COMMENTS ON "THE BODY AS PROPERTY: ETHICAL ISSUES" BY RUSSELL SCOTT

by

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Introduction

When these remarks were delivered at the ASLP Seminar in September, they were received with a torrent of abuse, the burden of which was, roughly, that the specific recommendations to be found in the second half of the paper do not follow from the principles expressed in the first.

Since in the first half I argue that in all probability more than one principle should govern the legislator, while in the second half the implications of just *one* principle, that of personal autonomy, are explored, the complaint seems to be singularly ill-considered.

Not only does the principle of autonomy stand to be corrected, modified, or limited, by other principles, but also, where it does properly dominate among relevant considerations, its application to particular cases is not a mechanical matter The question of the right to dispose of one's own corpse is such a case.

In a short reply to someone else's paper I did not spell this out explicitly, using instead the tentative vocabularly of "seems" and "in my view" to cover the situation To signal that there is room for doubt in the application of principle is not to opt for "rhetoric", as critics claimed.

In this whole field of bodily integrity, the position I would have developed had I been the presenter rather than discussant of a paper, would argue that the principle of autonomy holds

a central place in this sense: its consequences have a *prima facie* claim to be adopted, and the onus of proof lies with anyone proposing that they should be departed from. Such proof would have to point to other principles and show that they have a prior claim in particular circumstances on particular substantial grounds. Nothing that was said in the discussion at the seminar was sufficient to establish so much.

The Body as Property: Ethical Issues

Mr. Scott's paper ranges over a wide field and touches on many of the most problematic issues in an area by no means short of new dilemmas. From them, I have chosen these four: whether law reform needs a philosophy to sustain it, the scope of integrity and autonomy, what conditions should be placed on transplantation and questions of surrogate parenthood.

1. Law Reform and Philosophy

Must Law Reform consist in applied philosophy? That is, can proposals for improvement in the law be responsibly made except insofar as the proposals stem from the recognition of a valid principle whose expression under existing law is inadequate? Mr. Scott's answers to this question are equivocal. Such an approach is undeniably desirable, yet he is uncertain as to its utility, doubtful about its practicability "in our community", and he suspects that the use of a single principle in all circumstances may not be suitable, or even possible. (This is all on pp. 40-41)

This indecision has the effect of making his commitment to personal autonomy and individual freedom appear more arbitrary, more personal and less open to justification than need be. Law reform does and must rest on principle and this is not such a questionable matter as it is made to seem in the discussion in the paper.

In the first place, law reform is a matter of improvement. In this context 'reform' is an honorific and the recognition of the need for reform, the reference of issues to a law reform agency, is an admission that the laws in their present state do not adequately embody the values which the law is required to sustain.

So law reform is not mere change in the law, it is change *for the better*. And what makes change not mere change but improvement is its relation to principle. A purely pragmatic conception of law reform reduces it to mere change, or perhaps, change to a condition in which it satisfies more influential elements in society. Law reformers strive for something more important than *de facto* acceptability. They seek acceptability on the ground of real advance towards more perfect justice. In other words, advance towards a better fit with sound principle.

However, in the second place, it does not follow from this that one single general principle does, can, or should govern every development of the law. It is on the fact of it unlikely that society should be so conveniently simple. Jurisprudence may very well need several irreducibly distinct principles. Principles which are distinct are not therefore always in conflict. Mr. Scott introduces two plausible ones in his discussion: the negative principle, of great importance, that the individual is not primarily a social debtor (which has wider ramifications than its positive counterpart, the principle of preserving personal autonomy, when it comes to taking organs from the dead, for example) and the principle that exploitation of the weak should not enjoy the countenance of the law.

To operate with several principles is not to *compromise* any of them in any disgraceful sense. They must be accommodated to one another to yield the best joint outcome. Can this accommodation be itself conducted by reference to principle? No. How then is it to be done? As best we can. The making of mutual accommodations between *desiribilia* which in some cases point in opposite

directions can not be a mechanical matter. Framing the laws was not meant to be easy. But this by no means implies that it is a pragmatic, or haphazard or in any way an unprincipled process.

A third consideration suggesting a smaller role for principle and a larger one for pragmatism is our contemporary *pluralism* as a society. Not only does each law reformer operate in accordance with several principles which do not always sit comfortably together, but different law reformers may be operating with at least partly different sets of principles, or with principles similar enough in themselves, but accorded different priorites by different participants in the process of recommending legal developments. Since good government's role is to conciliate as many as possible of the interests represented among its citizens, the government's impulse is always to seek a consensus to which most can subscribe. This process of seeking a consensus among distinct, principled visions of the law's best path forward may indeed be a pragmatic and compromising one. The search for consensus is, however, a distinct, practical issue quite different from the theoretical issue of how the laws should be framed to best recognise the moral principles to which they should give expression.

Mr. Scott's dominant guiding principle in his deliberations over these matters of life and death has been, and is, the preservation of the autonomy and integrity of the person. I am so emphatically in agreement over this that I would like to see this principle displayed as something more than an optional, or even *ad hoc* notion, which his modesty has made it appear. Social institutions, such as the law, are not of value in themselves. They are means whose value lies in their serviceability for human persons. If there were no human persons there would, of course, be no law, but this would not matter one iota. It is on account of the people which it benefits that the law is of any value. And further, the value which is peculiar to human beings lies in their being persons, that is, in their capacity to understand themselves as beings with a history and a present condition and a future to be shaped, in

their capacity to form projects and carry them through, in their capacity to think, create, strive, share and love.

Now these capacities of the full human person cannot emerge, cannot reach and sustain their proper measure, *except* on the condition of a generous autonomy. To shackle, hobble or frustrate human beings is to put obstacles in the way of their personhood. And that is to sabotage their distinctive human value. Hence it is no arbitrary, whimsical or optional matter whether or not the law seeks to maximise autonomy. Any other course runs counter to the greatest value the law can have, which is to foster human personhood. And it is too modest to claim that this "naturally leads to a belief in the entitlement of persons" to informed consent in circumstances of bodily invasion. Such a conclusion is a mandatory, not a merely natural, consequence.

When our themes are of such intimacy and such moment as the fate of our bodies, autonomy and integrity take an unchallengeable first place in our deliberations.

2. The Scope of Bodily Autonomy

Our bodies are, or should be, our own. They are the only ones we've got and, according to many of the best authors, including Mr. Scott, we don't have anything else to make us who we are. ("A human body before death" is another way of describing a living person. p. 48.) It follows that no one else should be in a position to dispose of us while we live. No slavery, no forced transplantations or transfusions from us, no obligatory child bearing and so forth. Straightforward enough.

But what about the other side of this coin? Are there any limits to what we can do to ourselves? Are there any moral restrictions on self-disposal? The existing law is inconsistent here: it is unlawful to sell oneself into slavery, however willingly. Yet it is not unlawful to suicide, which seems an even more radical reduction in one's scope for autonomous personal

life. Self mutilation is an offence in military but not in civil law. Alan Donagan, in his book *A Theory of Morality* reminds us that despite the notorious passage about plucking out offending eyes (and such like) self mutilation is an offence against divine law in its Christian version.

Such a view is *consistent* with the principle of autonomy. That no one else may do such and such to you is compatible with no one at all, not even yourself, being permitted so to do.

That we hold a veto over what others do to us does not of itself confer a licence on ourselves. But it seems to me that the law should not restrict self-disposal. People should so value themselves that self-mutilation is not a problem, but that is not itself enough reason to attempt regulation.

When we consider the possibilities of commercial traffic in body tissues we need to keep clearly before our minds the distinctions Mr. Scott makes in his book but has not expanded on here: there are crucial distinctions between tissues which regenerate, such as blood, marrow or hair, and those which do not. Then among the non-regenerating, we have the vital (kidneys) and the non-vital (fingers). Among the vital are those which are paired (kidneys) and those which are not (heart).

If we decide commercial transactions are undesirable to the point of legal prohibition, the best way, in my opinion, is to make it an offence to perform the operation in question, since this appeals as the most effective point to attempt control. Transplantations of non-regenerating organs from the living would be permitted only for paired, vital organs: paired so the donor survives, vital so the recipient really needs it. Such a rule would provide some protection for the bullied and exploited. Regulations to ensure that consent is genuine would provide more. A set of scale prices might help too.

Autonomy and the dead

Mr. Scott holds (p.43) that there is no reason from the point of view of autonomy why persons should be empowered to determine the disposal of their own corpses. We allow, within limits, that the will of the deceased should determine the disposal of his or her property. Should the body not be the property of the former person whose body it was, to be disposed of according to that person's direction? My view is that no one else should ever own us or our corpse. People should not be others' property and should not become others' property merely by dying. This applies to the next of kin as much as any one else.

Indeed, I think it should apply to next of kin more than to anyone else, since they are the very people most likely to fall into habits of thinking of us in a proprietorial way while we live. And our next of kin are the very people we are tempted to make proprietorial attempts upon. As property attitudes are so contrary to autonomy among the living, they should not get any posthumous countenance.

What moral issues are there in the question of disposing of the dead? What is essential is for the bereaved to be able to honour and take leave of those they have loved. This is an essential element in the grieving process. It is an assault on the autonomy of the bereaved to frustrate this process and I think this is why what are felt to be disrespectful or improper ways of treating corpses generate such outrage.

There is a real danger, in my view, of the enthusiasms of transplant surgeons breaking in on the leave taking process. It would not be a good thing even if we did get used to it, to be offhand with the collection of useful spare parts which a corpse can now become. For our treatment of the dead is one index of the value we put upon the living.

Consignment to recycling should be an alternative to burial

or cremation at the option of the person in question. It should occur *after* a funeral ceremony. Let the technicians solve the problem of the delays involved.

3. Conditions for Transplantation

Transplantation may be a transitory phenomenon. That is, artificial devices may be developed which can perform the functions of all transplantable tissues. On that happy day our present problems will disappear. Meanwhile, transplantation is likely to increase in frequency and extent. (To my alarm, Mr. Scott mentions a partial brain transplant in animals. Suppose we learn to transplant A's brain from her hopeless body into B's dead but otherwise superb one? Suppose A is a woman and B was a man. Is the result A transformed or B revived? I postpone the question.)

Mr. Scott, both in his book and again in the paper, mentions the large and unsatisfied demand for transplant organs and seems to suggest that this in itself goes at least some way towards validating measures to increase the supply. In my opinion, this would be a most dangerous error. Especially when we are dealing with the vital non-regenerating organs, where the shortage is most severe and the demand most desperate. The ill do not, because they are ill, thereby get a claim on any one else's body parts. Life is not to be prolonged at the cost of invasions of autonomy.

There is an ethics of receiving as well as one of giving. What Mr. Scott calls "peremptory" measures, whereby hospitals are authorised to use the parts of corpses in the absence of consent are on the edge of acceptability. In circumstances when the possibility of consenting is properly provided for, peremptory measures should be disallowed.

Consent is the key. There is no moral objection to organising consent on a "contracting out" basis, rather than a "contracting in" one. But it is always a dubious business to take silence for

consent. And it is not necessary. The driving licence is so nearly universal a document, especially among the most suitable donors, (young traffic accident victims) that it can be used. Just as we answer a question about spectacles, which we can answer Yes or No but must answer and the answer appears on the issued licence, so we could be required to answer, whichever way we choose, the question of our willingness to donate organs no longer of any use to us. And the answer could appear on the licence.

Consent, to repeat, is the key. But the law has most unfortunately pitched the age of consent too high, at 18. Mr. Scott plainly agrees on this point (p. 50). Fourteen is, if anything, on the high side. Fourteen year olds are certainly capable of understanding and consenting to organ donation; let alone donation of regenerating tissue. The consent of parents or guardians of minors would provide a safeguard against folly.

There are, of course, problems about full, free, informed and unconstrained consent and problems about improper pressure, either commercial or within a family. But the law is already equipped to deal with these.

4. Separating Different Aspects of Parenthood

We already have surrogate fathers, in the sense of the AID genetic male parent. We face the prospect of surrogate mothers with the new surgical skills of ET, which are already routine in stockbreeding.

There are two different forms surrogate motherhood can take. The first is directly parallel to AID. An IVF embryo with genetic mother P is implanted in woman Q who bears, and then rears, the child. The second form, which takes the name 'surrogate motherhood' in most discussions, has Q bear the child which is then returned to P to be reared as her own. A variation on this can have Q bear for P a child whose genetic mother is some third party R.

What gives rise to problems in these cases is the recent possibility of dividing up the classical parenting process, among different parties, so that it need not be the same person who conceives, bears and rears the child. All three elements can now be separated. With this division possibilities of conflict arise and problems of the appropriate rights for the various parties, parent and child, involved.

We already have well developed mechanisms for a comparable situation in the law of adoption. The surrogate parent situation differs because *one* parent can be both natural and social parent, while with adoption neither normally is. But a couple can adopt one spouse's children by another partner.

In my view, the adoptive model is a good one: the social parent should take precedence over the genetic one in all respects. To offer sperm for AID is to thereby relinquish claims of paternity. To be the husband agreeing to an AID pregnancy is thereby to undertake all social parental responsibilities. Inheritance should go by social, not natural, descent. Authority over the child should be social, not natural. Surrogate parents' rights should be the same as natural parents of adopted children.

The surrogate mother introduces a new complication in this sense: she is not natural, i.e. genetic parent, but she does bear the child. As this is a less close connection than the natural mother with her afterwards adopted child, there seems no case for according the surrogate mother more rights. Surrogate motherhood can be treated, so far as this side of things is concerned, as a pre-arranged adoption. The fetus could have the same legal relationship to its future social parents as a natural fetus in a normal pregnancy.

That women should be able to act as surrogate mothers seems to follow from their autonomy. That they should be able to do it commercially also seems to me to follow. For some women, child bearing is their greatest talent, the very thing they do best and

like doing best. Why should they not make their living by it?

It may turn out that it is only acceptable to women in desperate circumstances, or that the wrench of parting with the child is often extremely painful. That is, it might be that consent to surrogate motherhood is seldom genuine because not fully informed and unconstrained.

In that case, the proper remedy is to mend the desperate circumstances and take great care over the question of full understanding. The case suggests that surrogate motherhood should be, not illegal, but confined to women who have already born children and do know what to expect.
