTIVATING BDM IN TGR**

Outside his arguments for TGR, Titmuss writes that economics is ‘a means to serve liberty and alternative conceptions of excellence’10 (p 14) and ‘social policy ... must function as an instrument for the encouragement of economic flexibility’.19 Given these claims and the understanding that TGR is a value pluralistic framework, it seems odd that Titmuss would be ideologically opposed to the use of economic mechanisms as a way to increase BMD in all social situations, especially when supply and consequently welfare may be significantly improved.

At times Titmuss writes as though he would endorse a strong interpretation of TGR with a principled opposition to materially rewarded donations. For instance, he quotes the then President of the American Medical Association who said that ‘... money payments for blood can destroy the motivation of the family and friends to replace the blood and could result in the creation of too many ‘semi-professional’ donors who would contribute too frequently to the detriment of their own health ...’.3 (p 223) Nevertheless, we should note that, of key importance to Titmuss, is how the system structures the relationship between procurers/donors and recipients, and correspondingly the freedom to give. Thus, with regard to the crowding out effect, what Titmuss actually says is that ‘commercial blood programs [rather than material incentives] ... are driving out the voluntary system [rather than selfless altruism]’.1 (p 223) As Waldby and Mitchell point out, ‘Titmuss believed that the greatest threat to the gift system was not the pragmatic example of the blood system in the United States per se but ... neo-liberal market rationalism’ which views relations between strangers in society only as ‘instrumental, non-binding commodity relations between producers and consumers’.20 To reiterate, the rationale of TGR as a public policy choice is not to promote the good of selfless non-materially motivated donations. Rather, it is to resist the systemic introduction of neo-liberal market rationalism into structures of social relations that would result in blood and other essential body goods being treated ‘in theory, in law, and ... in practice’ as ‘trading commodities’.1 (p 158)

As such, Titmuss’s central disagreement with a market system is not that it allows individuals the freedom to give for material gain. As highlighted earlier, he accepts that some blood donors would need to be motivated by material rewards. For Titmuss the socially and ethically problematic form of liberty in the supply of essential body goods is the freedom to sell as it is tied to the freedom to ‘decide on the specific destination of the gift’.1 (p 242) What he is opposed to in principle is therefore the freedom to control to whom to give, regardless of their need, based on utility exchange as structured by competitive market-driven frameworks. Under such social arrangements, the values that can be expressed in supplying a body good are narrowed into utility maximisation of a material kind rather than directed towards a sense of collective responsibility for the welfare of donors and recipients.

An in-principle objection to a market-driven system for BMD should therefore not be equated to an in-principle objection to the use of an economic mechanism for BMD. Whether the use of material incentives for a particular type of BMD is consistent with TGR would depend on its organisational form: can the system for procurement and distribution be designed to be socially responsible and just? To fulfil these principles, the system can loosen the connection between supply and distribution so that only one aspect of cooperative behaviour is subject to reciprocity as an element of justice. Consider again the case of organ donation. As has been proposed, a single national agency rather than competitive procurers can be established to financially reward citizens who donate live organs anonymously in a non-directed fashion to a public supply, which is subsequently distributed to assuage need according to some fair criteria of medical priority.21 The meaning of the Titmussian gift, even if it is motivated by material gain, is thus maintained as a voluntary public service to contribute to a common good. What needs to be added to such a proposal for it to be consistent with the rationale of TGR is that a systemic responsibility for the well-being of donors—including the rejection of potential donors based on unacceptable objectively established medical or psychosocial risks—should be ensured despite the fact that they would be materially rewarded.

There may be an objection to the fact that, regardless of organisational design, an economic mechanism for BMD would unduly induce the poor or exploit the injustice of their background conditions. These issues, while certainly important, are beyond the scope of Titmuss’s arguments for TGR. It may also be argued that material incentives (especially financial ones) would nevertheless crowd out selfless altruism, which is as a matter of social fact the primary motivational source for BMD, with the counterproductive outcome of reducing supply. The opposition of TGR to an economic mechanism for BMD should be viewed as pragmatic in nature rather than in principle.
In response, we should note the policy implications that Frey concludes in his analysis of the crowding out effect. According to Frey, policymakers should allow individuals to act on their intrinsic motivation (ie, motivation in which satisfaction is gained from the value of the meaning of the act itself, which may include but not be limited to selfless altruism or fulfilment of civic duty, rather than material gain) with regard to the supply of a good if such motivations are cardinal to regarding participation as voluntary; an external intervention, not necessarily incentives, would be regarded as undermining their sense of self-agency and control, hence decreasing their willingness to supply the good. Nevertheless, as he argues, policymakers should not rely exclusively on intrinsic motivations as they vary from time and place and from good to good, and disregard institutional conditions that shape the meaning of the incentives which may ‘crowd in’ supply when they are perceived as supporting individual agency. Those who are concerned about the crowding out effect in a particular BMD by an economic mechanism should therefore not presume or overestimate the behavioural importance of altruistic motivations or underestimate the importance of organisational design. As a recent study with various European citizens shows, public attitudes towards the choice of donation into selling oneself are flexible so long as the system is not driven by ‘the profit-oriented logic of the market-place’.

As Raymond notes, Titmuss understands that any gift framework is influenced and constrained by the particular cultural values (both social and economic) of a society. Thus, whether TGR should be applied to regulate a particular type of BMD in a given society and whether and what kind of material incentives should be used would depend on the dialectic between the values of that society in the giving and receiving of that good and the fundamental principles of TGR. If selfless altruism fails to adequately supply a body good despite organisational efforts in fostering this motivation, TGR as a value pluralistic framework should not be opposed to the use of material incentives, particularly ‘robust’ kinds that can accommodate the diverse valuations and complex motivations of potential donors by not polarising the choice of donation into selfless altruism and utility maximisation, which may increase the social inclusiveness of the system and its effectiveness in meeting its supply and health goals. Such economic mechanisms may be vital for the continued relevance of TGR as a public policy for BMD. Ultimately, TGR is a social space for creative solutions to reconcile liberty, justice and community in meeting a common need.

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The social rationale of the gift relationship

Teck Chuan Voo

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ALTRUISM AND REWARD: MOTIVATIONAL COMPATIBILITY IN DECEASED ORGAN DONATION

TECK CHUAN VOO

Keywords
organ donation, altruism, reward, motivation, payment, transplantation, Titmuss

ABSTRACT
Acts of helping others are often based on mixed motivations. Based on this claim, it has been argued that the use of a financial reward to incentivize organ donation is compatible with promoting altruism in organ donation. In its report Human Bodies: Donation for Medicine and Research, the Nuffield Council on Bioethics uses this argument to justify its suggestion to pilot a funeral payment scheme to incentivize people to register for deceased organ donation in the UK. In this article, I cast a sceptical eye on the above Nuffield report’s argument that its proposed funeral payment scheme would prompt deceased organ donations that remain altruistic (as defined by and valued the report). Specifically, I illustrate how this scheme may prompt various forms of mixed motivations which would not satisfy the report’s definition of altruism. Insofar as the scheme produces an expectation of the reward, it stands diametrical to promoting an ‘altruistic perspective’. My minimal goal in this article is to argue that altruism is not motivationally compatible with reward as an incentive for donation. My broader goal is to argue that if a financial reward is used to incentivize organ donation, then we should recognize that the donation system is no longer aiming to promote altruism. Rewarded donation would not be altruistic but it may be ethical given a persistent organ shortage situation.

INTRODUCTION

According to Childress:

[o]nce we recognize that motives are often, and perhaps usually, mixed and that the procurement system does not require pure altruism as the [organ] donor’s sole motivation, then we can begin to consider not only how the society could remove disincentives to donation, but also how it might provide incentives – i.e., additional motivating reasons – without replacing a moral sense of altruism . . .

In its report Human Bodies: Donation for Medicine and Research (hereafter the Nuffield Report), the Nuffield Council on Bioethics employs a similar argument to ethically justify its proposal for the National Health Service Blood and Transplant (NHSBT) to pilot a scheme offering to meet the funeral expenses of those who register for deceased organ donation (DOD). It defines an altruistic action as ‘one that is primarily motivated by concern for the welfare of the recipient of some beneficent behaviour, rather than by concern for the welfare of the person carrying out the action’. A funereal reward scheme would prompt DOD registration that can be characterized as altruistic in this motivational way.


3 Ibid: 231.
This article casts a sceptical eye on the Nuffield Report’s claim that its proposed funereal reward scheme would prompt DOD of an altruistic nature as defined and valued by the report. Specifically, it illustrates how this scheme may prompt various mixed motivations which would not satisfy the report’s definition of altruism. An account of altruism – what may be called the ‘altruistic perspective’ – is then sketched out and linked to a sense of social responsibility for the needs of strangers based on an identification of self and others as part of a common humanity. The aim here is to argue that altruism is not motivationally compatible with reward as an incentive for donation. Reference will be made to Titmuss, who applied this idea of altruism to his defence of altruism in blood donation in his often-cited book The Gift Relationship. The broader argument is that if a financial reward is used to incentivize DOD, it should be acknowledged that the system no longer aims to promote altruism as the motivational basis of DOD. The article concludes with the remark that one must recognize the limits of altruism in tackling a persistent organ shortage.

WHY MAINTAIN ALtruism?

As Steinmann writes, ‘[f]or decades, Titmuss’s model of medical donation as a charitable, altruistic giving has served as the dominating model.’ Titmuss has been interpreted as arguing that donation of blood and other bodily materials should be based purely on altruism. Authors like Epstein have, however, been scathing of altruism as a foundational ethical principle and value for organizing organ donation, when around the world supply of organs is persistently short of meeting need. As Satel puts it, while some people are capable of ‘supreme acts of generosity’ and would donate their organs to strangers, ‘reliance on generosity makes for woeful public health policy’. Organ policies should therefore depart from ‘the doctrine that altruism should count as the sole legitimate impulse behind donation’. Like many critics of altruism in bodily material donation, Satel traces this doctrine to Titmuss’s arguments for blood donation as ‘a gift relationship’.

Contra Satel, altruism should not be thought of as arising from impulse or spontaneity in the context of bodily material donation. Altruistic donation is framed and produced by the organization responsible for procuring and allocating the material: its ability to produce the social environment of giving – a ‘community of participation’ – is a factor in its effectiveness in getting people to donate. This is how Titmuss understands altruism in blood donation, as emphasized by Healy.

In addition, Titmuss recognizes that blood donation under a gift system or ‘voluntary community donation’ cannot be a disinterested act. In his analysis of the motivations of British blood donors in his time, he concludes that ‘[n]one of the donors’ answers was purely altruistic . . . There must be some sense of obligation, approval and interest . . . what was seen by these donors as a good for strangers in the here-and-now could be (they said or implied) a good for themselves – indeterminately one day.’ This reason may also underpin or motivate DOD. In their study on public attitudes and motivations toward DOD in Spain, Scandroglio et al. found that among those favourable towards DOD, ‘knowing they might someday need a donation’ was a main motive.

Titmuss also does not appear to regard altruism as the only legitimate motivation for blood donation to be ethical. He employed terms like ‘reciprocity’ and ‘to

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10 As Titmuss writes,’[n]o donor type can . . . be said to be characterized by complete, disinterested, spontaneous altruism.’ Titmuss, op. cit. note 4, p. 89.


13 Titmuss, op. cit. note 4, p. 228. ‘Reciprocity’ for Titmuss includes what Schneider calls ‘transitive reciprocity’, that is, not to make a return gift to the original benefactor (in this case, some anonymous person(s) who had donated blood that one used) but to pass on that gift of health to others. D. Schmidt. Elements of Justice. Cambridge: Cambridge University Press; 2006: 83. It also includes being motivated by a desire to support the system based on the belief that one or a family member might need blood someday. Such motivation might however be better
obtain some benefit\textsuperscript{15} to characterize some of the donor motives. Benefits sought included tangible and intangible kinds, such as free health checks and social status. Some blood donors could not distinguish a single or predominant motive.\textsuperscript{16} In Titmuss's view, '[t]he vividness, individuality and diversity of these responses add life and a sense of community to the statistical generalities.'\textsuperscript{17}

Why then argue so strongly for altruism if donation can be non-altruistic but not ethically unacceptable since it need not undermine a sense of community? How else may the importance of altruism be understood? Kekes writes:

One may hold that altruism must be one of the ideals accepted by any justifiable system of morality. This interpretation does not commit one to holding that no action has moral worth unless it is altruistic. Rather, it supports the claim that one of the grounds upon which moral worth depends is altruism. Thus a nonaltruistic action may have moral worth. . . But it follows from it that other moral claims may take justifiable precedence over the claim of altruism.\textsuperscript{18}

Moorlock, Ives and Draper appear to interpret the Nuffield Report as holding altruism to be ‘a necessary as opposed to desirable component of ethical donation’.\textsuperscript{19} This goes too far. Like Titmuss, the report recognizes that ‘donation unaccompanied by altruistic intent is not necessarily unethical in itself’.\textsuperscript{20} Its rationale for promoting altruism in bodily material donation can be interpreted as broadly aligned with Titmuss: to support ‘a solidaristic approach to health care’.\textsuperscript{21} The Nuffield Report defines solidarity as the idea that ‘we’re all in this together’, with an implication of mutual obligations and mutual support within a definable community (based, for example, on geography or on shared interests).\textsuperscript{22} According to the report, ‘altruism has much in common with solidarity: an altruistic basis for donation helps underpin a communal, and collective, approach to the provision of bodily material for others’ needs, where generosity and compassion are valued.’\textsuperscript{23}

As Schmidtz writes, '[t]he point of distributing according to need is not to prove our hearts are in the right place, but to meet the need.'\textsuperscript{24} Still, the ‘right heart’ may need to be promoted to preserve, to quote the Nuffield Report, ‘a communal commitment to the provision of materials needed by others for the preservation or improvement of their health.’\textsuperscript{25} As the report states, altruism in bodily material donation should be understood with reference to motivation: the ‘internal psychological states that produce behaviours’.\textsuperscript{26}

**ETHICAL ACCEPTABILITY OF FINANCIAL REWARDS**

Nevertheless, the need to save or improve lives of those waiting for an organ transplant calls for more efficacious ways to increase donation rates. Sale of and commerce in organs are strongly opposed; reward schemes, on the other hand, have been proposed as an ethically acceptable means to incentivize organ donation, particularly for deceased organs.\textsuperscript{27} Financial rewards suggested in the literature include cash payment; income or estate tax benefits; medical-related benefits; charitable contributions; and coverage of funeral or memorial service expenses.\textsuperscript{28}

A systematic review of the literature on financial incentives for organ donation (both live and deceased organs)

\begin{itemize}
\item \textsuperscript{22} Nuffield Council on Bioethics, op. cit. note 2, p. 121.
\item \textsuperscript{23} Ibid: 132.
\item \textsuperscript{24} Schmidtz, op. cit. note 14, p. 166.
\item \textsuperscript{25} Nuffield Council on Bioethics, op. cit., note 2, p. 13.
\item \textsuperscript{26} Ibid: 139.
\item \textsuperscript{27} The Nuffield Report defines ‘purchase’ or ‘sale’ as ‘payment in direct exchange for a “thing” (e.g. a certain amount for a kidney)’ (p. 70); ‘commercial dealings’ as ‘[t]he giving or receiving of payment that brings profit to the parties involved, typically involving the purchase of an item for which the market sets a price’; and ‘reward’ as ‘material advantage gained by a person as a result of donating bodily material, that goes beyond “recompensing” the person for the losses they incurred in donating’. Ibid: 70 and 232. For this purpose of this paper, I do not differ from these definitions. It may be added that based on these definitions, a reward scheme for DOD seeks to avoid the commodification of organs. Commodification may be regarded as ‘the effect on the characteristics of a product or activity of supplying it exclusively or predominantly on commercial terms rather than on some other basis – such as informal exchange, mutual obligation, altruism or love, or feelings of service of obligation’. F. Hirsch. 1976. *Social Limits to Growth*. Cambridge, MA: Harvard University Press: 87.
\end{itemize}
reveals a general public preference for models that appeal to altruism or rely on removal of incentives to motivate people to donate, although there is an acceptance of some forms of financial reciprocation; public support for coverage of funeral expenses for DOD, for example, can range between 4–81%. A recent survey finds that the Canadian public largely supports financial rewards for DOD, with reimbursement of funeral expenses receiving the strongest support.

Public support for rewarded DOD does not equate to its ethical acceptability. An Ethics Committee convened by the American Society of Transplant Surgeons (ASTS) provides some criteria. An ethically acceptable reward/incentive should preserve voluntariness; respect the human body; honour the deceased; serve the ‘public good by maintaining the current public perception of organ donation as good’; not lead to the justification of organ sale; convey gratitude; ‘preserve the concept of the organ as a donated gift’; and not ‘subvert or diminish’ altruism. Based on these criteria, the committee concludes that, depending on the amount provided, payment of funeral expenses could be an ethically acceptable incentive. Unlike the Nuffield Report’s proposed reward scheme, this payment is to be offered to families to incentivize them to consent to the donation of their dead kin’s organs rather than to individuals to incentivize them to give explicit consent for DOD.

DOD is an ethically complex process which involves the consent of individuals and/or their next of kin. Factors that may affect consent include ‘positive altruistic motives and negative psychological responses [such a lack of empathy for the distress of the family]’ produced by the donation process. The ASTS Ethics Committee’s criteria above illustrate the need to take into account the various social and existential aspects of DOD to consider the ethical acceptability of introducing financial rewards to incentivize DOD. The focus here is on the decision-making process, specifically the motivations that are likely to be produced by a financial reward scheme for DOD. Titmuss’s idea of altruism will be contrasted with the Nuffield Report’s definition to argue against the claim, as the Nuffield Report holds, that promoting altruism is compatible with the use of a funeral coverage reward to incentivize DOD to justify the ethical acceptability of this reward.

MOTIVATIONALLY MIXED YET ALTRUISTIC

As the Nuffield Report claims, while ‘solidarity may indeed by [sic] undermined by the offer of rewards in return for donation’ in some circumstances, it is ‘possible to imagine circumstances in which individuals make decisions to promote the health of others based on a combination of genuine altruism and personal enrichment’. In addition, ‘an altruistic basis for donation does not necessarily exclude other approaches: systems based on altruism and systems involving some form of payment are not mutually exclusive’.

To support these claims, the Nuffield Report points out that that ‘in reality many decisions that help others [including bodily material donations] have mixed forms of motivation lying behind them’. From this, the report does not ‘think it important from an ethical perspective that altruism [in bodily material donation] is thoroughly “pure”’. To reiterate, the report defines an altruistic act as one that is ‘primarily motivated by concern for the welfare of the recipient of some beneficent behaviour, rather than by concern for the welfare of the person carrying out the action’. An act would not just be ethical but genuinely altruistic even if it is motivated by self-regarding concerns, including a reward motive, as long as concern for others is the primary motivation. Accordingly, DOD registration incentivized by a funeral coverage reward could be altruistic insofar as it is primarily motivated by concern for the welfare of others.


31 I thank an anonymous reviewer for the suggestion to include a discussion on what constitutes an ‘ethical donation’.

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INTERVENTION LADDER

Before the Nuffield Report is critiqued, its ethical framework, and how it justifies a funereal reward scheme, should be explicated. With altruism as an organizing idea, the report presents an intervention ladder (Figure 1) for ‘analysing the justification required for different means of encouragement and persuasion to donate’.

Interventions can be sorted in ascending order, from the ‘altruist-focused’ to the ‘non-altruist-focused’. Altruist-focused interventions ‘act to remove disincentives from, or provide a spur to, those already inclined to donate’, while for non-altruist focused interventions, ‘the reward offered to the potential donor is intended alone to be sufficient to prompt action’.

In line with the previous discussion of altruism as a non-essential component of ethical donation, the report emphasises that ‘the ladder should not be seen as moving from “ethical” actions to “unethical” actions, but rather from actions that are ethically straightforward to those that are ethically more complex’. Interventions to promote donation are only forms of ‘input’: ‘how individuals respond to such inputs will clearly vary from person to person, and indeed inevitably there will be some degree of overlap in how people respond to neighbouring “rungs”’.

The report justifies the funereal reward scheme by its unlikelihood of undermining the common good, ‘since a very similar system exists for covering cremation costs of those who donate their bodies to medical science’. Importantly, it argues that the scheme would still prompt altruistic DOD. It claims that the funeral payment reward might, in terms of people’s responses, constitute rung 4 of the intervention ladder: for those already inclined or disposed towards donation, the reward would be a final spur for them to act, ‘with the added altruistic feature that others, and not the donor themselves, would benefit’. Alternatively, the reward might constitute a

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42 Strathern & Wright, *op. cit.* note 21, p. 192.
44 Ibid.
46 Ibid.
47 Ibid. The Nuffield Report also justifies the scheme on the claim that donors cannot be physically harmed.
rung 6 intervention: for those not disposed or inclined towards donation, the reward would serve as the primary motivation. Nonetheless, their action still has an ‘altruistic component’ as it aims to benefit relatives or those who would otherwise bear the costs of their funeral. The funereal reward scheme therefore amplifies altruism or retains an element of it in prompting DOD registration.

**MOTIVATIONALLY MIXED BUT NOT ALTRUISTIC**

The Nuffield Report’s view of altruism and its argument that its proposed funeral payment reward would be consistent with promoting altruism in DOD have been cited approvingly. Nevertheless, Moorlock, Ives and Draper argue that while the report’s definition of altruism is more precise than ‘the account of altruism seemingly endorsed by organ donation policy and guidance in the UK’, it remains problematic for determining the ethical acceptability of means to prompt donation, since it may not ‘ever [be] possible to be certain [from an external viewpoint] what a person’s motives are, let alone what their primary motives might be’. The argument here is that even if primary motives can be ascertained, the Nuffield Report’s claim that the funeral payment reward would prompt donation of an altruistic nature (as defined and valued by the report) is questionable.

The Nuffield Report argues that even if the funeral payment reward prompts people with no inclination to donate organs to register for DOD, such registration would still have an altruistic component. Sun Life Direct (a life insurer in the UK) characterizes the protection of family and friends from the burden of one’s funeral costs as a selfless act. But selflessness or self-sacrifice does not necessarily constitute altruism, even though they may contribute to its understanding. (I will discuss more below on the relationship between self-sacrifice and altruism.) This does not discount the possibility that acting to benefit one’s relatives could be regarded as altruistic, and thus we can broadly accept the report’s claim. But we can doubt the relevance of the altruism prompted, as the report holds that altruism in bodily material donation is to be valued for its crucial role in supporting solidarity in health care provision. If people were primarily motivated by the funeral payment reward to register for DOD just to benefit their relatives, their altruism does not seem to have ‘much in common with solidarity’.

Let us now examine the Nuffield Report’s argument that the funeral coverage reward would amplify altruism in DOD if it spurs those already disposed or inclined towards DOD into registering for it. Let us assume that this disposition or inclination stems from a concern towards those in need of a transplant. In being spurred to DOD registration by the reward, however, concern for these others may not be the primary motivation. Hence, the act may not be altruistic as defined by the report. The report sometimes regards ‘primary motivation’ as a motive that is sufficiently strong to move one to act, and, elsewhere, as ‘a reason for action on its own’. Thus, the report likely regards reasons for donation as motivating reasons. The issue here is that the Nuffield Report seems to assume that as a final spur for those disposed towards DOD, the funeral payment reward would not be

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40 Ibid: 175.
42 Moorlock, Ives & Draper, op. cit. note 19, p. 1.
43 Ibid: 4. One may add that even if DOD registrants were to give their reasons for donation under the reward scheme, their answers may be influenced by social desirability bias, i.e. the tendency of people to provide responses that will be viewed favourably by others in self-reports. Thus, whether a funereal reward scheme for DOD would still prompt altruism, or whether it actually maintains, increases or undermines altruism compared with current non-rewarding approaches, would be hard to prove or disprove empirically.
45 As Campbell and Christopher write, ‘[h]ow you define altruism is, more than anything else, a function of the way you think of the self and of self-interest. If your interests terminate at your epidermal layer, then virtually anything you do for friends and loved ones, let alone marginal acquaintances or strangers, qualifies as altruistic behavior.’ R.L. Campbell & J.C. Christopher. Beyond Formalism and Altruism: The Prospects for Moral Personality. Dev Rev 1996; 16: 108–123.
46 The Nuffield Report writes that ‘“non-altruist-focused interventions” . . . are targeted at potential donors who have no strong motivation to help others through the donation of their bodily material’ and that ‘the incentive [the funereal reward] might seem sufficiently strong for someone to decide to register as a donor simply to spare their relatives the financial burden of a funeral’. Nuffield Council on Bioethics, op. cit. note 2, p. 5 & p. 175 respectively. These statements suggest that the report sometimes understands ‘primary motivation’ as a sufficiently strong motivation.
47 This is suggested by the Nuffield Report’s definition of a non-altruist intervention as an intervention in which ‘the reward is calibrated with the aim of providing a reason for action on its own’. Ibid: 141.
48 As suggested by the Nuffield Report’s distinction between “token incentives”, where the value or nature of the incentive would be insufficient to provide anyone (regardless of income level) with a primary reason for donating, and incentives that seek to provide that primary motive: Ibid: p. 5. ‘Motivation’ and ‘reason’ are often distinguished philosophically, however. For example, one could recognize a normative reason for doing something which does not motivate (because of some failure in rationality). See D. Parfit. Reasons and Motivation. The Aristotelian Soc 1997; Supp. Vol. 77: 99–130.
a sufficient motive in itself for them to register for DOD. How the scheme motivates depends on its value. The Nuffield Report likens its proposed funeral reward scheme for DOD to existing payment arrangements for the funerals of those who donate their bodies to medical science. Payment for the latter is usually limited to simple funerals or memorial services. In addition, as a survey conducted in the Netherlands shows, motivations for body donation to science are commonly underpinned by a negative attitude towards funerals. As the authors observe, ‘[t]he respondents choose to donate their body, not so much because of a positive decision but rather because they are averse to other methods of body disposition.’ There may be a significant difference, in terms of monetary worth and how people value the reward, between the offer of funeral coverage for DOD and typical funereal coverage for body donation to science if the former were to incentivize DOD and increase the donation rate.

To preserve the idea of rewarded DOD as an altruistic gift, the majority of the ASTS Ethics Committee suggests that payment for funeral expenses be kept ‘intentionally small’ to USD$300. Bryce et al.’s survey among Pennsylvania’s households showed that most found this amount to be too little to offer to donor families. Plausibly, the same would apply if this financial reward were to incentivize more individuals to sign up for DOD. To incentivize more DOD registration in Sweden, Omar, Tinghög and Welin propose that the state contribute up to €5,000 towards the funeral expenses of donors. Such a reward ceiling (possibly a higher one) may be needed for the Nuffield Report’s proposed reward to incentivize and increase DOD registration in the UK – the main reason for introducing the reward scheme in the first place.

Indeed, funeral costs in the UK are rising, even as money becomes tighter for many with the on-going global economic situation. There is also a trend for funerals to reflect or celebrate the personality or lifestyle of the deceased, which results in higher funeral costs. Given the socio-economic context of funeral organization in the UK, the offer of funeral coverage – assuming a payment ceiling scheme were used – would likely become a sufficient motivation for DOD registration even for those already inclined towards DOD, and one that is self-regarding to some extent, revealing a desire to ensure one’s preferred funeral. The individual might not differentiate this desire from concern for the welfare of relatives paying for one’s funeral. As the report notes, ‘altruism is only one among several values that motivate relatives to do things for one another: between kinsfolk – and in other close relationships – self-interest and other-interest are closely entwined.”

The funeral payment reward may thus prompt ‘over-determined’ actions: both the inclination to help those in need and the reward (underpinned in part by self-concern) would be motives for registration, with each motive alone sufficient for one to act. The inclination to help others would likely not be a sufficient motive for most people in the first place; if it were, non-rewarding interventions to encourage DOD registration should be explored further, rather than trialling the reward scheme. Registration for rewarded DOD may thus be a ‘hybrid’ action: neither the inclination to help those in need nor the reward alone is sufficient for one to act, but together, as distinct motives, they would prompt registration. Motivations may also become so intermingled that donation is best characterized as determined by a single yet complex motive, making it meaningless to separate concern for oneself, concern for relatives, and concern for those in need of a transplant in the psychological state that prompts DOD registration. These motivational structures – over-determined, hybrid, and single yet complex – do not seem to fit the report’s definition of an altruistic action.

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63 According to the ninth annual report Cost of Dying Survey commissioned by the life insurers Sun Life Direct, the average basic cost for funerals in the UK was about £3,284 in 2012. The report found that 17% of respondents struggled to meet funeral costs; this suggests that 90,000 people in the UK might have difficulties paying for funerals, given that around 552,000 deaths occur in the UK every year. According to the report, the Department for Work and Pensions awards £1,241 on average to those who apply for Social Fund Funeral Payment (which only individuals in receipt of particular welfare benefits are eligible to claim). The report also found that despite lower incomes, spending on non-discretionary costs, for e.g. memorials, flowers etc. has increased. Assuming all services (which would include non-discretionary, discretionary and estate administration costs) were used, the average cost of dying in the UK was £7,114 in 2012. Sun Life Direct, op. cit. note 51.
67 These ideas of mixed motivations were raised and discussed in relation to understanding and evaluating what Kant means in claiming that an action has moral worth only if it is done from duty, particularly in view of the fact that, as Herman writes, ‘It is quite common for us to have more than one motive for what we do, and even more than one motive that by itself would be sufficient to produce a particular action.’
Altruistic intent

Now it may be argued that the psychological state the Nuffield Report is interested in maintaining is ‘altruistic intent’. As the report states, ‘systems based on altruism and systems involving some form of payment are not mutually exclusive . . . because some forms of reward (monetary or otherwise) may in fact coexist with altruistic intent’. The report does not explain what is meant by ‘altruistic intent’. Intent or intention has been distinguished from motive as the goal or end of our action, rather than what prompts or moves us to act per se; ‘intent’ reflects exercise of choice or deliberation over one’s behaviour or action, which in turn may reflect one’s cares and commitments. For intent of an act to be characterized as altruistic, it should not be equated to mere intent to benefit or promote the welfare of others. While the latter intent may suggest altruism, it could simply be understood as a beneficent intent. Many social psychologists – and the Nuffield Report – believe that altruism is based on concern for others, taking the form of empathy, sympathy and other vicarious affects. The source of an act is not necessarily the determinant of its character. As Rescher writes, ‘The determinative consideration with respect to . . . altruism . . . is not just that a person is concerned for the well-being of others but why he is so – namely because their welfare is at issue. A person’s values become the pivotal consideration here.’

In attempting to prove (using social psychological experiments) the existence of altruism as a motivation not reducible to egoism, Bateson hypothesizes that altruism arises from empathic concern for individuals perceived to be in need, and together with colleagues, identifies the valuing of their welfare (as an end in itself) as an antecedent cause of empathic concern. He defines altruism as a motivational state in which ‘the ultimate goal is to increase another’s welfare’. Prussably, altruistic intent can be understood in this sense. According to Bateson, ‘Ultimate’ does not here mean ‘cosmic’ or ‘most important’; it simply refers to the [valued] state or states a person is seeking at a given time . . . It is the ultimate goal that defines a motive. Accordingly, the Nuffield Report can hold that so long as a person’s intent or ultimate goal in DOD registration is altruistic – that is, he seeks the valued state of promoting another’s health – it matters not whether his motivations were over-determined, hybrid or singularly complex, as prompted by the reward. Many real-life actions can be and are regarded as having an altruistic intent even if they are well rewarded. The Nuffield Report states that ‘someone who is paid well for charitable work may undertake this work for a combination of reasons, including a genuine desire to assist others and a desire to improve their own quality of life. Their altruism remains genuine here, for it might explain why they choose charity work as a career rather than some other (potentially better paid) job.’ If the funereal reward scheme were to be piloted, those considering DOD registration would have only these action options: no donation, unrewarded donation and funerally rewarded donation. They would not have a better-paying option within the UK. Furthermore, judgments on altruism in relation to a career in charity work are more judgments on conduct or character by considering various actions taken or not taken over the course of one’s life. Even if the DOD registrant is a regular bodily material donor, we are judging whether the intent of an act of DOD registration as prompted by the funeral payment reward is altruistic. Consider below (A) a common-enough case of a rewarded altruistic action, and (B) how the funeral coverage reward might prompt DOD registration.

(A) Tom, a cab driver, finds a large sum of money in his cab and returns it to the passenger who left it there. Passenger gives a cash reward to Tom, which Tom accepts because it will help his family financially.

(B) Alan feels concern for people waiting for an organ transplant after seeing a TV campaign informing him of their plight and the scarcity of organs. Nevertheless, Alan did not register for DOD. Surfing


69 According to Heyd, for e.g. ‘altruistic intention [which means that the act must be conceived as benefitting another person or persons] should not . . . be confused with altruistic motive. While intention forms only part of the description of the act, the motive is only the “feeling” which moves us to do it’. D. Heyd. Supererogation: Its Status in Ethical Theory. New York: Cambridge University Press; 1982: 137.

the net on DOD in the UK one day, he comes across the information that donors’ funeral expenses would be taken care of. Incentivized by the reward, Alan registers for DOD.

The intent of some act or behaviour may be described in various ways. To keep the argument simple, let us assume that Tom and Alan’s intent is to realize the valued welfare of the passenger and those in need of a transplant respectively. However, there is a potential difference. Alan expects a reward as an outcome of registering his intent to help those in need of a transplant, or successfully donating his organs at death. Unlike Alan, Tom may not expect his reward. If so, Tom’s intent or ultimate goal is to promote the welfare of the passenger, without being conditioned by a reward outcome. The reward is an unintended consequence of his intent to benefit the passenger. Now it may be pointed out that it is quite normal in a lot of societies to get a reward or a finder’s fee for returning valuables that one finds. If so, Tom, whether consciously or unconsciously, would be expecting a reward. There is a difference, however, between an expectation of a possibility of some reward pay-off and full expectation of a specific reward as a pre-calculated outcome of performing a helpful act.

As the Nuffield Report argues, a reward, if it is to incentivize effectively, aims to alter individuals’ perceptions of costs and benefits, but this alteration does not by itself make the incentive ethically objectionable.77 However, it arguably does affect the characterisation of the act of donation. As Bateson argues, behaviour directed by altruistic goals may involve a ‘hedonic calculus’ (a relative benefit analysis).78 However, in altruism, this calculus occurs such that the actor is considering the extent of the costs to oneself in relation to the valued benefit to the other. Beneficence is still directed solely to the other in reaching a favourable cost-benefit analysis. Individuals considering DOD registration with the funeral payment reward acting as an incentive are likely to be directed to balancing the benefits to those in need of a transplant with the benefits to self/relatives against costs to self. If one does register based on a favourable relative benefit analysis, the ultimate goal would be to contribute to the welfare of those in need of a transplant and that of self/relatives. Such intent seems to fall into the category of mutual or collective welfare promotion, rather than altruism.

THE PERSPECTIVE OF ALTRUISM

The above objection to the Nuffield Report may be viewed as merely terminological, as altruism can be defined in many ways. In support of expansive understandings of altruism to negotiate the ethical dilemmas of bodily material donation, Steinberg coins the term ‘predominant altruism’ to characterize ‘intentional and voluntary acts that aim to enhance the welfare of another person that come with a reward of a relatively trivial nature’.79 Lavee et al. use the same term to justify Israel’s policy to provide priority points for organ allocation for those who had been the DOD registry for at least three years prior to placement on the waiting list (their first degree relatives would also receive priority points): altruism predominates, however, because reception of the reward is improbable and not that it is trivial.80

Other ‘impure’ definitions can be formulated to reconcile altruism and reward incentives.81 As Saunders writes, however, ‘[w]here apparently “altruistic” behaviour is conditional on others reciprocating [to oneself or to the particular groups one feels attached to], this is no more than extended self-interest: you scratch my back and I’ll scratch yours.’82 It is not the contention here that decisions to help others prompted by a financial reward should be reduced to self-regarding motivations of a mere quid pro quo kind. The point here is that the promotion of altruism and the use of reward incentives to prompt donation are not compatible. In this section, I sketch out the social-moral psychology of altruism that a ‘Titmussian’ gift model seeks to promote.

As the Nuffield Report says, ‘Altruism is widely understood as entailing a selfless gift to others without expectation of remuneration. For several decades, this understanding of altruism has been presented as the basis

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77 D. Steinberg. Altruism in Medicine: Its Definition, Nature, and Dilemmas. Camb Q Healthc Ethic 2010; 19: 249–257. Steinberg also proposes the term ‘possible altruism’ to categorize donation ‘[w]hen it is unclear whether the border between predominant altruism and commercialism has been crossed’. See pp. 25–252. For Steinberg, oocyte donation prompted by compensation of USD $10,000 could be categorized as such. This to me is an extreme example of trying to reconcile altruism with financially incentives for bodily material donation.

78 As they write, ‘most people who sign an organ donor card will never need an organ themselves and in all likelihood will ultimately receive no material reward for their promised donation and therefore although they might not be purely altruistic, they remain predominantly altruistic’. J. Lavee, T. Ashkenazi, G. Gurman & D. Steinberg. A New Law for Allocation of Donor Organs in Israel. Lancet 2010; 375: 1131–1133. See also J. Lavee. Ethical Amendments to the Israeli Organ Transplant Law, Am J Transplant 2013; 13: 1614. The priority scheme also applies to live donors.

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of blood and organ donation in the UK.83 In examining reasons for maintaining the altruistic model in bodily material donation, it considers that altruism maintains the communal virtue of ‘a general disposition to be moved to self-sacrifice by the health needs of others’.84 Presumably, this disposition provides a (the?) link between altruism and solidarity.

Saunders argues that unrewarded DOD in general should not even be characterized as altruistic as most people who actually register for DOD do not regard themselves as making a significant sacrifice at all, presumably because they see no use for their organs once dead.85 Altruism is however not the same thing as self-sacrifice, although it implies the possibility of the latter. More precisely, an altruistic intent is not intent to be self-sacrificial. Like other actions, an altruistic action will involve personal costs, but they are borne as a matter of following through the intent to increase another’s welfare, and are regarded as self-sacrificial ‘only when the agent prefers the value forgone to the value gained’.86 Thus the lack of a sense of self-sacrifice in one’s psychological state as one pursues the goal of helping another does not mean that one is not acting altruistically.

However, ‘no expectation of reward’, or the absence of a calculation of a reward whether tangible or intangible, as a precondition to help another, seems integral to the psychology of acting altruistically. As Monroe argues, altruism is best explained by having a certain perspective, which refers to one’s worldview and identity, and which involves ‘canonical expectations’, i.e. what is normal and right to do in some given situation.87

The altruist sees the world differently. The behaviour results from the recognition that the actor is human and therefore required to act in a certain way, and that the needy person is human and therefore entitled to certain treatment. Humanity plus need: this is the only moral reasoning, the only calculus for altruism.88

The intent to increase another’s welfare as a function of altruism thus arises from the identification of self and other as part of a common humanity, in which one feels that one ought to help another in need. Altruism is thus underpinned by a perspective in which concern for another’s need directs one’s action as an imperative to help. This perspective is the essence of the Titmussia gift relationship.

As commentators on Titmuss have noted, the gift relationship is a ‘stranger’ relationship, rather than a ‘face to face’ one (particularly, ‘the reciprocal rights and obligations of family and kinship’).89 In promoting helpfulness to social strangers as its central concern,90 a collective provision policy for therapeutic bodily materials seeks to foster social integration: ‘to build the identity of a person around some community by which he is associated’.91 The stranger (recipient) is likely to be a fellow citizen: he or she is certainly a fellow human being.92 The gift system thus seeks to build identification within a community of an inclusive, universalizable kind. Identification with others has been theorized as the foundation of a commitment, to quote Sen, ‘concerned with breaking the tight link between individual welfare (with or without sympathy) and the choice of action (e.g. acting to remove some misery even though one personally does not suffer from it).93 Sen writes:

If the sense of identity takes the form of partly disconnecting a person’s choice of actions from the pursuit of self-goal, then a noninferior outcome [in the coordination of interests] can well emerge even without any formal contract and enforcement. One of the ways in which the sense of identity can operate is through making members of a community accept certain rules of conduct as part of obligatory behaviour toward others in the community. It is not a matter of asking each time, What do I get out of it? How are my own goals furthered in this way?, but of taking for granted

83 Nuffield Council on Bioethics, op. cit. note 2, p. 120.
84 Ibid: 144.
85 Saunders, op. cit. note 79, p. 378.
87 K.R. Monroe. 1996. The Heart of Altruism: Perceptions of a Common Humanity. Princeton, N.J.: Princeton University Press: 14. To quote Monroe at length: ‘Perspective provides the critical component, particularly the altruist’s perception of self in relation to others. Earlier studies on altruism have failed to identify this critical explanatory variable, focusing instead on the many different factors that may precipitate or encourage the development and growth of this altruistic perspective. This perspective provides a feeling of being strongly linked to others through a shared humanity and constitutes such a central core to altruists’ identity that it leaves them no choice in their behavior when others are in great need. It is this perspective that best distinguished altruists from traditional rational actors.’ At p. 234.
88 Ibid: 212.
89 Titmuss, op. cit. note 4, p. 212.
the case for certain patterns of behavior toward others.94

Identity forged by shared rules or norms stands, in contrast to goal- or welfare-maximizing calculation, as the foundation of voluntary actions to serve the common good. In the context of voluntary blood donation, identity or a sense of a community is framed by these rules: ‘absence of tangible immediate rewards in monetary or non-monetary forms; the absence of penalties, financial or otherwise; and the knowledge among donors that their donations are for unnamed strangers without distinction of age, sex, medical condition, income, class, religion or ethnic group’.95 Such rules apply to DOD in the UK.96 The recent NICE guidelines on DOD state that ‘Organ donation should be considered as a usual part of “end-of-life care” planning’.97 Framing DOD as such may violate certain philosophical definitions of altruism,98

95 Titmuss, op. cit. note 4, pp. 88–89.
96 Following the Ashworth case in the UK, in which the Human Tissue Authority (which makes the final decisions on organ donation) denied the wish of Laura Ashworth (a registered deceased organ donor) to donate a kidney to her mother at death because her wish was not formally recorded, the Department of Health amended its guidance on deceased organ donation such that ‘in certain exceptional circumstances, the requested allocation of an organ to a specified relative or friend may be permissible.’ UK Health Departments. 2010. Requested Allocation of a Deceased Donor Organ. UK Health Departments. Available at http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/gp/documents/digitalasset/dh_114803.pdf [Accessed 12 May 2012]; Moorlock, Ives & Draper take issue with departure from unconditional donation as a fundamental principle of DOD, pointing to its inconsistency with some philosophical accounts of altruism that take impartiality as a necessary condition of altruism to support their argument that altruism is a confusing and ultimately unnecessary requirement to guide organ donation. Moorlock, Ives & Draper, op. cit. note 19. As I argue here with reference to Titmuss’s thinking, however, the promotion of altruism in the donation of bodily materials like transfusion blood and transplant organs is linked with fostering universal inclusiveness, which is not the same as impartiality in allocation between citizen and non-citizen, kin and non-kin etc. Impartiality is a concern of justice. As Schmidtz argues, justice is about considering how elements like need, reciprocity (including to our intimates), equality and desert could fit to guide our actions and practices. See Schmidtz, op. cit. note 14. So while I agree with Moorlock, Ives and Draper that we should recognize the limits of altruism in organ donation, I differ from their views in that altruism is not that confusing a guide.
98 Moorlock, Ives and Draper argue that making DOD ‘“usual” may make it “part and parcel”, . . . of the social role of dying people’ (Ibid: 5) which would turn DOD into an non-altruistic act if we apply Miller’s definition of altruism as ‘behaviour that is intended to meet the needs of others . . . where there is no institutional requirement that one should’. D. Miller. Are They My Poor? Crit Rev Int Soc Polit Philos 2002: 5: but this is just what is needed to foster the ‘altruistic perspective’.99

As noted by Farrell, ‘Titmuss largely focused on donors in the context of the donor-recipient relationship: their characteristics, their recruitment and motivation. In contrast, the patient-recipient was minimally sketched and largely depicted as a passive and necessarily trusting individual’.100 Whether or not Titmuss depicted recipients thus, there is a rationale for his focus on donors: to promote – in view of a lack of an ethical or legal foundation for patients to claim others’ bodily parts as a right – a sense of social responsibility for the needs of other members of society.101 According to Titmuss, that most donors’ expressed reasons for blood donation, as found by his survey, could be categorized as ‘Altruism’ (expressed in general terms as a desire to help), ‘Duty’ and so forth suggests a high sense of social responsibility among British people in his time.102 Such an inference may not be warranted, but it is the desired social-moral psychology as underpinned by the altruistic perspective that the rules of the system aim to foster.

REWARD AND SOCIAL RESPONSIBILITY

It is hard to say whether the introduction of a funeral payment reward rule would undermine or subvert a sense of social responsibility for the needs of strangers in the context of DOD; the funereal reward scheme could be trialled for a period and then compared with a post-trial, no-reward period in terms of willingness to donate, actual donation rate etc. As social responsibility may depend on many factors, the possibility that such subversion might not occur does not undermine the claim of this article that the promotion of an altruistic perspective is not compatible with a scheme that aims to incentivize behaviour through offering a substantial reward for self/kin, even if that perspective may be compatible with some self-regarding reasons for donation.

However, this is not to say that a reward scheme cannot be compatible with the promotion of altruism. In

106–127. It is unclear to me why even if making DOD usual or normal to do did turn it into a social role of dying people that this role is an institutional requirement on dying people. The NICE statement appears under the heading ‘Identifying patients who are potential donors.’ The statement relates to those involved in procurement. Making organ donation a usual part of end-of-life planning need not violate Miller’s account of altruism.
99 Promoting altruism in DOD thus comes close to promoting, as Williams defines altruism, ‘a general disposition to regard the interests of others, merely as such, as making some claim on one, and, in particular, as implying the possibility of limiting one’s project’. See B. Williams. Problems of the Self. Cambridge: Cambridge University Press; 1999: 250.
101 Titmuss, op. cit. note 4, p. 236.
Singapore, immediate family members of deceased organ donors may receive a subsidy towards medical expenses incurred at government hospitals, effective for five years following donation. This reward is not part of the transplant industry and relevant health professionals’ communicative norm – it is not offered to donors or relatives to prompt them to agree to donation. (This is partly because the donation system is an opt-out system, in which the taking of organs may be enforced unless the person has prior to death formally objected to DOD.) The system therefore does not create much, if any, expectation of reward in the calculative sense. (What may prevent people from opting out is that dissenters would be given lower priority on the waiting list should they later be in need of a transplant.) The reward thus lies in the ‘background’, with the central role of expressing social appreciation for the contribution of donors and their families to the common good. Similarly, a funeral coverage reward can operate in the background, but it may have little effect as an incentive and, thus, on increasing the supply of transplant organs.

In any case, the Nuffield Report does not propose a background reward. It states that the offer of meeting the costs of funeral expenses for those who register for DOD would ‘effectively [provide] a funeral benefit to the deceased’s estate or to those who would otherwise bear the costs of the funeral’. Not only would DOD registrants and their relatives expect the reward as a direct and specific outcome of the act of registration, it would appear that the relatives could actually demand the reward as part of the deceased’s agreement with the NHSBT. If so, this would in effect make a donor’s trans- action with the NHSBT a statutorily enforceable agreement akin to a contract.

CONCLUSION

Like the Nuffield Report, Peters argues for the continued promotion of altruism in financially rewarded DOD. Arguing for a death benefit (USD$1000) to incentivize family consent to donation of a deceased kin’s organs, Peters states that ‘We should not lose sight of the good of altruism, and we should promote it to an even greater extent.’ In response, Pellegrino argues that such a scheme creates ‘a deliberate conflict between altruism and self-interest’ which ‘reduce[s] our freedom to make a gift to a stranger. This, as Titmuss shows in his study of the commercialization of blood donation, has serious destructive effects, ethical and non-ethical, on the whole of society’.

We need not agree with Pellegrino that a financial reward system reduces our freedom to gift to strangers per se, or would produce serious destructive effects. But, as this article has hopefully shown, Pellegrino is essentially right: the promotion of self-interested reasons of a reward-seeking kind is incompatible with promoting altruism with respect to donation to strangers. To be sure, no procurement system ‘produces’ only one form of motivation. Donation, rewarded or not rewarded, can be regarded as social, moral, charitable, helpful, sense-making, identity-forming, self-interested, or all at once. To paraphrase Veatch, some individuals and organ procurers may also consider themselves to be participating in altruistic gifting under a financial reward scheme.

In introducing a reward/incentive for DOD – whether directed at individuals or at their relatives – as a means to increase donation, it should be recognized however that the system would be departing from an altruistic gift framework. This understanding lies at the heart of recognizing the limits of altruism in fighting a persistent organ shortage. The focus on preserving altruism as a criterion of ethical acceptability not only undermines the serious consideration of relatively substantial financial rewards to incentivize DOD. It also distracts from the consideration of and debate on other elements of the reward scheme. The Nuffield Report writes that ‘[t]he precise way in which such a scheme might operate – factors such as . . . whether expenses should be covered if in fact the person’s organs prove to be unsuitable for transplant –


105 This disincentive has been justified on the grounds that those willing to be part of the common pool of potential kidney donors should be the first ones to benefit from the pool. See Singapore Parliamentary Report. Vol. 48 at Col. 866. 9 Dec 1986. (Tan Cheng Bock).

would be key questions for such a pilot scheme to determine. Childress argues that making a reward for DOD conditional on organs procured makes the reward equivalent to a purchase/sale. In his view, reward should be a response to the act of donation itself: ‘[s]uch a practice of conveying gratitude would express communal solidarity with the deceased and the bereaved who donate or do not block donation.’ Ethical acceptability lies in the details of the scheme.

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111 The Nuffield Council on Bioethics, op. cit. note 2, p. 175.

112 Childress, op. cit. note 1, p. 11.
PAPER

Organs as inheritable property?

Teck Chuan Voo, Soren Holm

ABSTRACT
It has been argued that organs should be treated as individual tradable property like other material possessions and assets, on the basis that this would promote individual freedom and increase efficiency in addressing the shortage of organs for transplantation. If organs are to be treated as property, should they be inheritable? This paper seeks to contribute to the idea of organs as inheritable property by providing a defence of a default of the family of a dead person as inheritors of transplantable organs. In the course of discussion, various succession rules for organs and their justifications will be suggested. We then consider two objections to organs as inheritable property. Our intention here is to provoke further thought on whether ownership of one’s body parts should be assimilated to property ownership.

INTRODUCTION
Most jurisdictions allow people to donate but not sell their solid organs for use in transplantation. A persisting shortage of transplant organs worldwide has however led many to advocate for organ trading. Nevertheless organ trading is resisted partly because of the view that the human body should be accorded special respect: it should not be treated like ‘our disposable property, our car, house or CD collection.’ A counterview is that body self-ownership should be assimilated to liberal property ownership of material possessions or assets. Claiming that individuals should be as free to dispose of their body parts as their expendable clothing, Steiner, for instance argues that “the transfer of my body parts, whether by sale or donation, is an exercise of my self-ownership right—just as my sale or donation of anything else I own is an exercise of my other ownership rights.”

As Munzer writes, “It is a commonplace to think of property as something that one may use during life and then upon death transmit by will or intestate succession to others.” If organs are to be considered tradable property for transplantation purposes, should they also be inheritable property? The idea of the human body and parts as inheritable property has been considered and dismissed before. It raises the issue of freedom in ‘bodily testaments’, and whether and how it should be balanced against the claims of the family and of the state to succeed to property interests in the body and its parts. As body parts are not property—and even if they were—respect for autonomy of the person over the body or her posthumous interests provides a basis for rejecting those claims.

This paper argues that organs should be inheritable if they were to be socially and legally recognised as tradable property. It also seeks to contribute to the idea of organs as inheritable property by providing a defence of a default position of the family of a dead person as the inheritors of transplantable organs. In the course of discussion, various succession rules for organs—which might exclude the right to destroy and waste transplantable organs—will be suggested. Lastly, we consider some objections to organs as inheritable. Our intention in this paper is to provoke further thought on whether ownership of one’s organs should be assimilated to property ownership.

BODY OWNERSHIP AND PROPERTY OWNERSHIP

Assimilating body ownership to ownership of property

As Banks writes, “Those who oppose a market in human organs argue … that the human body deserves much greater respect than to be classified as property to be sold in the open market. The determination of the status of the human body, as property or life, is a major hurdle which may need to be resolved before a market in human organs is legalised.”

Jurisprudentially, property is usually understood as a bundle of rights held by an individual or a group. (Rights here can refer to various normative modalities like claims, powers, immunities, liberties and privileges.) Such a view is congenial for arguing that bodily ownership should be assimilated to private property ownership of material possessions and assets in as much as sufficient likeness can be found between the bundle of rights relating to one’s body parts and the bundle of rights relating to material possessions. Quigley, for example, argues that body self-ownership can and should be extended into most if not all property rights associated with full liberal ownership to promote the value of individual liberty.

Self-ownership as a basis for one’s body and parts as property has been heavily criticised. Consider Ryan’s objection:

[T]he rhetoric of self-ownership is self-destructive because it first relies on the ordinary understanding of property to argue that since our bodies are our property, we (but not other people) may do anything we like with and to them—which is not the ordinary view—and then relies on the ordinary view of our relationships with our bodies to argue that since our bodies are property, we must extend to all property the tenderness that we extend to rights of bodily integrity, privacy, and the like.

Implicit in the passage is the view that bodily self-ownership and property ownership are different normative ideas. The human body and parts are
intimately connected with humanness, or implicate human dignity.\textsuperscript{10} Such a view informs ‘body exceptionalism’—the view that human body and parts should be treated differently from other material resources.\textsuperscript{11} Bodily exceptionalism may be informed by the moral concern that because property rights are rights to ‘things’ (understood primarily as mere resources), the recognition of rights to organs as property rights would lead to people being wrongfully objectified in terms of having their autonomy or subjectivity (one’s experience and feelings) denied in the acquisition of their organs. As Wilkinson writes, “The core ethical problem [with the acquisition of organs to resolve the shortage issue] is that the organs are within people, who are not just raw material.” (p. 7)\textsuperscript{6}

**Thinghood and alienation**

The relationship between the legal ideas of property and ‘thinghood’ needs to be explicated to see the force of the above moral concern. Property law defines things by way of assigning interests in tangible or intangible objects to persons (or entities), and conferring on them control and protection of the objects vis-à-vis the right of exclusive use, which is enforceable against the world at large.\textsuperscript{12} As Penner writes, “The analogy of property with the relation one has with one’s body is grounded on the fact that both involve exclusive use... The distinction between the two is that an owner is not necessarily connected to, but is separable from, the things he holds as property.” (p. 121)\textsuperscript{12} As he argues, property rights are ‘personality-poor’, that is, they are separable from the owner in the sense that the identity of the rights remains essentially the same even if the identity of the owner changes with the transfer of those rights. In other words, if a person P’s property ownership of an object O is (fully and validly) transferred to another person Q, Q would acquire the same normative relations to O as P.

Certainly, freedom in alienation by sale or otherwise is often regarded as the distinguishing mark of property relations given the historical links between liberal ownership and free trade in the market societies most of us live in. Nevertheless, as Penner argues, it is because property rights are rights to a thing, that is, rights separable from some person that the rights can be freely alienable. Because separability underpins and cannot be reduced to transferability, he suggests that “the better test of the property status of our right to our kidneys [might be] to ask, not whether we may sell them, but whether they can be removed and sold by our trustee in bankruptcy to pay our debts.” (p. 117)\textsuperscript{12}

The point here is that legal recognition of objects as property engenders normative possibilities of their modes of alienation and transmission, including those which do not follow from the choice, will or interests of the individual person. It also opens up the possibility of the legal recognition of the survival of the property rights and their inheritability after the death of the source/owner, even if those rights are intimately bound with her person. For example, in many US states, the right of publicity (the right of an individual, usually a celebrity, to control the use of her persona for commercial purposes), in being recognised as a property right, is recognised as capable of surviving the death of the person and as descendible. A celebrity may become a social recluse in the years before she dies. But her family could market her image after her death if they inherit the right of publicity over her persona, and would have strong incentives to do so if the market value is substantial or if ownership is taxable. Indeed, in examining the notion of bodily materials as property, Gold discusses the right of publicity to illustrate how normative reasoning in property law tends to be dominated by economic considerations even when moral concerns relating to personal identity, self-determination and relationship to society are acknowledged in court.\textsuperscript{13} In many jurisdictions, it is not necessary for the person to have commercially exploited his attributes during his or her lifetime for them to be descendible and marketable. Similarly, it need not be necessary for a person to have commercially exploited his bodily parts for them to be recognised as inheritable. Given this threat of property law, Andrews proposes a ‘quasi-property’ approach: while people can treat their own body parts as ‘objects for possession, gift and trade’, “[t]here will be no means for a tax man or physician to put a lien against a person’s body parts. Nor can relatives choose to sell a person’s parts after his or her death.”\textsuperscript{14}

Nevertheless, a property regime for organs need not be one that leads to the treatment of people as mere bodily resources. ‘Sticks’ of liability for seizure of organs to satisfy debt or tax can be taken out from the bundle of rights that constitutes organs as property. A property regime for organs need not be one that permits—as many have advocated as policy or argued philosophically for—state enforced redistribution of organs from the dead to the living in need of a transplant. Rights to organs need not survive the owner’s death for them to be property rights or be succeeded automatically by his relatives. A person may also be given the right to extinguish future valuable interests in his organs as provided by directions contained in her will. What property rights and relations should attach to organs is a normative question to which the legal idea of property cannot provide a definitive answer. Whether organs should be inheritable if they were recognised as property is the subject of the next section.

**ORGANS AS TRADABLE PROPERTY, ORGANS AS INHERITABLE PROPERTY?**

As Clarke and Kohler write, whether human body parts should be treated as property ultimately depends “on certain views on the efficacy (be that in practical, moral, ethical or whatever terms) of making them subject to such a regime.”\textsuperscript{16} In line with such consequentialist thinking, Björkman and Hansson argue that different bundles of rights can be constructed for different bodily material to optimise social advantages for their originators, recipients and society at large. They do not argue however that the bundles should constitute liberal property ownership.\textsuperscript{17}

One social advantage of recognising ownership of organs as liberal property ownership would be to increase individual freedom and control over organs as transplant resources. An equally important advantage would be to increase efficiency in supply-demand coordination. Iran’s regulated organ trading system—the only legalised system in the world—has been lauded as the way forward for addressing organ shortages. However, sale is limited to a live kidney; a kidney foundation coordinates meetings between the patient at the top of the waiting list with a potential seller and if this patient is not ready for a transplant, the next patient on the list will be arranged to meet the seller and so on.\textsuperscript{18} To promote more efficient transfers and individual freedom, a legal regime can be established in which people have more extensive exclusion/sale rights over their organs as their property. Sale can take place during life, or for the payment to be provided to the family or other assignee after their deaths in return for supplying their deceased organs.\textsuperscript{19} Thus, deceased organs have to remain as property so that agreements on posthumous sale would be respected. What should happen to transplantable organs that remain in the dead that have not been transferred by or
designated for sale or donation? As Beckert writes, “Everyone who owns property leaves it behind [when he or she dies]. But whom does this property belong? All societies that recognise individual property rights need rules to reallocate property upon the owner’s death.” (p. 1)20

Succession—transfer of property on death—occurs mainly by testamentary and intestacy rules. Allowing testamentary disposition of organs would promote personal control over one’s dead body and possibly increase deceased organ donation, particularly if one could designate specific individuals or individuals from specific groups to receive one’s organs, which is currently not allowed in most countries. (A UK case in which a mother was denied by the relevant authorities to receive a kidney from her dead daughter despite the latter’s expressed intention led commentators to call for the propertisation of organs to protect persons’ intended direction of their organs for transplantation.)21 Prima facie, organs should be disposable by testamentation for similar consequentialist reasons underpinning their recognition as tradable property.

Just as not many people make a will for the distribution of their external possessions and assets for whatever reasons, not many might make a will for their deceased organs. In setting out who will inherit one’s organs in the absence of a valid will, specific rules of intestacy will minimise conflicts. In his comparative study on the development of inheritance law in the USA, France and Germany, Beckert found that all three jurisdictions have long defended inheritance rights as an extension of individual property ownership.20 According to him, jurists from positive law and natural law traditions have justified intestacy rules “as the presumed last will of the testator… and not from the moral functions of the family or from the common good.” (p. 52) One could argue that absent a will, family disposition of deceased organs would not be substantially different from testamentary disposition.

Justifying familial inheritance of body parts as an extension of respecting private property ownership may be questioned, however, because of disanalogous consequences between disrespecting wills for bodies and disrespecting wills for material assets. As Wilkinson argues, one reason for respecting wills is the desirable consequence of “reassuring people or giving them an incentive to pass resources to subsequent generations rather than go on a pre-death consumption splurge…” It is hard to believe that, in a society without rights of bequest over one’s body, people would go on a pre-death consumption splurge of their organs.” (p. 51)6 While people would not ‘consume’ their organs in the absence of succession rules for their organs based on respecting their (explicit or presumed) will, we can imagine that respecting their will might incentivise people to maintain their health and keep their organs transplantable so as to maintain their posthumous value for their family. On this view, the family of a deceased person should be permitted to succeed to property interests in her transplantable organs such that they could sell the organs to derive income or pay off the deceased’s debts including hospital bills incurred prior to death. Or, they could offer the transplantable organs in lieu of or to offset inheritance tax or estate duty.

Of course, family relations may be strained or estranged, and the will of the dead might omit relatives or distribute the estate contrary to what a family member might expect. As Beckert observes, the normative structure of that development in all three societies reflects not ‘an increasingly individualistic orientation’ but ‘embedded individualism’: testamentary freedom is to be balanced against family claims (and claims of the state) (p. 82)20. Although the institution of inheritance has been criticised for making possible the acquisition of assets without individual merit, it has been defended for promoting intergenerational family preservation and continuity. Inheritance of organs could be similarly defended. Natural rights and common law jurisprudence might accord to some extent. For example, it is argued, from a Lockean perspective, that rights of bequest and inheritance should be limited by a duty to provide for a deceased’s dependents.22

Family members could thus be recognised as ‘natural successors’ to the dead’s bodily estate as justified by the social good of intergenerational family preservation. The extent to which the family’s interests in inheriting organs should limit bodily testaments may be based on or inspired by the existing inheritance rules of a society. Macy, Alan’s estranged daughter, needs a kidney transplant but dead Alan had willed all his organs to a transplantation organisation. In England and Wales, the Inheritance (Provision for Family and Dependents) Act 1975 could be expanded to provide for people like Macy to apply in court in an expedited way for an organ, if it is suitable to be transplanted in her, from Alan. In civil law systems like France, Alan’s kidney could be recognised as Macy’s legitima portio: her hereditary right to her father’s bodily estate. Alan might however have three children in need of a kidney transplant. Equal distribution would not be possible even if he left two transplantable kidneys. Deviation from inheritance regimes with codification for compulsory equal shares among descendants may therefore be necessary in the case of organs.

ANTIWASTE

Family members may, however, have an interest in possession of all organs, despite their economic value, in order to preserve the integrity of the body for funeral disposal purposes. Respecting their right to dispose of all organs and thus the body as a whole may allow them to maintain a connection, or accord with the person’s will or with what they consider as respectful disposal. Such respect would, however, lead to the destruction and ‘waste’ of otherwise life-saving or significantly life-improving resources. Should relatives have the right to destroy valuable body parts?

The right to destroy property has long been a part of our thinking on what it means to own property. Strahilevitz observes, however, a trend of curtailing owners’ right to destroy valuable property, especially in the testamentary context, in American case law.23 Courts rule against testators’ wish to destroy valuable property, such as historic homes, for two related reasons: society should not tolerate destruction and waste of valuable resources, and that damage to third parties’ interests, economic and social, justifies curtailing the wish of the testator. In favour of such curtailment, Sax argues that owners should not have the right to destroy property of cultural significance.24 McCaffrey argues that the right to destroy/waste (in either form of dissipation or inefficient use) property, unless it attaches to permanent assets, is out of place in modern economic workings and property ownership.25 As he claims, “the right to waste emerged as part of an absolute conception of ownership developed largely in the context of an agrarian economy where waste referred to the dissipation or destruction of a permanent physical asset, paradigmatically land. The right was seen as both a necessary and a non-problematic, because self-limiting, aspect of the absolute conception of ownership, which was itself desired for other reasons, such as wealth maximisation.” (p.77) In other words, societies’ shift towards private property systems had an antiwaste rationale: individuals
in general are expected to seek and be the better judge on the optimal use of resources as their property.

One can argue that the same antiwaste stance should be taken when assimilating bodily ownership to property ownership: deceased transplantable organs have great human value and significance (arguably more so than real property of cultural significance); they are not permanent resources; and waste of transplantable organs in dead bodies might not be a self-limiting problem even in a property regime as people and their families may prefer to dispose the dead body as a whole as a social norm of dealing with death. There is therefore good reason not to include within the property bundle the right to dispose organs wastefully. Hence, one could argue there should be no individual and thus no inheritable right to designate transplantable organs for funeral disposal should they be suitable and needed for transplant. However, there is a danger of equivocation between two different concepts of waste, an economic concept and a moral concept, and it is not clear which of these does the work in this argument.

In the next section, we consider two objections to organs as inheritable property.

REASONS AGAINST INHERITABILITY

First, as Brazier observes, most people would reject the idea of the body of their deceased kin as their property that they could dispose at will, such as auctioning off their body parts for exhibition purpose.26 “The sense of continuing relationship, of still being parents, sharply distinguishes their child, or their husband, from their house or their car. The interests which families perceive centre on the integrity and welfare of the family of whom the deceased is still a part.” (p. 32) The moral relational function of the family thus serves as a reason for rejecting organs as inheritable, tradable property. However some families might want to sell, for instance those at or near the poverty level. Their interests, while pecuniary, might not be that divorced from preserving the integrity and welfare of the family. And some not so poor families might want to sell because they believe it to be the wish of the deceased.

The right to sell organs as an inheritable right might be constrained or rejected for more pragmatic reasons. Although preservation technology has improved tremendously, deceased organs do not stay viable for transplantation for long. By the time the estate could be settled, the organs will be useless. And some very poor families might want to sell because they believe it to be the wish of the deceased.

Sperling goes too far with likening family’s control of one’s body to slavery. Family’s control of a dead person’s body would probably not be regarded as slavery if the relationship between them is one of intimacy and of trust that the body would not be abused with succession of ownership. According to Sperling, our symbolic existence usually exists in the memory of surviving family members and not just in our belongings: inheritance and use of Alan’s deceased body by surviving family members might be promoting Alan’s symbolic existence. Just as I could inherit and use my dead grandfather’s walking stick in my memory, I could inherit and use his deceased organs in my memory: I could, for example donate them in honour of his generous nature, or sell them in memory of him as a hard-nosed businessman. In our case the family’s control over one’s body would not amount to slavery and all its wrongs since their control relates to decisions over organs for transplantation purpose, rather than to control over chattel subject to their whims.27

While it may be a social norm to funerally dispose of a person’s belongings, the law might find it beneficial to go against that norm even if the disposition follows from a will. In Melras Estate, the court ruled against a will instructing the burial of personal valuables with the deceased person because of the increased risk of the negative externalities of grave robbery and related welfare loss to the family.28 Respecting testaments to bury transplantable deceased organs would not attract bodily grave robbery, given their perishability. The point here is that third party interests can be given more weight than testamentary destruction even for personal belongings. Granted that interests of great human significance exist on both sides, the moral question is why one’s bodily testaments and symbolic interests wishes should be given more weight than the interests of third parties? Are bodily testaments really a function of symbolic interests, an expression of what a person really identifies with or values?

If organs were tradable property, a rule could be established that balances respect for one’s bodily testaments and one’s symbolic (or religious) interests and others’ interest in the use of one’s organs. Strahilevitz proposes an innovative ‘safe harbour’ property rule: the law would honour bodily testaments if the owner had marketed future interests in her deceased organs, and had rejected the highest bid, which signals that she values the destruction of her organs more than anyone else values their preservation for transplantation.23 According to Strahilevitz, courts are more willing to entertain living owners’ destructive
acts but are hostile to destructive instructions contained in wills because of the view that only living owners will suffer the consequences of their acts, and it must (almost by definition) be in their interests if they (provided they are sane and rational) choose to do so. The act of forgoing the best market value of a future interest in one’s property which the owner or her descendants would otherwise enjoy provides evidence that she genuinely cares that her organs be disposed in and with her dead body.

As Strahilevitz argues, such a rule “might serve an educational function for potential donors and their heirs ... and help society differentiate between those who sincerely want their cadavers to remain intact and those whose preferences are weak or driven by the default [consent] rule.” (p. 852) A possible social disadvantage, which Strahilevitz does not consider, is costs that might be imposed on individual owners. The owner might be required to pay for marketing the interests—including health tests to demonstrate the value of the future interests—if the futures market is filled by many insincere sellers. That could be the price to pay for having one’s symbolic or expressive interests respected in a property regime for organs.

CONCLUSION
Price remarks that “It is not necessary for such items [human tissue, including solid organs] to be treated synonymously with other inheritable personal property” (p.295) if a society were to shift to a property regime for bodily material. Nevertheless such rights can and perhaps ought to be part of the property regime to protect individuals’ wish to leave at least something of value to their family, and also to protect the family’s interests in the organs. The consideration of organs as inheritable property can be taken as a reductio ad incommodum, to show the potential unpalatable results of advocating bodily ownership as property ownership. Or, it might be taken as plausible and pragmatic, for those who want to maximise the use of organs in the dead. We have no issue with readers taking either perspective, and only aim to provoke thought on how far one is committed to rejecting body exceptionalism in arguing for body parts as tradable property.

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