

A Kantian Argument for a Duty to Donate One's Own Organs. A Reply to Nicole Gerrard

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ABSTRACT Nicole Gerrard is right to criticize Munzer for not connecting a person's dignity to the "capacity to exhibit humanity by acting rationally". However, connecting these does not mean that they are one and the same concept. Gerrard fails to make two distinctions that are decisive in the context of Kant's ethics. First, she does not distinguish between vital organs, integral organs and mere "accumulations", each of which requires a specific moral argument. Second, she does not distinguish between human rational nature in itself, or the capacity to have free will, and the possibility of acting rationally, or freedom of choice. Having drawn these distinctions, I argue that Kant's own principles fully allow certain kinds of organ transplants such as blood, skin and marrow transplants from living bodies as well as the transplantation of both vital organs and essential organs from fresh corpses. In fact, Kant's own moral principles should make of these an enforceable duty of right. Unlike Gerrard, then, I think that the question of whether or not donors should be paid — and the patient should pay — is a key issue even in a Kantian context.

It is no wonder that Kant has become attractive again in the last two decades, in bioethics as well as ethics in general and political philosophy: he represents the main historical reference for an alternative to utilitarian ethics. In ethics and political philosophy, as in bioethics, Kant's principles of ethics are typically invoked in order to put forward strict restrictions on what should be allowed. In the case of organ transplantation, Kant is often cited in favour of a prohibition of all organ sales. In her article, Nicole Gerrard [1] goes a step further and argues with Kant in favour of a ban on all organ transplantation, on the ground that it is an affront to human dignity. I disagree with her for the following reasons.

First, Gerrard seems to be obviously right: Kant expressly forbids not only the sale but also the voluntary donation of one's own organs, even if this donation is obtained without any coercion or even friendly pressure applied upon the seller or the donor. Also true is that Kant considers that one does not own one's own body, which means that there is a duty of self-conservation. Of course, this duty is not absolute, but needs to be qualified. More precisely, it does not extend to a right to throw other people from a lifeboat in order to save one's own life [2]. Kant limits the duties and rights resulting from the duty of self-conservation to the duty to protect oneself against illegitimate threats and the duty not to harm one's own body. I say 'illegitimate threats', because Kant explicitly advocates castration in some cases of sexual offence [3] and the death penalty in case of murder [4].

However, it seems to me that Nicole Gerrard fails really to explain and nuance Kant's prohibition.

She is right to criticize Munzer for not connecting a person's dignity with the "capacity to exhibit humanity by acting rationally" [5] and morally. Again, she is right when she quotes Kant: "[...] we cannot make use of our freedom except through our bodies" [6]. But unfortunately, she does not strictly distinguish between these two points, but instead deals with them as equivalent throughout her article. She fails to distinguish the capacity to decide rationally and morally from the capacity to act this way (Kant calls the terms of this distinction respectively intention and act). Consequently, she does not really answer Munzer, who argues against the Kantian prohibition of organ transplantation by accusing Kant of committing the fallacy of division because "[...] even if a living body is an entity that has a rational nature and a capacity to act on principles, it does not follow that parts of that body are such entities" [7], so that the prohibition of suicide does not imply the prohibition of organ transplantation. Gerrand does not really answer Munzer, because, in what she says, all one needs in order to be free is a body, but this does not necessarily mean a "complete" body, with all its members and teeth. Gerrand does not give the correct explanation for Kant's prohibition of organ transplantation. Hence she cannot strengthen Kant on this point. Furthermore, I shall try to show that Kant's prohibition is not absolute, and that some kinds of organ transplantation are fully consistent with Kant's own principles.

1. A Distinction between Three Sorts of Body Part

In order to make my point, let me distinguish between three sorts of body part that give rise to three different kinds of restriction on how individuals can dispose of them.

The key expression in Kant's position seems to me to be "partially murdering oneself", because it qualifies the failure to do one's duty in a way that is at the same time apparently precise, yet ambiguous.

When one reads the very strong expression "partially murdering oneself" [8], one initially thinks of the first sort of body part: the organs in the absence of which one could not survive because each of them is indispensable for the whole organism. Moreover, these organs are those which Kant places in a central position in his Critique of Judgment, giving the concept of 'organ' a new meaning: between the organs and the organism there is a relationship of internal teleology. Kant distinguishes this new concept from the traditional one by writing about the body:

In such a product of nature, just as each part exists only as a result of all the rest, so we also think of each part as existing for the sake of the others and of the whole, i.e. as an instrument (organ). But that is not enough (for the part could also be an instrument of art, in which case we would be presenting its possibility as depending on a purpose as such [but not yet as a natural purpose]). Rather we must think of each part as an organ that produces the other parts (so that each reciprocally produces the other). Something like this cannot be an instrument of art, but can be an instrument only of nature, which supplies all material for instruments (even for those of art). [9]

As much as the implantation of this organ in the recipient makes the difference between life and death for the recipient, so taking the organ from a living person implies her death, in which case the transplantation really results in the instant suppression of a

moral and rational being. Depending on who initiates such transplantation, it is therefore either a murder or a suicide, both of which are strictly condemned by Kant's moral principles. This case is so trivial that Kant does not even give an example of it in the brief passages in which he deals with organ transplantation. However, I would like to draw attention to the fact that this is valid only if a whole organ, or at least a crucial proportion of it, is cut off. Indeed, some organs can naturally regenerate, and some will still function after a part of them has been removed. The liver can rebuild itself after a part of it has been cut off, provided a sufficient portion remains. Kidneys cannot regenerate, but a person can survive with only one kidney. Therefore, I would classify such partial transplantation of vital organs as cases of transplantation of the second sort of organs.

The second sort of organs corresponds to the traditional meaning of 'organ': any "integral part" [10] of the body. This second sort is the one Kant focuses on when talking about organ transplantation. Such organs are all parts of the body that cannot be replaced by the body itself once they are cut off from it. An integral organ does not need to be important, despite a misleading English translation: "[...] nobody may therefore voluntarily mutilate himself in the important parts of his body, and still less so for the sake of gain, without lowering himself" [11]. Indeed, the German for "important parts" is "*wesentliche Teile*", which implies that these parts belong to the essence (*Wesen* [12]) of the body, not that they have an importance for the whole body. In fact, Kant's example is of a rather unimportant organ: "for example, accepting money to have a tooth pulled, for another use" [13]. Many of our contemporaries have had, for whatever reason, to have a tooth or several teeth pulled. Many more had this done in Kant's time. This certainly does not and did not affect their "capacity to exhibit humanity by acting rationally" and morally in any way. The same applies to the other example given by Kant: castration. In this regard, Munzer is obviously half right to say that: "[...] even if a living body is an entity that has a rational nature and a capacity to act on principles, it does not follow that parts of that body are such entities" [14]. Indeed, a maimed human being does not cease to have a rational nature. If it did, we should deny human nature and therefore any rights to all human beings who lacked even a single organ — even a single tooth.

While Munzer is right on this point, he is partially wrong to think that maiming does not diminish the capacity to act, and consequently to act on principles that characterize a human nature. In fact, body parts of this second sort are all "instruments", which is the original Aristotelian and Thomist understanding of the concept of an "organ". And instruments are by definition destined to serve action. Before I develop what in my view is the moral point missed by Munzer and Gerrand, let me observe that Gerrand is even less able to explain what Kant means when he writes about the third kind of body parts:

"[...] To] have something cut off that is a part but not an organ of the body, for example, one's hair, cannot be counted as a crime against one's own person — although cutting one's hair in order to sell it is not altogether free of blame." [15]

The German expresses "not altogether free of blame" a bit more strongly and specifically: "*nicht ganz schuldfrei*" [16]. "*Schuld*" is guilt, in a moral as well as in a legal sense. I shall explain this below, but let me first quote what Kant has to say about it, which clearly shows the unity of his point of view on all parts of the body. Kant writes:

“Now it is entirely possible that some parts in (say) an animal body (such as skin, bone, or hair) could be grasped as accumulations governed by merely mechanical laws. Still the cause that procures the appropriate matter, that modifies and forms it in that way, and that deposits it in the pertinent locations must always be judged teleologically.” [17]

Of course, I am fully aware that one may presume *prima facie* that Kant would have prohibited skin or bone transplantation as he did for teeth. But this implies that Kant should also have followed his own principles by dealing with skin in the same way as with hair. The morally relevant difference lies between the second and third sorts of organs, and does depend upon whether they can be naturally replaced or not. The necessity to judge this third sort of body part teleologically obviously has some kind of moral relevance for Kant that I shall return to later.

2. A Distinction between Free Will, Freedom of Choice and a Teleological Premise

While the prohibition on transplants involving the second sort of body parts has nothing to do with moral and rational agency, it really has something to do with our freedom, of which we cannot make use but through our body. Now, this freedom is not the free will (*freier Wille*), defined by autonomy and which consequently supposes moral and rational agency. The freedom I shall talk about is freedom of choice (*Willkür*). Unlike free will, the use of which implies autonomy and the contrary of which is called heteronomy by Kant, freedom of choice has degrees, and can be quantitatively increased or decreased. The freely chosen desires of all persons cannot be satisfied all at once. Kant's concept of right consists of mutually limiting the freedom of choice of all individuals according to a universal law before which all human beings are equal. Now, common to the free choice to transplant the second kind of body parts is the possibility of considering degrees of quantitative change. As a one-legged man, I certainly would dispose of fewer choices than with my two legs. I would likely prefer to lose one tooth than one leg, but with one tooth less, I would have slightly fewer choices than with all my teeth: I couldn't sing, speak or eat as well as I have done up to now. Now, I can legally renounce the use of any particular choice, and even renounce the use of most of my choices. But I cannot renounce the right to exercise these choices. A typical example given by Kant is that it is permissible to work as a servant, obeying the orders of someone else, while it is prohibited, even voluntarily, to become a slave [18] (Kant makes only one exception: enslavement as punishment for certain crimes [19]). In the same way, I legally may renounce the use of one of my organs, but I cannot donate it, because then I could not get it back.

This point has two consequences. The first one is that, just as killing myself is for Kant as much a murder as someone else killing me, so also irremediably depriving myself of some of my choices by maiming myself is as much a crime as someone else maiming me. If self-murder and self-maiming are not to be punished while the Doctrine of Right prescribes a punishment for murder and physical violence, the reason is not that they are any less criminal, but only that no threat of punishment can deter me from murdering or maiming myself. Indeed, Kant states that some crimes are both

“inculpable (*inculpabile*)” and “unpunishable (*impunibile*)” [20], because the fear of possible punishment cannot outweigh the fear of something that is certain. And Kant believes that the punishment must be equal to the crime (strict retributivism), such that murderers should be punished by death and sexual delinquents should be sentenced to castration. On the opposite side, threatening the self-murderer with death or someone who wishes to engage in self-mutilation with maiming is not likely to prevent them from committing those crimes. The difference, however, rests on a merely pragmatic premise. If another form or degree of punishment were available, the Kantian point of view would command us to prosecute and punish attempts at suicide and self-maiming.

The second implication is that selling one’s own hair is no crime because “it grows back again” [21], so that by selling it, one really only renounces the use of a choice for the time being; one is not definitively renouncing the right to exercise this choice. However, since one has to cultivate one’s own dispositions, and the growing of hair is one of these dispositions, one ought to cut hair only as needed for natural beauty or for the health of the body. To do otherwise is to make oneself guilty of not realizing one’s moral duty. Because the teleological judgment on natural products is required by reason, Kant places much more value upon the beauty of natural products than of artistic products. Hence, wearing one’s own hair and neither wearing a wig nor having one’s hair disfigured because one has sold it, is in better taste, which in turn influences moral behaviour. All this really has nothing to do with the preservation of a human being’s rational nature, nor directly with its exercise, but only through the teleological premise understood in a very broad sense. By this I mean that by making the sale of one’s own hair blameworthy, Kant understands the hair itself and not the growth of hair or the organ of capillary glands to be a natural disposition that has to be protected and developed. This seems to me much too broad an understanding of natural dispositions. The significance of this point concerns not only the relatively frivolous case of hair, but also the case mentioned above, of skin and bone.

If I shift the focus from legality to morality, I even have a duty of virtue to train all my organs, to make them strong, healthy and skilled. From the *Idea of a Universal History* to the *Lectures on Morals* and the *Doctrine of Virtue* [22], there is a duty for human beings to develop as best they can their innate dispositions, whether rational or merely physical. According to Kant, there is a duty to cultivate oneself. The *Doctrine of Virtue* also sets out the following law for the maxims of our acts: “Cultivate your powers of mind and body so that they are fit to realize any ends you might encounter” [23]. The reason for this is that for Kant reason requires a practical and theoretical unity, or systematicity, which in turn demands to see nature as well as human beings as oriented towards an idea. This teleological model postulates that “All the natural capacities of a creature are destined sooner or later to be developed completely and in conformity with their end” [24]. For Kant, it cannot be the case that the right allows me or other people forever to renounce what my duty requires me to do. I have the right not actually to do it, but I cannot renounce my duty forever.

Since the body is the *conditio sine qua non* of the “capacity to exhibit humanity by acting rationally”, as Gerrand reminds us, Kant prohibits suicide as well as maiming and organ transplantation. But in this regard, there are two elements that result in two different prohibitions. The first is the preservation of one’s own life, because without living I cannot form any intention, whether rational and moral or not. Here self-preservation protects the rational disposition present in all human beings, i.e. the

disposition towards having rational intentions. The question is of life or death. But there is also the preservation of the means to develop oneself as perfectly as possible, in order to promote this disposition towards reason. Here self-preservation covers the physical disposition of all human beings, i.e. the disposition to act as much as possible according to one's own intentions, rational or not. What matters is not life or death, but the extent to which I am physically able to act. The former has a lexical priority over the latter, as we see in the case — mentioned by Kant — of an amputation performed because an organ has become a hindrance to the life of the whole body, and consequently for the organ itself as well as for any other organ. A fully aware quadriplegic who can move only her eyes, or someone who has had her legs and arms cruelly amputated, can nevertheless have rational and moral intentions.

At the beginning I wrote that Gerrand is right to criticize Munzer for not linking a person's dignity to the "capacity to exhibit humanity by acting rationally" and morally. But connecting two concepts does not mean that they are one and the same concept, which Gerrand seems to forget. Indeed, when Kant uses the words "humanity" and "dignity", he means the "personality independent of physical attributes (*homo noumenon*), as distinguished from the same subject represented as affected by physical attributes, a human being (*homo phenomenon*)" [25]. He also calls it the "capacity for freedom". To exhibit this capacity in action is something other than the capacity itself. And in the case of the sale of hair, we have to do with yet another thing: a strong teleological assumption that all the parts of a human being are "destined sooner or later to be developed completely and in conformity with their end".

Given the distinctions we have drawn in Kant's prohibition of cutting off a part of one's own body, I recommend avoiding any overinterpretation of the expression "partially murdering oneself". I think that the only thing in common between a suicide considered as a murder and a self-maiming considered as a crime against oneself is that they are crimes, which means that they each harm someone's freedom of choice, that is, one's own freedom of choice. The word "murder" is therefore no more than an unfortunate lexical choice which has no impact on the argument. In fact, Kant deprives this word of most of its power by the restriction "partial". By failing to allow for any nuance in Kant's expression, one can easily be misled to the point of making self-maiming morally worse than it is. Indeed, if it really does impair one's own freedom of choice, nevertheless it does not destroy one's capacity for dignity or humanity understood as capacity of free will.

3. Kant's Principles Allow and Even Command Some Organ Transplants

A more important point I see missing from Gerrand's article is a critical stand towards Kant's over-broad extension of the natural dispositions and their protection and promotion. Gerrand writes that Kant's "primary concern is that a person should not have any part of her body removed, unless a part is a threat to her self-preservation". Kant does not talk about "any part of the body", but only about the "integral parts" [26]. According to Kant it is neither a crime to give away one's own hair nor to sell it. Furthermore, I explained why, unlike Kant, yet applying his principles, I do not think that it infringes the duty of virtue. At any rate, Kant objects only to the sale of hair, not to it being given away. Since medical science can now take blood, skin and marrow

samples without impairing the organ producing them, so that they will be naturally replaced after a short time, I see nothing at all in the Kantian argument for freedom of choice against such transplants, since these are not “integral” or “essential” parts of the body. I find it unfortunate that this, too, is not mentioned by Gerrand.

Another omission is even more unfortunate, because it concerns a common kind of organ transplantation for which there actually is a tremendous shortage of donor organs. These organs are of the first and second kind mentioned above, i.e. vital organs and integral, essential organs. Yet there is nothing at all in Kant’s argument to prohibit such transplants. The transplants I am talking about involve organs from people who have just died accidentally or who are in a state of clinical death. I shall put aside for the moment the very difficult question of how to determine clinical death after a long coma, and such similar problems. I shall take only the case of a person instantly dying, e.g. in a car accident, and I shall assume that her death is uncontroversial and that the person was the bearer of an explicit and freely signed document in which she donates her organs in case of death. If her organs are taken and transplanted on time, they can save lives. At the same time, this does not kill the donor nor impair the donor’s freedom, since she is already dead.

So Nicole Gerrand’s argument can never apply to this donor, unless we consider the corpse as still being inseparable from the person in such a way that the person would act against her self-preservation by allowing the donation. One could argue that a corpse is still not a thing. And it is true that a corpse is not a thing: this is why, for instance, the profanation of graveyards is a crime. Nor do I deny that a person may still have some rights after death. The defamation or slander of a dead person is punishable in many countries. On the other hand, Kant never condemned cremation as a crime. One of his students, Fichte, even recommended it [27]. All this despite the fact that cremation separates the organs, while burial just lets the corpse disintegrate naturally, i.e. on its own. To me it would simply make no sense to pretend the contrary, at least from a Kantian point of view. In fact, while for Kant one has to postulate the immortality of the soul, he does not make the immortality of the soul depend on the way someone is buried or burned. Even the soul of a murderer sentenced to death or of a suicide is immortal. But I assume that Nicole Gerrand will agree with me that organs may be taken from people who have just died.

I would even like to go a step further, however, and say that under some circumstances it is even a duty of virtue to give advance authorization for such transplants after one’s own death. Indeed, since such transplants do not harm the dignity of a person in any way, and can save lives, it is a duty to accept them, as rescuing a drowning person is a duty of virtue. I am not arguing that donating one’s organs is as heroic as rescuing someone from drowning (even if donating them against the will of the rest of the family may sometimes require some degree of courage). I say only that it is at least a duty of virtue. If one considers the definition of right given by Kant, it may even be a duty of right: “Right is [. . .] the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom” [28]. Such organ donations obviously make it possible for some external freedoms to coexist with others. Thus they should be a duty of right, which should be enforceable. But then, the issue about the sale of organs as opposed to the donation of organs becomes much more interesting from a Kantian point of view than Gerrand assumes. If everybody is equally a subject of right, and the donor does not

own her body as a thing, then there is a strong argument that the authorization to take her organs after her death can happen neither in the form of bequest nor the form of inheritance (here I put aside the problem of the legitimacy of the right to bequest or to inherit, both of which Kant advocates in his Doctrine of Right). Thus the donor should not decide who should receive the organs. Even less should the donor decide to sell an organ after her death and to bequest the money resulting from the sale. Here again we find a Kantian argument which Gerrand correctly stresses: the body is not property in the way a thing is. But precisely because of that, those authors who actually use Kant against the sale of organs, and only against such sales, are right to use Kant this way. It may be that they know neither why they are right nor to what extent they are right. Gerrand may also be right to say that they ignore Kant's literal prohibition of organ donations (while the person is still alive). But this does not mean that they are wrong, and the point is moot. Given the fact that there is actually an alarming shortage of organs donated for transplantation and that every day many patients die because of this shortage, I find it somewhat unfortunate that Gerrand does not at least try either to criticize (in the Kantian meaning of critique) Kant's prohibition of organ transplants or to have a second look at it. This does not mean that the transplantation of an organ from a living donor should be authorized, and this may have been what Gerrand wanted to say. If so, however, she obviously has a very strong case but few opponents, especially among those authors who invoke Kant.

All these nuances seem to me to make Kant stronger while Gerrand seems to me to give — especially to people who are not specialists on Kant — a picture of Kant's position that is excessively dogmatic and strange. Such a picture can backfire, leading people to ignore the strong case made for freedom of choice. In this regard, I would like to point out a final argument on behalf of the proponents of a wide range of organ transplants, including transplants of “integral parts” (such as kidneys) from living bodies, because Kant seems to me to provide an answer consistent with his restrictions on organ transplants. Some proponents argue that some hazardous sports, travels, or other adventurous activities can also injure the people who do them. Yet we allow them to practise these activities. Thus, they conclude, we should also allow the transplantation of organs like kidneys, etc, from living people, provided the transplantation is not coerced, and the donor is not paid for it. Kant draws exactly the opposite conclusion: there is only one case in which it is “permitted to venture one's life”: it is “against the danger of losing it” [29], that is, only for the purpose of self-preservation.

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NOTES

- [1] cf. NICOLE GERRAND (1999) The misuse of Kant in the debate about a market for human body parts, *Journal of Applied Philosophy*, 16, 1.
- [2] cf. IMMANUEL KANT [1797] (1996) *Doctrine of Right* in *Practical Philosophy*, trans. M. J. Gregor, (Cambridge, Cambridge University Press), p. 391.
- [3] *ibid.*, Appendix 5, p. 498.
- [4] *ibid.*, §49E, p. 475.
- [5] GERRAND, *op. cit.*, p. 64.
- [6] GERRAND, *op. cit.*, p. 63. I. KANT [1775–89] (1963) *Lectures on Ethics*, trans. L. Infield, (Indianapolis and Cambridge, Hackett), p. 124.
- [7] cf. GERRAND, *op. cit.*, p. 64.
- [8] KANT, *Doctrine of Virtue* in *Practical Philosophy*, §6, p. 548.
- [9] KANT [1790] (1987) *Critique of Judgment*, trans. W. S. Pluhar (Indianapolis, Hackett), §65, p. 253.
- [10] KANT [1775–1789] (1997) *Doctrine of Virtue*, §6, p. 547.
- [11] KANT, *Lectures on Ethics*, trans. P. Heath (Cambridge, Cambridge University Press), p. 371.
- [12] KANT [1775–1789] (1975) *Metaphysik der Sitten Vigilantius in Gesammelte Schriften* (Berlin, De Gruyter), vol. XXVII, p. 630.
- [13] KANT (1997), *Lectures on Ethics*, p. 371.
- [14] cf. [8].
- [15] KANT, *Doctrine of Virtue*, §6, p. 548.
- [16] KANT [1797] (1914) *Tugendlehre* in *Gesammelte Schriften* (Berlin, Königlich Preußische Akademie der Wissenschaften), vol. 6. p. 423.
- [17] KANT, *Critique of Judgment*, §66, p. 257.
- [18] KANT, *Doctrine of Right*, §30, p. 431.
- [19] KANT, *Doctrine of Right*, §49E, p. 474.
- [20] KANT, *Doctrine of Right*, p. 392.
- [21] KANT (1997), *Lectures on Ethics*, p. 371.
- [22] cf. KANT, *Doctrine of Virtue*, p. 518.
- [23] *ibid.*, p. 523.
- [24] KANT [1784] (1991) *Idea of a Universal History with a Cosmopolitan Purpose* in *Political Writings*, trans. H. B. Nisbet, 2nd ed. (Cambridge, Cambridge University Press), First Proposition, p. 42.
- [25] KANT, *Doctrine of Virtue*, p. 395.
- [26] KANT, *Doctrine of Virtue*, p. 547.
- [27] JOHANN GOTTLIEB FICHTE [1810] (1994) *Die Republik der Deutschen* in *Gesamtausgabe*, ed. R. Lauth and H. Gliwitsky (Suttgart-Bad Cannstadt, Frommann-Holzboog), vol. II, 10, pp. 371–426; here, p. 420.
- [28] KANT, *Doctrine of Right*, Introduction, §C.
- [29] KANT (1997), *Lectures on Ethics*, p. 370.