

"Ethical Aspects of Owning Human Biological Material"

by
Barbro Björkman

1. Introduction

When discussing ownership a clear distinction needs to be made between a legal approach and a philosophical one. This contribution is about ethics and it focuses on the moral rights we may, or may not, have to biological material both from our own body and other people's bodies. The purpose of an ethical discourse on property rights is to contribute to the discussion on how such rights should ideally be constructed in a legal system. The actual implementation of ethical principles in law gives rise to a number of more technical legal claims that will not be covered here.

Most people believe that they have a reasonably clear grasp of what is meant by ownership. By and large it would be the type of relationship one has to one's shoes or one's computer, i.e. an all-or-nothing approach to property rights. This entails that a legitimate owner has a full set of rights with regards to the object, the right to rent it, sell it, destroy it, and so forth. The only real limitation would be the violation of the rights of another. This might well be true in an everyday sense of the word but if we opt for that definition it becomes quite difficult to account for immaterial objects such as patents and copyrights. In those situations there are several parties with vested interests who all have different types of rights with regards to the object. One such example would be this text – being the author the copyright belongs to me at the same time as you, the reader, might own the very copy of the book you are holding. Another challenge to such a take on what it means to own something is posed by the type of biological material which cannot be shared between different users. This type of goods are called rivalous and good examples are most of our organs e.g. livers, kidneys and hearts. Traditionally the rights we have to such types of biological material take a different form than property rights. They are considered inalienable - or simple - rights and are legally impossible to part with. Yet, organ *donation* is not only allowed but seen as highly praiseworthy. It appears that our relationship to organs such as parts of the liver, a kidney or a section of a lung indeed is such that they might be given up under certain circumstance.

The nature of property in biological material is a highly contested topic and intense debates on issues ranging from national DNA-banks to organ selling are flaring up all over the globe. Who has the right to what and under what circumstances? The practical as well as the philosophical importance of the matter can hardly be overestimated as seen in cases like e.g. John Moore vs. The Regents of the University of California.¹ John Moore was diagnosed with leukaemia and a number of samples were removed from his body by the doctors at the UCLA Medical Centre. After years of tests and treatments it was revealed that the doctors (without seeking Moore's informed consent) not only had performed extensive research on the samples and cultivated a cell-line, but also had patented the latter in a joint venture with the University of California.² An infuriated Moore sued both the doctors and the hospital. Arguing that he had been robbed both of his just property and his dignity he sought compensation. The Supreme Court of California, however, was not convinced. It ruled that Moore could not be said to legally own the biological material after it had been removed from his body and furthermore that the patented cell-line was so different from the original sample that he could not possibly have any property claims over it.³

As even the briefest introduction to the philosophical underpinnings of the concept of ownership reveals, we are struggling with quite a perplexing matter. (See 1.2 below). The example above highlights several of the questions at hand - what does it mean to say that we own our bodies, and moreover which moral rights and obligations would follow from such a position? This thesis presents an approach to property in biological material which is subtle, yet powerful, enough to account for these different types. An additional dimension is of course whether or not these relationships really ought to be labelled *ownership* at all or if that only creates more confusion given the manifold interpretations of the term.

1.1 Aim and scope of the thesis

In light of the problem outlined above the aim of this thesis is to develop a theory capable of doing more than to simply determine whether or not a certain person owns a particular object.

¹ John Moore vs. The Regents of the University of California, Supreme Court California. 51 cal. 3d 120, 793 P.2d 479, 271 Cal. Rptr 146 (1990).

² Patent US 4 438 032.

³ The violation of integrity and the lack of informed consent aspects were settled out of court.

As shown by the Moore example analytical tools which can determine the exact nature of the property right in question are required if we are to deal successfully with practical bioethical problems about rights to biological material.

One possible answer can be found in a strand in liberal political theory which treats property relations as socially constructed bundles of rights. It seems to me that such a many-faceted approach to ownership is more apt at capturing the problem at hand. It facilitates a constructive and nuanced debate with regard to the ownership of biological material, in particular those types which would involve immaterial rights, e.g. a cell-line cultivated from stem cells. Once this base is established it is possible to move on to other deeply challenging questions such as commodification and commercialization of biological material.

1.2 Two traditions regarding property rights

In the broadest sense there are two major, rival, schools of thought in political philosophy with respect to property rights. Whereas the first is generally referred to as the natural rights theory the second lacks an established name. In the essays included in this thesis I have, however, referred to it as the social constructivist theory of property. For example, I choose to call Felix Cohen's view a social constructivist theory of ownership since it stipulates that ownership is the result of a series of social choices and processes that could well have been different. This standpoint can be contrasted with the natural rights theory of ownership, according to which ownership is based on rules that are independent of social choices and conventions. It follows from the social constructivist account of property that society is free to choose the system of property rights which best promotes social good. Indeed, according to this view it is one of the chief tasks of any government to issue positive laws that create and define ownership.

Natural rights theorists tend to think of property as a relation between the owner and the owned object.⁴ In the Lockean, and perhaps most traditional, sense natural rights theory claims that the right to own is God-given. Greatly simplified the argument is the following: Man has an obligation to God to preserve His creation (including ourselves). Our chances of being successful in this venture are thought to increase greatly if we are

⁴ For a traditional account see for example **Locke J.** *Two Treatises of Government*. UK, Orion publishing group, 1993.

allowed to secure exclusive rights to land and other goods. Without this possibility to private ownership we would be far more likely to fare badly, starve and miss out on the good in life. On this account ownership precedes, and is indeed a precondition for, the state. The primary role of the state is to create and uphold laws which safeguard the right to private ownership. To exchange part of one's freedom in return for security in this manner is assumed to be in the best interest of most people and thus the choice that rational individuals would make. There are also numerous modern proponents of the natural rights theory, although their accounts tend to be secular. A prime example would be Robert Nozick, who in his groundbreaking *Anarchy, State and Utopia* presented a theory of rights rooted in a libertarian framework.⁵

Although the natural rights account provides criteria to determine whether or not a certain person legitimately owns a particular object, it lacks the power to determine the exact nature of the property rights in question. Property in biological material can take very different forms, from patents and other forms of intellectual property to traditional ownership of material objects. Because of this I argue that we require an account of property that is better equipped than traditional natural rights theory in the sense that it can provide guidance about the appropriate form of property rights.⁶

In a famous essay Felix Cohen (1907-1953) elaborated on the social constructivist approach to property.⁷ On this view, property rights have their origin in the law and historically laws express the interests of those who write and promulgate them. Ethically, on the other hand, the merits of any law or legal arrangement should be judged according to how well it promotes the good life for those affected by it. Felix Cohen pointed out that for a detailed analysis of the nature of property rights, it is more useful to perceive them as sets of legal relations between the owner and the non-owners of an object. A persons' ownership of a piece of land includes rights which entitle her or him to exclude others from entering the land, rights to charge them for doing so, rights to sell the land and so forth. On this view, ownership is made up of a bundle of relations between the owner and the non-owners. Although Cohen developed this account of property rights in a utilitarian tradition this does not in any way imply that it does not fit in with a virtue ethics framework for example. As mentioned above the gist of the social constructivist

⁵ **Nozick R.**, *Anarchy, State & Utopia*, UK, Oxford; Blackwell Publishers, 1974.

⁶ This argument is expanded on in Essay I.

⁷ **Cohen F S.** Dialogue on Private Property, *Rutgers Law Review* 1957;9:357-387.

idea of property is that ownership is to be arranged such that it promotes social good. There is no reason why this cannot be specified as virtuous behaviour rather than economic incentive for example. Several proponents of the social constructivist theory of ownership have provided a systematic account of the components of the bundles of rights that constitute ownership. The most famous of these so called dimensional analyses is Tony Honoré's list of eleven legal relations that he considers to be the major components that make up ownership.⁸ Some examples of central components would be: the right to possess, the right to use, the right to income, the right to capital, the right to security and the instance of transmissibility. Interestingly the list also includes components that are negative for the owner such as a duty to prevent harm and a liability to execution. In other words this is an account not only of the owner's rights but also of her or his obligations. Note, however, that the rights and obligations that make up the bundle vary depending on the nature of the object in question. Honoré emphasised that some combinations of less than eleven components are sufficient for full ownership.

1.3 Preview of Essay I-III

Essay I. The first essay of this thesis, called "Bodily Rights and Property Rights", was written in collaboration with Sven Ove Hansson. The article discusses ownership of biological material from a philosophical perspective drawing on the work of e.g. Felix Cohen and Tony Honoré. Whereas previous discussions on ownership of biological material have been much informed by the natural rights tradition, insufficient attention has been paid to the strand in liberal political theory, represented by Felix Cohen, Tony Honoré and others, that treats property relations as socially constructed bundles of rights. In accordance with that tradition, we propose that the primary normative issue is what combination of rights a person should have to a particular item of biological material. Whether or not that bundle qualifies to be called "property" or "ownership" is a secondary, terminological issue. We suggest five principles of bodily rights and show how they can be applied to the construction of ethically appropriate bundles of rights to biological material. The first principle stipulates: No material may be taken from a person's body without that person's informed consent. The second: Under conditions of informed consent, removal of bodily material is allowed as a means to obtain significant therapeutic advantages for the person herself. The third: Under conditions of informed

⁸ Honoré T. Ownership. In AG Gueast ed., *Oxford Essays on Jurisprudence*. UK, Oxford University Press, 1961.

consent, removal of bodily material is allowed as a means to obtain significant therapeutic advantages for one or several other persons, provided that the removal does not cause serious or disproportionate harm to the person from whom the material is taken. The fourth: If there is a significant risk that a certain practice in dealing with a biological material will result in exploitation of human beings, then that practice should either be disallowed or modified so that the exploitation is brought to an end. The fifth, and final principle is: The system of legal rights should promote the efficient distribution of biological material for therapeutic purposes to patients according to their medical needs.

Essay II. The second paper, “Different Types – Different Rights”, should be regarded as a stand-alone continuation of *Essay I*. Drawing on the social construction theory of ownership in biological material this paper discusses which differences in biological material might motivate differences in treatment and ownership rights. The analysis covers both the perspective of the person from whom the material originates and that of the potential recipient. Seven components of bundles of rights and their relationship to various types of biological material are investigated, drawing on the analytical tradition of Tony Honoré. To exemplify these categories the cases of a heart, a kidney, stem cells and hair are used.

In the essay the term “biological need” is used. This is of course a charged concept with many a connotation, and any detailed analysis is far beyond the scope of both the essay and the thesis. In spite of all this I have decided to use this term and by it I mean those needs that are related to the biological functioning of our bodies. This would then include the physical need that every living human being has for a heart, a liver etc. Practically speaking, these are needs that human beings have under all, or nearly all, social conditions. Admittedly it may not be possible to draw a sharp line between biological and other needs but none the less there appears to exist a common sense understanding of what a biological need is. It should be noted, however, that I do not wish to say that all biological needs are equally important.

The paper reaches the perhaps somewhat surprising conclusion that the higher the biological need of an e.g. organ the fewer are the rights attached to it. On the surface this may well appear counter intuitive. Should we not enjoy very strong rights with regards to biological material which literally means the difference between life and death? A

possible explanation could be that the lawgiver tries to protect us by not giving us those rights as we might use them to our disadvantage, and as a result suffer loss of organs and other types of biological material.

Essay III. In this article I chose a virtue ethics approach seeking to explain why we are morally allowed to donate but not to sell our organs. Virtue ethics has gained popularity in recent years and I wanted to investigate if the theory would prove apt at explaining complex issues in bioethics. I argue here that virtue ethics can be action guiding in the sense that it is clear what decision a virtuous person would reach when faced with the choice between donating their organs for free or giving them up conditioned on a price. Further to that point it is concluded that donating organs will bring us closer to a state of flourishing as it implies that we act in accordance with several of the virtues as listed by Aristotle when we refrain from monetary compensation in these instances.

For obvious reasons it is always intellectually risky to try to apply an ancient analytical framework to a modern situation. Pulling only a small set of ideas from a whole school of thought, spin them and then plug them into a different context might well amount to little more than a distortion of the original ideas. Still, this is what I chose to do. I did it because I am convinced that Aristotle's work, although many of his ideas seem strange to us, reveals a deep insight into morality which is as relevant today as it ever was.

2. Where to go from here

A natural continuation of this project would be to explore the possibility of virtue ethics as a theory for social construction of rights. Virtue ethics is an intriguing and appealing ethical approach in general but it also appears to be capable of explaining complex issues in bioethics in a manner that corresponds to most peoples' well-considered moral institutions.⁹ Drawing on this thesis I shall attempt to sketch a link between virtue ethics and the social constructivist view of ownership.

Virtue ethics has its origin in ancient Greece where it was developed by thinkers like Aristotle, Plato, and Socrates among others. They were primarily interested in studying and elaborating on the virtue – the driving force – rather than looking at the action as

⁹ A capacity which presumably is an asset to any moral theory.

such. Very broadly speaking they approached ethics by asking ‘what traits of character makes one a good person?’, which stands in stark contrast to the core question asked in most modern moral theories, i.e. the normative ‘what is the right thing to do?’. Virtue ethics is thus concerned with what kind of persons we should be, what kind of characters we should have, and from that it then follows how we should act. As a result the theory holds that (fully) virtuous persons can never be said to act wrongly in the sense that they cannot commit moral failure. They can, however, be compelled or ignorant and thus make mistakes. Traits or qualities we are born with do not qualify as virtues. Virtues have to be things that we can train ourselves to achieve, or learn through proper upbringing and education. There is an element of strife and hardship here - we work on and hopefully improve our characters as we go through life and little by little we become better, i.e. more virtuous, people. We learn practical wisdom – the ability to deliberate – and the virtues or excellences.

Virtue ethics gained a renewed momentum in the latter half of the 20th century. It is often suggested that the virtue ethics project was resuscitated by Elizabeth Anscombe in 1958 when she wrote her well-known article “Modern Moral Philosophy”.¹⁰ Her contribution marked the beginning of what is referred to as “the aretaic turn” in moral philosophy – essentially a return to the ancient emphasis on human excellence and virtue. In the text she attacked the concept of moral law (central to most ethical theories e.g. utilitarianism and Kantian ethics) by questioning how there could be said to exist an objective moral law at the same time as it was argued that there was no lawgiver, i.e. no God. This is a core problem in secular ethics – where does the moral law come from? Is it something we all agree upon? Does right and wrong exist independently of us? Is it culture independent? Anscombe claimed that the whole idea was non-sensical and called for a return to the Aristotelian approach seeking to leave the focus on duty, rightness and obligation behind.

Although virtue ethics is primarily occupied with what kind of person one ought to be, that is not to say that it is incapable of competing with e.g. utilitarianism as a theory of the right action. It is indeed central to the argument I would like to make that virtue ethics can, and should, be action guiding. Rather than saying that virtue ethics is unable of living up to the demands of a comprehensive ethical doctrine and thus needs to be supplemented by another theory of the right and wrong action, I believe that a strong

¹⁰ **Anscombe GEM.**, Modern Moral Philosophy, *Philosophy*, JA 58; 33; 1-19.

case can be made that virtue ethics can be an action guiding, stand-alone theory. Having said that, virtue ethics does not (at least not in its modern form) easily lend itself to clear-cut theories for social organisation. In the following I shall attempt to sketch a very brief account of what seems to me a possible way of connecting virtue ethics and a modern view of property rights.

It does not necessarily follow from the belief that people ought to be virtuous that society should facilitate or encourage such behaviour. According to Aristotle, however, there clearly is such a connection. “It is evident that the best politeia is that arrangement according to which anyone whatsoever might do best and live a flourishing life.”¹¹ In modern times we have, on the other hand, witnessed a call for the neutral society partly as a result of liberal political ideas gaining popularity. It is argued that in order to open up for individual choices what is seen as state coercion has to be kept to a minimum, a conviction which does not sit well with the Aristotelian priority of the good.¹² That said there are contemporary proponents of virtue ethics as an appropriate theory for social construction. One of these is William Galston who advocates not only the compatibility of liberalism and virtue theory but also that “...liberalism needs an account of goods and virtues that enables it to oppose the extremes of both unfettered individual choice and unchecked state coercion.”¹³ Further to this point he argues: “Sustaining these institutions [of the liberal society] and practices, in turn, requires of liberal citizens specific excellences and character traits: the liberal virtues. These virtues are by no means natural or innate. Liberal communities must, then, be especially attentive to the processes, formal and informal, by which these virtues are strengthened or eroded.”¹⁴

A way of linking virtue ethics to social organisation is to shift the focus to rights; an example would be Rosalind Hursthouse’s argument that the construction of the just society (to be understood as the properly functioning society) is prior to rights - that ethics is prior to politics.¹⁵ Hence, the starting point should be eudaemonia and the rights (as codified e.g. in laws) in the just society should be those rights which allow the

¹¹ Aristotle, *The Politics*, 1323a 14-19.

¹² Nussbaum M., “Aristotelian Social Democracy”, in R. Douglass, G. Mara & H. Richardson (eds.), *Liberalism and the Good*, Routledge 1990, pp. 203-252.

¹³ Galston W., *Liberal Purposes*, Cambridge University Press 1991, pp. 258-259.

¹⁴ Galston W., *Liberal Purposes*, Cambridge University Press 1991, pp. 18-19.

¹⁵ Hursthouse R., “After Hume’s Justice”, *Proceedings of the Aristotelian Society* 91:229-245, 1990-91, pp. 229-245.

members of that society to achieve a state of eudaemonia. Taking the cue from G. E. M. Anscombe's papers on rights, promises and justice, Hursthouse champions a eudaemonia-based account of rights and the just society, thus rejecting the priority of the right in favour of that of the good.¹⁶ Anscombe calls rights 'naturally unintelligible', since "a right is not a natural phenomenon that can be discerned and named as a feature found in some class of creatures by, say, a taxonomist."¹⁷ Pushing for an analytical understanding of what a right is Anscombe uses a certain set of stopping modals, i.e. "a set of 'you cannots' which surrounds, fixes and protects a 'can' on the part of the one who is thereby said to have a right".¹⁸ These stopping modals work as linguistic instruments designed to teach us how to react in different situations and to follow rules. One of Anscombe's own examples is when a child is told that it cannot do x, e.g. not cheat when playing a board game, although it is obvious to the child that s/he is perfectly able to physically do x. On this view all rights, promises, rules etc. are prescriptive in the sense that they are based on custom and as a result they are naturally unintelligible.

Hursthouse takes the idea one step further and writes "The logically prior concept is that of a properly functioning society; justice is then specified as the virtue or excellence of such a society, and the laws of justice as those which are in place in such a society; and rights come last, as those things which such laws establish as mine and thine (and ours and theirs). This is the point of saying that a right is 'naturally unintelligible'; it is intelligible (only) via the concept of a law or convention (nomos)."¹⁹

The above is in no way seeking to give an exhaustive account of whether or not society ought to be organised in such a way that it promotes, or encourages, virtuous behaviour. However, I hope to have made the point that there are sensible ways to construct a eudaemonia-based view of social organisation. Looking at the pace at which biotechnology is developing one cannot help but suspect that the ethical questions will not become easier or fewer in between. Quite on the contrary it seems reasonable to assume that bioethics, and with that hopefully virtue ethics, will come to play an even bigger role in the future

¹⁶ **Anscombe GEM**, *Ethics, Religion and Politics*, Blackwell Publishing, UK, 1981.

¹⁷ **Anscombe GEM**, *Ethics, Religion and Politics*, Blackwell Publishing 1981, p. 138.

¹⁸ **Anscombe GEM**, *Ethics, Religion and Politics*, Blackwell Publishing 1981, p. 145.

¹⁹ **Hursthouse R.**, "After Hume's Justice", *Proceedings of the Aristotelian Society* 91:229-245, 1990-91, p. 235.

References

- Anscombe GEM.**, Modern Moral Philosophy, *Philosophy*, JA 58; 33; 1-19.
- Anscombe GEM.**, *Ethics, Religion and Politics*, Blackwell Publishing, UK, 1981.
- Aristotle**, *The Politics*, 1323a 14-19.
- Cohen F S.**, Dialogue on Private Property, *Rutgers Law Review* 1957;9:357-387.
- Galston W.**, *Liberal Purposes*, Cambridge University Press, UK, 1991.
- Honoré T.**, Ownership. In AG Gueast ed., *Oxford Essays on Jurisprudence*. UK, Oxford University Press, 1961.
- Hursthouse R.**, “After Hume’s Justice”, *Proceedings of the Aristotelian Society* 91:229-245, 1990-91, pp. 229-245.
- Locke J.**, *Two Treatises of Government*. UK, Orion publishing group, 1993.
- Nozick R.**, *Anarchy, State & Utopia*, Oxford; Blackwell Publishers, 1974
- Nussbaum M.**, “Aristotelian Social Democracy”, in R. Douglass, G. Mara & H. Richardson (eds.), *Liberalism and the Good*, Routledge 1990, pp. 203-252.

