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Edition in Tribute to Stephen Munzer

Stephen Munzer, currently Professor of Law at the UCLA School of Law, has authored significant legal and philosophical work on the theory of property and its application, especially of late in the area of biotechnology. In this volume Professor Munzer responds to commentaries on his metaphysical commitments for the ethical theory underlying his philosophical theory, the nature of autonomy as it might figure in his social relations theory of property, and to emerging and important questions of ownership of cord blood. James Penner opens the volume by pressing Munzer’s reliance on a pluralist intuitionist ethics, and illustrating difficulties that might beset Munzer’s pluralistic approach to human-nonhuman chimeras. John Christman follows with a piece that suggests that charting the proper relationship between property institutions and the protection of individual autonomy requires a renewed attention to social relations that may plausibly undergird the autonomous self. The final comment on Munzer’s work is offered by Donna Dickenson, who uses the status of ownership of cord blood as a vehicle for challenging the moral particularism she finds in Munzer’s general theory of property. Munzer defends his views against Penner’s and Dickenson’s challenges and builds on Christman’s observations, particularly as they relate to moral character.

The editors thank the commentators and Professor Munzer for their substantive and detailed engagement. This edition is part of a series honoring and analyzing the writings of influential theorists in legal, social, and political philosophy. The format for each edition is to invite several commentaries and responses by a featured philosopher. The goal is to establish an engaging and lively exchange of ideas that contributes to the profession and is accessible to a broad audience, as befits the unique place of the APA Newsletters.

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Stephen Munzer’s Pluralist Moral Theory

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The signature feature of Professor Stephen Munzer’s moral and political philosophy is his commitment to what he calls a “pluralist” theory of morality, in which, as he puts it in a recent paper,

...no single principle, nor any supreme principle, governs moral analysis—be it the principle of utility in some form of consequentialism, Kant’s categorical imperative, or any other principle. Instead, morality is pluralist: it is governed by multiple irreducible principles that sometimes conflict.

This take on the nature of morality informs Munzer’s major work on the nature of property, A Theory of Property, as well as his much more recent work on the ethical issues raised by recent developments in biotechnology. In the first part of this paper I shall consider Munzer’s pluralist ethics in general, before turning in a second part to his moral pluralist approach to regulating the creation and use of human-nonhuman chimeras discussed in a recent article.

Pluralist morality

Munzer describes the gist of a pluralist theory of morality in two ways. It is a morality in which “deontological principles can to some extent be qualified or overridden by consequences.” More telling of the theory’s substance than this tension between deontological and consequentialist claims, however, is Munzer’s identification of this moral pluralism with a sophisticated confidence in and reliance upon moral intuitions; indeed, he states that this form of moral pluralism is sometimes just called “intuitionism.” That this intuition is “sophisticated” is obviously crucial. Drawing upon the work of John Rawls’7 and M.B.E. Smith,8 Munzer hastens to point out that it is the careful and plausible examination of our intuitions, read as our “most considered judgments or convictions,” that both allows us to “remove” those intuitions which are incorrect and also holds out the prospect of moral agreement.9

The promise of such a pluralist theory is that it can helpfully negotiate between different intuitions and competing moral principles to deliver, if not always a practical solution to moral quandaries, then at least a rational conversation about them such that though we may act in genuine moral uncertainty, we at least have a fairly solid grasp of the issues at stake and even, one hopes, their relative moral weights. We can, that is, at least be in the position to learn as we proceed. Though
it is beyond the scope of this paper to consider this in any
detail, an assiduous consideration of our competing intuitions
may provide a markedly effective tool for the criticism of the
philosophical theory of others. It might be argued that a
corollary to Munzer’s attachment to his moral intuitionism is
his acute ability to perceive the suspect, the tendentious, and
the downright unsupported and unsupportable in the more
high-flown philosophical positions of others.10 That is all to the
good.

There is, however, I would argue, a contrasting, even
contradictory, methodological tendency which a moral
pluralism of competing, irreducible principles fosters. This is
the tendency toward ieristic compromise.

To see this, let us start by framing this approach to moral
reasoning in a somewhat unkind way, as a “kitchen sink” theory:
i.e., throw everything in in the hope that by combining, stirring
and, hopefully, fermenting the competing intuitions, theories,
and principles, something more refined comes out than went
in. Such a way of going about things is not necessarily to be
gainsaid. Simply getting everything that is plausibly relevant
on the table, and then thinking about the lot, is surely likely
to prompt some thoughts which order, weigh, and test the
various considerations. Furthermore, the proponent of such an
approach, though he or she can sound a bit fed up and nagging
at children who won’t get along, can point to a kind of plain
common sense or rationality that characterizes it. If we would
all just settle down and be reasonable for a moment, we would
find that our difficulties are tractable. This sort of advice is in
many, many cases, exactly what is wanted, and one would be
foolish to spurn it. At the same time, however, it is difficult to see
whether it is suited to the most searching moral issues where
opposing moral positions are adamantly, even fervidly, held.
Settling down and being reasonable are precisely not what is
wanted; pushing even unreasonable points (so long as they are
otherwise apparently logically unimpeachable) is exactly what
is required to assess the logical validity and conceptual cogency
of various theoretical claims, and to slap our (and others’)
untutored intuitions around a bit to see if they can take it. This
is, of course, a matter of degree, but arguably such a tendency
towards “ieric” suggestions11 for smoothing out differences
is not only endemic to this moral pluralist sort of intuitionism,
but may be excessive, pursuing peace to a considerable fault.
Munzer may be able, however, to avoid the critical force of this
point by limiting the scope of his methodology somewhat. In
his paper on human-nonhuman chimeras, Munzer is careful to
“bracket” certain highly controversial and explosive moral
issues.12 Perhaps once moral positions which can be treated
as true “outliers” and moral controversies which have shown
themselves to reflect simply non-transcendible moral (typically
religious) gulfs are excluded, peace-making can be seen as a
virtue, rather than an anemic failure of the combative side of
the spirit of inquiry. On the other hand, the ieretic tendency may
be a danger here as well, for it is always easier to make peace
amongst some parties than amongst others, and so what is
seen as needing to be bracketed or excluded may be subject
to the distortion of seeing the world through peace-making
spectacles; easier, after all, to exclude the more difficult than
the more compliant. On this point, one might perhaps discern
something of an in media res tendency in Munzer’s philosophy.
Without citing chapter and verse to prove the point,13 I think it
can be said that Munzer commonly begins his examination of
a topic by giving the lay of the literature as it presently is, telling
us just so much of the “story so far” as to give us the currently
competing positions. While there is an obvious point to doing
this—beginning where the current literature leaves off is a
straightforward way of relevantly addressing a topic—it leans
against dealing with a topic by grasping it by the scruff of the
neck and starting an interrogation from what one perceives to be
“first principles.” Perhaps this is more of a complaint than a
criticism, but to my mind it is sometimes difficult to know where
Munzer would start “from scratch” in attacking a question such as
“What is property all about?” But perhaps Munzer would
deny that a “first principles” approach is even possible (How
does one really start from scratch, anyway? By forgetting the
philosophy one already knows?), let alone profitable.

Leaving the practical pros and cons of the methodology
aside, I now turn to a brief consideration of the underpinnings of
Munzer’s pluralism. It is to be noted that there is a clear difference
between this sort of moral pluralism and a moral pluralism of
another kind, value or interest pluralism. The latter pluralism is
the view, roughly, that there are a number of different sorts of
values that can be realized in any human life, the realizations
of which are in persons’ interests.14 Furthermore, these values are
irreducibly plural, and incommensurable. A comparison between
intuitionistic moral pluralism and value pluralism is, it is
submitted, instructive, and not very favorable to the former. To
begin with we must notice that these are pluralisms of different
kinds: the former might be said to be meta-ethical, the latter
a position in substantial moral theory. The first considers the
nature of moral reasoning, the latter stakes out a position as to
what morality is about, so there is nothing necessarily or even
plausibly incompatible between the two; one’s intuitionist
moral methodology could lead one to adopting and defending a
value pluralist position. Nevertheless, the latter pluralism seems
eminent clearer and more explanatory, on its face, than the
former, regardless of whether one would ultimately adopt or
reject it. Prima facie, human lives seem to realize values of quite
different kinds, friendship, health, aesthetic pleasure, and so on,
the pursuit of which can lead to moral dilemmas and which
seem to provide some understanding of the importance we
might place on, for instance, individual autonomy. It would also
seem to illuminate the sense in which every person is an end,
and not merely a means, equally deserving of some measure
of concern and respect. Whether one agrees with it or not, the
idea is clear enough. The problem with the intuitionist moral
pluralism is that it is nowhere near as clear on what the
plural elements amount to. The irreducible elements are said to
be “principles,” and the central claim of this pluralism is that,
following the careful reflective consideration of our various
intuitions concerning some area of moral concern, we will
discover that our understanding is best captured by a set of
competing and irreducible moral principles, no doubt principles
which have been tempered and sharpened by that reflective
consideration. It is worth noting that Munzer’s position appears
to be different from Rawls’s on this point; for Rawls, following
our reflective consideration of our untutored intuitions we can,
at least in the case of justice, achieve “reflective equilibrium”
and fix on principles which are both comprehensive and have
a clear relationship of priority. Therefore, Rawls’s sophisticated
intuitionism is not pluralist in the way Munzer’s is. The obvious
question that Munzer’s pluralism prompts is why should morality
be plural in this way? Or, to put the point less tendentiously, are
there any independent reasons why we should believe that
morality itself embodies a kind of strife between competing
incommensurable viewpoints, rather than believing that, to the
extent we find a conflict amongst our principles, to just that
extent we have failed to identify and eradicate the illogic or
false premises which have led us into moral confusion? It is
perhaps worth noticing that intuitionism, whatever its faults,
is normally understood to cut the opposite way. That is, that
our intuitions, suitably refined, provide us with a platform of
agreement, not a batch of competing considerations that cannot
be reconciled. The promise is that if we overcome various
epistemic impediments (our prejudices, biases, insensitivities,
and so on) everyone should come to have the same intuitions in respect of any actual or hypothetical situation that calls forth a morally significant response.\textsuperscript{15}

There are different possible ways in which morality might involve us in a plurality of norms which cannot be effectively reconciled across their ranges of application nor ordered under clear priority rules. For example, we might say that moral understanding unavoidably involves understanding distinct sorts of norms, for example, principles and rules. We might say that our morality is not only discovered—we do not simply have moral intuitions about what is right and wrong and what is and is not of value, that is, intuitions about basic moral principles—but also made, also turns, that is, on the various social rules which allow people to get along together in a practically effective way given the backdrop of those intuitions which are more or less non-culturally specific. To complicate the picture, it might also be the case that the particular, historical social norms actually enable cognitive access to certain of the more universal (in the sense of non-culturally specific) considerations, such that certain moral considerations are only available in certain socio-historical contexts.\textsuperscript{16} If this is so, part of morality will have a “universal” sort of character, and part will have a socio-historical character. One sort of moral pluralist might claim that (assuming this is true) there will be norms that reflect the first sort of consideration, and norms that reflect the second, and that paying attention to both sorts of norms is essential to moral understanding, and that morality is irreducibly a matter of a congeries of irreducible norms as a consequence.

Or, to take another possible moral pluralism, we might say that life, like, perhaps, language,\textsuperscript{17} is a series of games, played in different contexts for different purposes, and as such, there is no over-arching, abstract principle of conduct which serves as the touchstone for acting in keeping with the dictates of morality.

One might, of course, accept such a moral pluralism of irreducible principles for the merely practical reason that no such over-arching principle of conduct, such as the principle of utility or Kant’s categorical imperative, has so far managed to do the job successfully. That might indeed be good evidence for the truth of Munzer’s claim. But negative evidence of this kind (the alternative is no good) is not the same as a positive characterization of the grounds for it, and, it is submitted, Munzer could do more on this score. If it is true that there is a truly irreducible pluralism in the moral norms that apply to us, this says something rather important about the nature of morality, and it would be of great assistance if Munzer could provide a more tangible feel of the nature of this plurality.

**Munzer’s principles for the regulation of human-nonhuman chimeras**

For the purposes of this discussion, a chimera is an organism with cells from two different species. Chimeras must be distinguished from transgenic organisms, in which one organism has acquired genes originating in another species, such as a bacterium into which has been introduced human genes which code for human growth hormone. Chimeras have some cells which are entirely of one species, e.g., human, in that the genetic complement of such cells is the complete set of human chromosomes carrying a complete set of human genes,\textsuperscript{18} and other cells carrying the genetic complement of another species, such as a mouse. Such chimeras might make useful research tools. For example, a mouse with a “humanized” liver, i.e., a liver which is a mosaic of mouse and human liver cells, might be a better predictor of the effect of a particular drug on the human liver than a non-chimeric mouse, all of whose liver cells are genetically those of a mouse. In his 2007 paper “Human-Nonhuman Chimeras in Embryonic Stem Cell Research”\textsuperscript{19} Munzer proposes a moral “framework” that can be used to analyze different cases in which human-nonhuman chimeras may be created and “used.” The framework is built out of distinctions (morally significant elements which though separate are often conflated\textsuperscript{20}), factors (morally relevant considerations\textsuperscript{21}), and principles (basically moral norms which require, forbid, or permit certain actions, or which prioritize the principles in case of conflict). Munzer aims for the framework to gather together these different sorts of “elements,” different sorts of moral considerations which properly bear on the issue of regulating the creation and use of human-nonhuman chimeras.

As a recent example of Munzer’s pluralist moral theory, it is worthwhile looking in some detail at how this framework is meant to operate, on the principle that the proof of the pudding is in the eating. Does the framework provide, first, a limpid exposition of the relevant moral issues, and second, are the regulations proposed, in light of that exposition, plausible? I shall argue that the framework is only a limited success, in part because it falls prey in some respects to the potential pitfalls of the pluralist intuitionism Munzer espouses that were discussed above.

Let us consider first the most important distinction to which Munzer draws our attention. Munzer distinguishes three levels of cognitive competence that human-nonhuman chimeras may have, as basic, enhanced, and dramatically enhanced. Basic chimeras have cognitive competence no higher than that of a dog or a pig; enhanced chimeras have the cognitive wherewithal of a chimpanzee, and dramatically enhanced chimeras match or approximate the cognition of humans.\textsuperscript{23} Very, very importantly, the terms “enhanced” and “dramatically enhanced” are wholly misleading: the chimerisation itself need have nothing to do with the cognitive function of the resulting chimera; any chimera of whatever kind which happens to have the brains of *homo sapiens* counts as a “dramatically enhanced” chimera;\textsuperscript{24} such a one was the late U.S. Senator Jesse Helms, owing to the fact that he was the possessor of a transplanted pig’s heart valve.\textsuperscript{25} The same applies *mutatis mutandis* for merely “enhanced” chimeras. A not very bright example of a chimp who nevertheless had a kidney combining human and chimp cells would count as cognitively “enhanced.” While it is difficult to resist the intuition that levels of cognitive capability are important moral considerations in this context, I must say that I find these “terms of art,” as Munzer calls them,\textsuperscript{26} utterly baffling. For if the cognitive capabilities of the resulting chimerical organism owe nothing to the result of the chimerisation, it is difficult to see why they are relevant at all here. Admittedly, there is a potential difficulty which this form of distinction between cognitive levels might serve to avoid, but which Munzer doesn’t mention, which might be called the “accession/specification” problem.

Accession and specification are terms of art from the law of property, and concern what happens when two items of property are mixed such that one or both lose their identity. In the case of accession, one item of property loses its identity when it “accedes” to another. When you use your paint to paint my car, you lose any property right you had in the paint because the paint is now part of the car, and ceases to exist as an item of property in its own right. (The same happens to the building materials which are used to build a house. As “fixtures,” they accede to the land.) In other cases, called cases of specification, property loses its identity as it becomes another thing. Water and malt lose their identity as items of property once they are made into whisky.

In this context, our concern with the accession/specification problem has to do with determining the dominant species in
a chimera in cases where there is one; this would be akin to a case of accession. Where there is no dominant species, one presumably has an entirely new creature, and this would be a case of specification. As far as I can tell, Munzer allows for the possibility of any of these results,27 and so presumably the framework should apply to all of them, since all are human-nonhuman chimeras.

Nevertheless, it seems pretty clear throughout that the focus of the framework is directed at chimeras which are dominantly nonhuman, by which I mean it seems to be the case that the framework only plausibly applies to non-human species into which are introduced human cells, human cells which “accede” to the non-human species, so that such a species is not human.28 Although there is nothing explicit which requires us to hold that the framework is so limited, the paper uses language in several places that is only appropriate if the chimeras the framework addresses are less than human. So, for example, Munzer says that “perhaps a reader would find a chimera’s creation morally permissible even if she concluded that some uses of it were impermissible”29 (my italics). We do not have a free hand to make “uses” of humans. Even if I was the doctor who inserted the pig valve into Jesse Helms’s heart, thus creating the chimera, I would have no right whatever thereby to make uses of Mr. Helms. Munzer can only be speaking here of chimeras in which the human cells accede to the non-human species; for the sake of the paper, Munzer accepts30 that we can experiment with, and make other uses,31 of them. Consider also Principle 1 of the framework32:

**Principle 1**: The creation of human-nonhuman chimeras is morally permissible, subject to Principles 3 and 4, if all of the following conditions are satisfied: (1) the projected use of the chimera in research serves a desirable purpose, such as the promotion of human health; (2) chimeras that are classified as enhanced or dramatically enhanced will not experience substantial and enduring physical pain; (3) chimeras will not breed among themselves, with humans or other animals; and (4) chimeras will not be created that have linguistic or other cognitive capacities greater than those of a chimpanzee. (my italics)

These words only sit well on the assumption that the chimera is dominantly nonhuman, rather than vice versa. Regarding condition (1), although humans do participate as subjects in research experiments, we don’t normally think of creating humans with particular qualities for research, though with genetic engineering that is now common in the case of plants and nonhuman animals. Again, with condition (2), surely it would be up to the human-dominant chimera to decide whether it would be willing to put up with substantial discomfort if the research or therapy is promising. Conditions (3) and (4) completely give the game away, for such strictures could not apply to human-dominant chimeras, however amusing is the thought that by having a pig-valve transplant a person might be thereafter prohibited from breeding, with humans or other animals, or that the very pig-valve operation would be banned because the resulting chimera would have (one assumes, at least in the case of U.S. senators) linguistic or other cognitive capacities greater than those of a chimpanzee.33

Looking at this, the reader is in an understandable quandary. Despite the fact that the definitions of “enhanced” and “dramatically enhanced” chimeras have nothing to do with enhancement, Condition (4) of Principle 1 as well as several of the other principles34 seem entirely geared to the creation of a chimera where the chimerisation itself enhances the cognitive capabilities of a nonhuman-dominant chimera by operation of the introduced human cells, presumably introduced somewhere in the nervous system, most probably in the brain.

There is, of course, nothing wrong with restricting the scope of the moral framework to particular kinds of human-nonhuman chimeras, i.e., nonhuman-dominant ones, but the framework is explicitly stated to apply to them all. The reader is then left to try to discern which principles or other elements of the framework are really intended to be general, and which apply only to the subset. But the more searching question is why Munzer seems to have, in so many places, tacitly restricted the plausible focus of the framework, despite his stated ambitions.

One could start with a cheap shot, just to get it out of the way. Why not press the charge that Munzer’s unwitting restriction of his focus upon nonhuman-dominant chimeras, in particular in cases where the chimerisation, i.e., the introduction of human cells, results in enhanced cognitive wherewithal, simply reveals an unconscious specieism, in which the creation of a speaking chimp is the sort of moral monster which he finds the most troubling? I do think this is a cheap shot, and so will not press the charge, for there does not seem to be any genuine textual evidence that this is driving the identified restriction of focus.

Instead, I would diagnose the difficulty as one which reflects Munzer’s methodology. It is worthwhile noting that the second half of the paper is devoted to social policy in which Munzer compares the way his framework generates policy recommendations with the way two reports on similar topics commissioned from public bodies do, and finds there is much agreement between the views expressed in them and the result of applying the proposed framework.35 This, to my mind, bespeaks an “ieric” ambition for the proposed framework to work towards developing a workable moral consensus. But with this ambition uppermost, the paper avoids looking at the moral issues that human-nonhuman chimeras raise from “first principles” as it were. I have identified one such “first principles” sort of issue, which Munzer clearly understands, but does not pursue, i.e., the accession/specification problem. Presumably there are loads of easy cases of accession where it is clear that one species remains the dominant species in the resulting chimera, the case of Jesse Helms and his pig’s heart valve being an obvious one. But what does one say of the mouse growing a boy’s new auricle (outer ear) on its back?36 After the ear is “finished,” and removed for transplantation to the boy, has the purpose of this chimera been exhausted? I suspect that this mouse will not be long for the world in the normal course of things—does that mean in this case that the ear is the dominant tissue, the mouse acceding to it (the mouse as a life support machine for the growing ear)? Beats me. And what does one say about another of Munzer’s examples, the obedient, cheerful chimera (produced by mixing human and primate cells at various stages of development), who can speak and do household chores?37 I suspect this must be a case of specification, not accession, that is, one would not want to say that either the human cell complement or the primate cell complement dominated here. But if that is so, then the notion of “enhancement” makes no sense. Enhancement only makes sense in the case of an accession, where the cognitive wherewithal of the chimera is assessed relative to the sort of wherewithal the dominant species of the chimera would have had minus the introduction of the foreign cells. It makes no sense here, since this cheerful fellow is sui generis. With respect, Munzer’s analysis of this case would appear to miss this point, as well as being rather off-the-cuff. After pointing out how the creation of such chimeras violates several of his principles (taking as read that these chimeras have an “enhanced” moral status, i.e., “elevated relative to the non-human primate”) he says the following38:
[This case] raises the spectre of using chimeras as forced labor because they have just the right combination of sunny disposition, intelligence, and docility. Consider that many people would like to have their housework done for them. Of course, they could hire a live-in human maid or contract with a house-cleaning service. But that could be expensive, and the hired workers might be noisy, sullen, or uncooperative. They could also annoy the homeowner by demanding higher wages. So what is a frustrated homeowner to do? The docile housework chimera with the happy disposition might seem to be the ideal solution to the homeowner’s problems. Of course, creating an intelligent organism for the purpose of forced labour is morally odious. (my italics)

The reason I describe this passage as “off-the-cuff” is that it seems to be nothing but the expression of Munzer’s intuition that something morally odious is going on, and that we readers (“of course”) share his intuition on this score. But this is very debateable. I am put in mind of two creatures from literature: the cow in The Restaurant at the End of the Universe, who is a creature bred to happily provide meat for human consumption, and the house elves in the Harry Potter books whom, with one notable exception, seem mentally and emotionally disposed to serve. Of course, I understand the sense of Munzer’s intuition, but the point here is that treating this intuition as a sound consideration without pressing it at all strikes me as just the sort of danger a pluralist intuitionist ethics is likely to present.

Munzer states the primary thesis of his paper to be the following:

My primary thesis is that the moral, social, and legal concerns about human-nonhuman chimeras are so complicated that, though one can illuminate the concerns, one cannot categorise the creation of human-nonhuman chimera (sic) as either permissible or impermissible. It is simply beyond the current state of scientific knowledge and moral thinking to formulate a set of necessary and sufficient conditions that could be used for sorting all cases into morally permissible and morally impermissible categories, without leaving any cases undecided.

Munzer looks on the brighter side immediately following this passage, arguing that much light may still be shed on our moral concerns, but it is difficult not to detect a sort of despair at the first couple of sentences here. Perhaps the ambition is too great—it is not clear that a set of necessary and sufficient conditions for sorting different cases of chimerisation into “permissible” and “impermissible” is what is required or desirable—but I would like to close by suggesting, once again, a “permissible” and “impermissible” is what is required or conditions for sorting different cases of chimerisation into.

Endnotes

1. I would like to thank George Letsas for very helpful comments. All infelicities and inanities are my own.


9. Ibid., at 746.


11. See, e.g., Munzer, ‘Social Relations’ at 69.


13. Though here is an example from Munzer, ‘Property’, at 37. Munzer begins his discussion of the question whether persons can be said to own their bodies as follows: “Here is how to resolve these issues. As to the former, some hold that the body should be thought of as property, and emphasise that each person owns or has title to himself or herself. Others maintain that the body ought not to be thought of as property at all, and indeed that it demeans human beings to think of them or their bodies as property. In contrast, the position advocated here suggests that, insofar as one takes an overall view, people do not own, but have some limited property rights in, their bodies. One should, however, combine this broad view with a finer-grained classification, and recognise a division of body rights into personal and property rights and, in the case of the latter, a further division into weak and strong property rights.” I hope I am not selecting an unrepresentative passage. The passage actually does double work for the points made above. Not only does it broach the question of property rights by first laying out the contending positions of others, it ends up with, though not quite a split-the-difference treaty between the warring sides, a median position which seems to aim for a workable modus vivendi.

14. An interest is something that it is, upon critical or rational consideration, worthwhile, which distinguishes interests from desires, which, of course, may not be.

15. I owe this point to George Letsas.

16. An example might be a more fine-grained understanding of the principle that murder is wrong, for example, of the difference between excuses and justifications as defences to a charge of murder.


18. Within the range of whatever normal variation exists in this respect.


20. Ibid., at 132-34.

21. Ibid., at 132, 134-36.
A Return to Social Relations: Comments on Recent Work by Stephen Munzer

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Owning property in any of its multiple forms demarcates one’s relative position in the distribution of social advantages. This is typically indexed by income and wealth, but clearly ownership conveys a wide variety of discretionary advantages depending on the structure of the ownership in question. In addition to specifying who has how much, ownership rules specify a set of relations among citizens that can be measured along any number of dimensions. Of particular interest is the way that ownership rules structure relations of power (intimate or oppositional), connections, and relationships. These latter factors relate to what has been labeled the social relations approach to the law of property, a view that takes into account (in various ways and to varying degrees) the ways that property rules legislate not only individual holdings but interpersonal and social relations marked by power, connection, and constraint.

Among Stephen Munzer’s vast and important recent contributions to research on law, ethics, and theories of property, the social approach to property has not been a dominant focus, but it exemplifies what, for him, has always been an abiding concern, namely, the complex and delicate balance between property ownership and social fairness (e.g., see Munzer 1990). What I would like to attempt in this brief comment on Munzer’s recent work is to engage with his insightful commentary on the social theory of property and, if all too cursorily, suggest in broad terms a reconstructed argument for a social relations approach to property that relies on a close connection between autonomy and social conceptions of the self.

I. The Social Relations Approach

In his essay “Property as Social Relations,” Stephen Munzer gives a comprehensive and insightful overview of the variety of approaches to the concept of property that has included an emphasis on social relations in the justification, analysis, and critique of property law and institutions (Munzer 2001). Viewing property through the lens of social relations arises, for the most part, out of legal realism and critical legal studies, though it also finds a place in feminist legal theory and other critical perspectives. The central elements of the approach, as Munzer explains, include the claim that selves are socially constituted and that interpersonal and social relations are fundamental to value, identity, and power. Legal protections and rights both protect and grow out of social relations, and indeed such relations always emerge from and reflect power distribution in a society.

J. W. Singer’s description is most apt (as quoted by Munzer):

(1) It [the SR approach] encourages us to see people as situated in various relationships with others that continue over time; (2) It describes social relations as comprising a spectrum from short-lived relations among strangers to continuing relations in the market to intimate relations in the family; (3) It comprehends rights as emerging out of understandings that develop over the course of relationships rather than as being fully articulated at clear decisions points; (4) It encourages us to ask various questions about the relationship between the parties. (quoted in Munzer 2001, 62-3)
Munzer stresses that this approach takes a variety of forms, and often the difference between critiques of particular justifications of (certain forms of) property and analyses or descriptions of property law and institutions is not made clearly. He is also right to point out that the view remains overly abstract, though he admits that this can be the result of theorists presenting models as ideal types or general approaches rather than a specific policy directive. For example, he argues that merely focusing on social relations as relevant to property would not rule out the kind of libertarian, bargaining-based, account of property developed, for example, by David Friedman, where property rules are determined by Nash equilibrium points in hypothetical bargaining between agents (Munzer 2001, 63).

However, Munzer’s major issue with the view is that many of its defenders fail to identify clearly the normative basis of their claims so that it remains hopelessly unclear what particular social relations should be seen as favorable or unfavorable, or which such relations bear on property per se (ibid., 75; see also Munzer 1999, 562-68). He understandably argues that many of the normative presuppositions of social relations theorists are either controversial (such as the left-of-center politics of the critical legal studies approach) or are overdrawn. In the latter category are claims that some theorists of this ilk make that the self (as the subject of justice and the holder of property rights) must be seen as socially constituted. Munzer puts the skeptical point this way:

Most analytic philosophers, I suspect, would greet the following positions with skepticism: (1) The self is socially constructed and must, therefore, be seen in an anti-individualistic way that leaves scant room for autonomy. (2) Society is a construction of reality such that greater interest attaches to relations rather than to individuals. (Munzer 1999, 564)

These worries are all well taken. However, I want to explore further the contours of the social relations approach to property in order to inquire whether a conception of the self and autonomy might be adopted which takes seriously the social components of our identities but steers clear of the overdrawn claims at which Munzer rightly balks. 2

II. Nedelsky’s Social Relations Approach

An important recent figure in the development of the Social Relations (SR) approach, both concerning property as well as autonomy, is Jennifer Nedelsky. Nedelsky’s overall claim, briefly summarized by Munzer, is that traditional accounts of the law, rights, property, and autonomy, assume an atomized conception of the agent and her interests. On these accounts, persons are separable entities whose interests can be defined without essential reference to other persons, social factors, and institutions, cultures, traditions, and so on. Law, then, and property rules in particular, fundamentally function as boundaries around persons so conceived, protecting the level of separation (negative freedom) required to pursue those individual interests. This by now quite familiar view rejects the traditional liberal account of persons and advances an alternative conception of law and rights that sees interpersonal connections, relationships, and participation in various social practices as fundamental to the interests of citizens. For writers such as Nedelsky, this exemplifies a social-relations approach to property (and, as I will discuss below, to autonomy) (Nedelsky 1990; see also Nedelsky 1989).

Munzer advances several “reservations” about Nedelsky’s approach. The first is that she objects to the “metaphor” of the bounded self and law as boundaries, only to replace it with equally vague alternative metaphors. Second, Munzer rejects the social constitution view of the self that Nedelsky relies on, since, he writes, “[e]xcept for conjoined twins, each person is physically bounded by his or her skin and sometimes has a legitimate interest in repelling attempted invasions” (Munzer 2001, 57).

But, clearly, a person is more than the mass of cells bounded by an epidermis. We are also kinds of beings (a Catholic, an African American, a woman) whose categorizations both fix our ideals (in many cases), ground our interests, and organize our identities. Many or all such categories are meaningful only as part of a social nexus (one cannot be the only Catholic who ever existed, for example). Indeed what counts as an “invasion” will depend in part on what counts as the self being invaded: a close embrace by one’s child may be seen as a fundamental expression of one’s deepest self (as a mother), while in other cases a close embrace will be seen as an intrusion by a stranger. Munzer clearly accepts this and expresses sympathy for a refashioned social model of the self elsewhere in this work (ibid., 74). But he goes on to argue that “[o]ne of the specific functions of property rights is to fence out others and the state in pursuit of legitimate interests. Property rights have important connections with privacy, the exercise and control over one’s life, and the development of individuality” (ibid., 57).

But this is precisely the point. Insofar as property is seen as chiefly the protection of interests defined in this manner, as the interests individuals have in separation and protection from others, then those aspects of our identity that require relations with others, care, support, recognition, and the like, will be occluded in such a system, or at least relegated to lesser status. In response to Nedelsky’s indictment of the “bounded” self presupposed by standard legal language, Munzer argues that it is “unclear” what unbounded selves are and that many boundaries and protections are needed to accomplish our goals. Right, but seeing the function of (property) law as centrally concerned only with such protections downplays the need to protect those particular relations that connect with our identities and central values, such as support for the raising of children, protecting one’s native language, giving social and economic support to one’s church, and so on. The contrast class to the “bounded self,” for Nedelsky, is not an unbounded self but rather a connected one whose projects, interests, activities, and deepest identity depends on connections with other people, groups, institutions, traditions, and so on.

Munzer’s response here, however, rightly points out that the normative basis for the call for a shift in paradigm for property law is not clearly or convincingly laid out (or is not fully convincing to all in a pluralistic culture) in much of the literature from which he draws. Let us, then, look a bit more deeply into conceptions of self and autonomy that are meant to serve as rivals to the individualist models of traditional liberal theory in order to articulate more clearly (and, one hopes, more convincingly) the normative foundation for a social relations view of property of the sort Munzer calls for.

III. Social Accounts of Freedom and Autonomy

A key element in SR theory is this (quoting Munzer): “The existence of power, coercion, and the largely socially constructed nature of the self leaves scant room for autonomy understood as highly individualistic self-government, although it may point toward some different account of the self and autonomy.” Munzer goes on to say of this claim:

Social relations thinkers…tend to distance themselves from understanding autonomy as the psychological capacity to be self-governing [which is Munzer’s own rendering of the concept]….Some seem to regard autonomy as a will-o’-the-wisp…Others seem to view autonomy as a complicated nonindividualistic
affair that involves fettered choices and communal constraints born of social relations. The appeal of social-relations views, then, resides partly in what their advocates see as a more accurate understanding of the self and autonomy than that offered by competing libertarian, law-and-economics, and liberal thinkers. (ibid., 42)

Nedelsky makes the point that “[i]n such of our constitutional protection can be understood as a (misguided) attempt to protect individual autonomy” (Nedelsky 1990, 167). Property law, she also thinks, is central to this endeavor. What is “misguided,” however, is that the conception of autonomy at work in these traditional approaches is autonomy as the individual capacity to form and act on (again, individually formulated) values.

An interesting recent trend in theorizing about freedom and autonomy is to look at these concepts as defined in terms of social relations, specifically relations of power, obligation, status, recognition, and care. Feminists, for example, who want to emphasize relations of care and responsibility that have traditionally marked the experience of women have led the drive to develop alternative understandings of self-government.3 Indeed, Nedelsky herself is a leading proponent of just this sort of revisionary account of autonomy (Nedelsky 1989). She argues that traditional notions of autonomy must be refashioned to account for social constitution of selves but in a way that does not valorize their contemporary (oppressive) social forms (ibid., 10). The process of “finding one’s own law” demanded by autonomy, she says, can only occur in a social context that nurtures the capacity to do so. For traditional notions of autonomy, on the other hand, “[t]he most perfectly autonomous man is thus the most perfectly isolated” (ibid., 12); and property is the most perfect protection of autonomy in this sense. But according to a revised, relational conception of autonomy, what enables autonomy are relationships that “provide the support and guidance necessary for the development and experience of autonomy”—“the most promising model, symbol, or metaphor for autonomy is not property, but childrearing” (ibid., 12); we should “think of autonomy in terms of the forms of human interactions in which it will develop and flourish” (ibid., 21).

I will return to this specific set of proposals in a moment. The relational accounts of autonomy that they have inspired share a general conviction that one’s status as a self-governing agent involves not only one’s own powers of reflection, agency, and choice, but also how one is treated by others and how one fits in a relational matrix of power and respect. “Relational autonomy” does not refer to a single account but is rather an umbrella term which refers to all views of autonomy that share the assumption that “persons are socially embedded and that agents’ identities are formed within the context of social relationships and shaped by a complex of intersecting social determinants, such as race, class, gender, and ethnicity” (Mackenzie and Stoljar 2000, 4).4 These concepts underscore the social components of our self-concepts as well as emphasize the role that background social dynamics and power structures play in the enjoyment and development of autonomy.5

As I mentioned, Nedelsky argued that we should “think of autonomy in terms of the forms of human interactions in which it will develop and flourish” (Nedelsky 1989, 12). Notice, however, that this specifies the conditions that allow autonomy to develop rather than the conceptual conditions that define it. Writers like Nedelsky are surely correct that discussions of autonomy have focused on the individual as if “he” were able to develop an authentic set of values and desires without the caring support of various others and the social structures that contribute to human self-development. In addition, feminist concerns of this sort point to the ways that many of us find our authentic selves in relation to various others (those we care for as well as cultural traditions, communities, and causes). However, if these lessons were all taken to heart, as they should be, we might still define autonomy as an individual undertaking, a set of capacities which a person, apart from others, might exercise. It might be more fruitful to focus on conceptions of autonomy that see relational factors as conceptually necessary for autonomy.

Marina Oshana, for example, insists that autonomy should be seen as a “socio-relational” phenomenon (Oshana 1998 and 2006). On her account, the conditions of autonomy include various individualist requirements—epistemic competence, rationality, procedural independence—but also normatively substantive conditions such as self-respect and facing an adequate range of relevant options (Oshana 2006, 84-86; cf. Raz 1986, 373-78). The specifically socio-relational conditions Oshana lists all come under the banner of “substantive independence.” They include: social and psychological security (persons cannot deprive the person of de facto or de jure power and authority “characteristic of global autonomy”) (2006, 86); the person can pursue goals different from those who have influence and authority over her; the person is not required to take responsibility for another’s needs unless reasonably expected in light of her particular function; she enjoys financial self-sufficiency adequate to maintain independence from others; and the person is not deceived.

Another relational approach to autonomy comes from a different direction and is one which combines considerations of equality of the sort that move Oshana with dynamic, interpersonal factors arising from a certain understanding of the development of the subject, specifically a Hegelian one. Axel Honneth and Joel Anderson have sketched a conception of autonomy that includes relational, in particular recognitional, elements (Anderson and Honneth 2005) that are of relevance to our concerns.6 Anderson and Honneth argue that in at least three spheres certain forms of social recognition relations—ones that establish self-respect, self-trust, and self-esteem—are required for individuals to avoid particular vulnerabilities to which citizens in current contexts are systematically subject, vulnerabilities against which their autonomy is meant to protect them. Such relations of recognition, they claim, are therefore conceptually required for autonomy in a full sense. As they put it, proper relations of self-respect, trust, and esteem are needed so that “full autonomy—the real and effective capacity to develop and pursue one’s own conception of a worthwhile life—is facilitated by relations-to-self (self-respect, self-trust, and self-esteem) that are themselves bound up with webs of social recognition” (Anderson and Honneth 2005, 137).

Now these accounts of autonomy are not without their limitations, and I have registered certain reservations about aspects of them myself. A chief worry involves the tension between this view of autonomy and the value pluralism to which much liberal theory, as well as feminist views and other versions of democratic theory, are committed. For many people have self-consciously and with apparent authenticity and rationality chosen forms of social life where relations with others do not conform to the egalitarian ideals motivating many of these views. Members of traditional religious communities, for example, may well accept positions in a strict social hierarchy that deny them equal recognition and opportunity to pursue open options. Now we might rightly condemn such practices for this very rejection of the equal status of agents. But to do so by way of defining autonomy as equal social standing in some way is to adopt a perfectionist account of that notion, one which rests on a controversial and contested conception of human
flourishing. Such a perfectionist stance is troubling when used in an account of autonomous agency, since that concept serves as a designator or the basic requirements of citizenship (and by extension, participation in democratic decision making) on many views.8

These reservations notwithstanding, relational accounts of autonomy serve to focus our attention on the ways that non-individualist accounts of the self and its interests can undergird normative political and legal principles. Insofar as institutions like property rules are structured to protect basic citizen interests (such as her autonomy) then relational accounts of autonomy require non-individualist analyses of property rights. That is, to the extent that social relations of certain sorts are required for autonomy and property rules should be structured to protect autonomy, then such rules must take into account those social relations that are central to autonomy. Before drawing out some implications of this argument, I will need to interrupt our discussion with a brief aside about the structure of property rights.

Aside: The Complexity of Ownership

Property rights themselves are complex: they involve several types of legal claims, from the right to possess, use, and alter the nature of the good in question, to liabilities concerning others’ injury, to powers to assign others as owners, renters, trustees, managers, and so on, to the right to income flows from contractual relations involving the holding (trades, shares, etc.).

In earlier work I analyzed the concept of ownership in terms of the interests the different elements of the typical property rights package tend to protect.9 I suggested that some rights in the cluster that typically defines ownership are particularly closely tied to the ability of persons to guide their lives in predictable ways and to maintain levels of control and reasonable expectations needed to make plans, pursue values, and independently coordinate with others (associated with what I labeled “autonomy interests”). Rights to possess, use, modify, alienate, and destroy one’s holdings cluster together to express an owner’s ability to manage her life independently, the value of which, I claimed, connects directly to individual autonomy. I called such rights “control rights.”

On the other hand, the rights to transfer and retain goods received in that transfer, at rates set only by the voluntary actions of the traders given constraints of the market, I labeled “income rights.” I claimed that such rights are not directly tied to one’s autonomy except instrumentally, in that income simply allows one further choice about future use and purchases. But the interests in question are strictly competitive, in that for any given flow of income, one’s interest is the same as any other person’s, for income generally is in the form of currency or capital. This is not to say that interests in income are negligible or should be ignored, but only that there is no autonomy-related interest to any particular bit of income any more than any other. Subject to diminishing marginal returns, one simply has an interest in more of it rather than less.

In addition, the possession and exercise of control rights have been shown to have psychological affects tied to senses of self-efficacy, self-definition, and self-expression. Lita Furby, for example, whose large, cross-cultural studies of this topic are among the most widely cited in the literature, concludes that:

both the meaning of, and the motivation for, possession seem[s] very often to be closely linked to the experience of efficacy and a sense of personal control. [In addition, there was found to be] an association between possessions and one’s sense of self. Both the meaning of, and the motivation for, possession [is] frequently related to one’s self concept.10

The reference here is to possession, but it is clear from this work and related studies in psychology, anthropology, and sociology that the connection between property and one’s sense of self and self-control concerns what I am here calling “control rights” and not, generally, to income rights.

In addition to affording persons with control over their environment and hence enabling them to coordinate plans and pursue goals, control rights over certain kinds of goods also can serve an expressive and symbolic function for persons.11 Furby mentions the connection between possession and one’s sense of self, but others have argued that certain kinds of possessions express and constitute a person’s concept of herself, her memories, and her values, while other sorts of goods are purely fungible and are valued solely for their market value. As Margaret Jane Radin has put this point: this “perspective generates a hierarchy of entitlements: The more closely connected with personhood, the stronger the entitlement” (Radin 1982, 986).12

The key point, though, is that control rights connect to autonomy interests in a particular and unique way, so that insofar as property rules function generally to protect or allow the exercise of autonomy, control rights are of special concern. Moreover, insofar as the “self” of self-government is socially constituted, then the control interests that property rules might protect will be related directly to those relations.

Much more needs to be said to describe and defend this view (and criticisms to it have been raised).13 As I will suggest presently, such a viewpoint is important in constructing the normative core of a social approach to property.

IV. Social Autonomy, Social Property

We may now have some elements in place to define a social relations approach to property that Munzer may well find sympathetic with, or at least may not resist given his comments on earlier iterations of such a view. The relational conceptions of autonomy outlined above were meant as mere examples, but we can be more specific. Munzer defines autonomy as a psychological capacity to be self-governing (Munzer 2001, 66). This is unproblematic, though the idea of “self-government” in the definiens would need to be unpacked. Insofar as selves are constituted, at least in some part and to varying degrees, by social relations, then the selves governing and being governed will necessarily involve such relations. That is, if one’s identity is defined in terms relating to one’s place in a network of interpersonal and cultural dynamics, then governing oneself requires the maintenance of those dynamics. If my self-conception centrally involves my religious convictions, for example, then living in a social setting where that religion is denigrated or suppressed would not allow me to govern myself. Social recognition and relational accounts of autonomy bring out this point. What I would add is the way property rights, specifically control rights, can help maintain relations that are inimical to self-definition.

However, some version of Munzer’s reservations about Nedelisky and other SR theorists continues to lurk, in that without a specific accounting of the relations that are crucial to self-constitution, we are left with a vague lens through which to analyze property rules but hardly a specific theory. Add to that my suspicions that some relational accounts of autonomy are thinly disguised perfectionist conceptions of the good, in that they specify social relations as required by autonomy (and hence justice) about which reasonable people disagree.
But I would like to utilize some of the points developed here to cobble together the outlines of an argument for a social relations framework for the analysis of property rules. The general argument runs as follows: particular social relations, among persons and between persons and institutions, social systems, cultures, traditions, and the like, often are constitutive of the identities of persons; such identities comprise the “self” of self-government in that they function to organize the perspective and the interests that self-government involves; rules of property codify the dimensions of social relations, often in ways that support or make vulnerable these identity-constituting relations; specifically, control rights in certain goods can fix the locus of decision making involving the use, development, alteration, or management of the goods in question, in turn altering the social relations to which such property rules apply; so property rules (in particular the relevant control rights) fix the locus of control over identity-constituting relations.

Insofar, then, as one purpose of property rules is to protect autonomy, and autonomy (self-government) essentially involves the support and maintenance of those social relations that constitute identity, then decisions concerning property rules must take directly into account those relations.

This skeletal argument captures, I think, many of the important elements of the social relations approach, anchoring those elements in the protection of autonomy (albeit autonomy in a socially cathected sense). However, one dimension of these relations that my reconstruction has not so far emphasized, and a consideration central to most social relations models, concerns power. I do not have the space to explore that dimension here, but it should be obvious how considerations of power enter in. Social relations, either among people or between persons and extra-personal phenomena (institutions, practices, cultures, and so on) always instantiate a level of power, specifically the power to control the contours of those relations. The relational conception of autonomy defended by Oshana, for example, requires that relations must be more or less equal for self-government to be exercised. Without committing to the adoption of that particular model, we should be clear that examination of the levels and loci of power in a social setting will be crucial in identifying and protecting autonomy-related interests when the self of self-government is partly constituted by relations, power over which will be fundamental in persons’ abilities to maintain and express their social identities.  

I hope also that such an approach avoids the most trenchant worries that Munzer has raised about some of the examples of social relations theories of property he discusses, particularly the kind that Nedelsky and others have advanced. Specifically, I hope this makes clear that the normative basis of this framework is the value of autonomy. It is still a vague framework rather than a theory of property in any precise sense, but this vagueness exemplifies the “ideal-type” approach that Munzer (somewhat approvingly) mentions. But the general normative directive should be clear: law, and particularly property law, should take into account the social relationships that are involved that can be claimed to be crucial to the ongoing social identities of the agents affected in a particular case. Alteration of property rules may well alter the stability of the relationships that bear on those identities. Such considerations relate directly to the autonomy interests involved in the case, and such interests should receive particular (not to say “strict”) scrutiny in the adjudication of such rules.

These comments touch only briefly on the many insights that Stephen Munzer has raised about some of the examples of social relations theories of property he discusses, particularly the kind that Nedelsky and others have advanced. Specifically, I hope this makes clear that the normative basis of this framework is the value of autonomy. It is still a vague framework rather than a theory of property in any precise sense, but this vagueness exemplifies the “ideal-type” approach that Munzer (somewhat approvingly) mentions. But the general normative directive should be clear: law, and particularly property law, should take into account the social relationships that are involved that can be claimed to be crucial to the ongoing social identities of the agents affected in a particular case. Alteration of property rules may well alter the stability of the relationships that bear on those identities. Such considerations relate directly to the autonomy interests involved in the case, and such interests should receive particular (not to say “strict”) scrutiny in the adjudication of such rules.

References

Endnotes
1. He writes: “If the social-relations view is an approach to the understanding of property, it cannot be a convincing vehicle of analysis and criticism unless its robust normative commitments are disentangled from the possibly innocuous proposition that property has to do with social relations among persons with respect to things.” (Munzer 1999, 567).
5. The terms “relational” and “social” do not mean the same thing, and it would be instructive to examine their different connotations and implications, given the variety of motivations for such non-individualized accounts. For example, “relational” views seem to express more thoroughly the need to underscore interpersonal dynamics as components of autonomy, dynamics such as caring relations, interpersonal dependence, and intimacy. “Social” accounts imply, I think, a broader view, where various other kinds of social factors—institutional settings, cultural patterns, political factors—might all come into play.
6. This view rests in part on Honneth’s earlier work on the importance of recognition for conceptions of the subject generally (Honneth 2001, 515).
7. See, for example, Christman (forthcoming), chapter 9.
8. For a further discussion of this criticism, see Christman 2004.
10. Furby 1991, 459. It should be noted that this relation is not unwavering and indeed may vary with such things as gender and age: see Dittmar 1991.
12. Munzer has commented on Radin’s work in Munzer 1994.
13. For criticism, see, e.g., Attas 2006.
14. One dimension of traditional social relations approaches to property that I am not emphasizing in this reconstruction is power as it is theorized by Foucault and his followers. That manner of conceptualizing power (and its relation to the self) would follow along similar lines to those outlined in the text but of course do so in a different vernacular. For discussion of such an approach to the self and its relation to autonomy, see Christian forthcoming, chapter 2. Munzer’s analysis of the SR approach also considers the Foucauldian influence (Munzer 2001).
15. I should add that although much latitude is made here for the various ways that individual selves are in various ways and degrees socially constituted, the autonomy being protected nonetheless remains individual autonomy. For discussion of the coherence of the combination of these ideas see Christman forthcoming.
An Uneasy Case against Stephen Munzer: Umbilical Cord Blood and Property in the Body

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Introduction
I have a long-standing admiration for Stephen Munzer’s work, dating back to his careful and synergistic analysis in A Theory of Property. That respect has been enhanced by his continuing ability to predict and explain the ethical and legal impact of unprecedented biotechnological developments, in such major articles as “An Uneasy Case against Property Rights in Body Parts” (Munzer 1994), “The Special Case of Property Rights in Umbilical Cord Blood for Transplantation (Munzer 1999), and, most recently, “Human-nonhuman Chimeras in Embryonic Stem Cell Research” (Munzer 2007). So it is with that rarity in academia, a genuine spirit of collaboration, that I offer up this article’s criticisms.

I make “an uneasy case” against the moral particularism of Munzer’s theory of property in general, and, in the more specific context of cord blood banking, against what I regard as an unexamined and untenable assumption that umbilical cord blood belongs to the newborn rather than to the mother. These points are rooted in the feminist analysis of my books Property, Women and Politics (1997) and Property in the Body: Feminist Perspectives (2007), but they are not confined to feminists like myself. The UK Royal College of Obstetricians and Gynaecologists has received legal advice that cord blood is the mother’s property, if anyone’s. While that may seem an arcane point, it has important ramifications for informed consent, commodification, and regulation of private interests’ claims in body parts, as well as for Munzer’s overall theory of property.

What I have long esteemed in Munzer’s work is his ambition to consider all the angles of new developments that often receive only a superficial analysis. I hope this critique will be taken as “an uneasy case” that in a crucial aspect of cord blood banking and other new biotechnologies, he still has important work to do.

Property in the Body: The Case of Umbilical Cord Blood

In his article “An Uneasy Case against Property Rights in Body Parts” (1994), Munzer takes issue with the acceptance by some other scholars (especially Margaret Radin, e.g., 1993) of commodification of the human body. Although he denies that markets in body parts should be prohibited altogether, he does feel that there is a qualified and “uneasy” case against the sale and transfer of body parts in markets. (Here I should state straightforwardly that I am much more on Munzer’s side than Radin’s, although I would go further than he does in prohibiting markets in body parts.) While Munzer is typically pluralistic rather than a “straight” adherent of any one philosophical school, central to his position on property in the body is a Kantian notion of human dignity as an unconditioned and incomparable value. Entities with dignity, such as human agents, differ from things that have only a market price. It is morally objectionable for persons to sell their body parts, in Munzer’s view, if they offend dignity by transferring them for a reason which is not proportionate to the nature of the body part sold.

Now one great difficulty in modern biotechnology is that the Kantian distinction between things and agents is under continued and concerted attack, as is the distinction between things external to ourselves and things within our bodies. External objects such as pacemakers can be incorporated into our bodies, while some body tissues and parts can be separated from our bodies and transformed into objects for our use. Following the Marxist conceptions of objectification and commodification, tissues and body parts so transformed have been objectified; where they have additionally been made subject to market transfers, including but not exclusive to sale, they have also been commodified.

Is it only the commodification of body parts and tissues which offends against human dignity, or is objectification...
inherently wrong? One would expect Munzer to oppose the latter position, since his “unease” is primarily with the sale and transfer of body parts and tissues in markets. One form of body tissue whose objectification Munzer does seem to accept is umbilical cord blood, which is taken between the second and third stages of labour by a process involving clamping the cord and extracting the blood for storage in a “bank,” for the child’s future use if stem cell technologies ever advance sufficiently. Such banks may be either private or public; the two forms raise different moral and clinical issues.

In his articles “The Special Case of Property Rights in Umbilical Cord Blood for Transplantation” (1999) and “Limited Property Rights in Umbilical Cord Blood for Transplantation” (2001), Munzer was among the first to explore the legal and ethical issues involved in this comparatively new technology. (See also Annas 1999; Haley, Harvath, and Sugarman 1998; Kirschenbaum 1997; Vawter 1998.) Particularly in suggesting the utility of a property model, Munzer did indeed break new ground, as was later recognized by other commentators (e.g., Dame and Sugarman 2001). I agree entirely with Munzer that a property model is appropriate, but I feel that it is unfortunate that Munzer’s model rests crucially on a clinically and legally dubious assumption: that the property rights to the cord blood vest in the newborn, and the child or adult that newborn will become. This apparently untested presupposition has serious ramifications for his work, as well as for public policy—and I sense that Munzer does want his work to matter for public policy, rightly enough.

In my view, and that of the leading professional body in the United Kingdom, cord blood is the mother’s property, to the extent that, following Moore, Greenberg, and Kelly, there can be any such thing as ownership of tissue once it has left the body. (The same reservations would also apply if the cord blood were regarded as the property of the newborn, because of the traditional common law view that tissue outside the body is res nullius, no one’s thing. In the Kelly case, however, the application of labour and skill was held to create property rights in tissue products.) When we view cord blood as the mother’s property, rather than the newborn’s, we come up with very different and more disturbing conclusions about consent to the procedure and transfer of property rights in the blood (Dickenson 2007 and 2008).

The Royal College of Obstetricians and Gynaecologists (RCOG) took legal advice during the evidence-based consultations that produced its two Scientific Advisory Committee Reports on the practice of umbilical cord blood banking (RCOG 2001 and 2006). That advice decisively rejected the assumption that cord blood belongs to the baby by virtue of genetic or immunological identity (RCOG 2006, section 6). It seems clear that Munzer assumes the former—genetic identity as the basis for ownership rights: he claims that both parents have a genetic share in the baby’s genome and, therefore, should share an equal right to control the disposition and management of the newborn’s cord blood (Munzer and Smith 2001, 205). But, as the RCOG report noted, genetic identity is rarely if ever the basis of property rights. The cord blood, the report declared, should be regarded as a gift from the mother to the child, not as the child’s property by right. In the report’s view, the UK Human Tissue Act (2004) likewise vests ownership of the placenta and cord blood in the mother. At least in the UK context, by statute, and also in other jurisdictions, by reasons of jurisprudential reasoning and physiology, Munzer’s assumption that cord blood belongs to the newborn is flawed.

Normally, in the absence of clamping and harvesting of cord blood, the infant would receive all the blood supplied through the conduit of the cord from the mother. The mother is the donor of the blood and the infant the recipient, in the usual case. Where cord blood is taken, a portion of that blood is donated by the mother to the public or private cord blood bank, rather than to the infant. It is donated for the infant’s benefit, in private directed banking, but it only “belongs” to the infant because the mother has transferred her entitlements in it. For these physiological and legal reasons, it is better to view cord blood as either a conditional gift or possibly even a sort of settlement in trust from the mother.

Thus the mother’s gift of the blood to the child is a transfer, but obviously not a transfer by sale. Presumably within Munzer’s “uneasy case” framework, it would not be an objectionable transfer because the motives for transfer are altruistic and are not incommensurate with the dignity of the tissue. But it is still a transfer from mother to child. This is important because if the cord blood were regarded as the child’s by right, it could conceivably be required of the mother that she should supply the child with it, despite the known risks involved in clamping and taking cord blood (Weeks 2007). It is also important because here, as in the production of ova for somatic cell nuclear transfer stem cell technologies, women are producing tissue of commercial value without receiving adequate recognition for it (Dickenson 2007, 99; Waldby and Cooper 2008). This is a denial of women’s agency and labour, and an injustice.

Whereas most commentators, like Munzer, simply assume that the cord blood belongs to the baby on the basis of genetic identity, I have argued that it is the mother’s on Lockeian grounds (Dickenson 1997, 2007, and 2008). Locke actually denies that we possess property rights in our bodies, as opposed to the work performed by our bodies, because we have not laboured to create our corporeal frame. Genetic or biological identity, or the mere fact of being “connected” to one’s tissue, is insufficient to ground property rights. Munzer himself has rehearsed the merits of a labour-desert model of property, a variant of Locke’s doctrine that investing work in an object confers property rights in it (1990). Yet he seems unable to see the possibility that the mother’s labour in childbirth generally, and particularly in undergoing the additional intervention required, might ground a property right in the cord blood. Indeed, he does briefly consider whether a labour-desert model might apply to cord blood, but rejects it because the fetus in the womb does not invest labour in producing tissue (1999, 497).

Yet, the mother does: cord blood is not merely “waste” discarded with the placenta after childbirth is complete, as some private cord blood banks misleadingly imply (Dickenson 2008, 54-57). It is taken by an additional procedure between the second and third stage of delivery, putting both mother and infant at some additional risk, particularly if the attention of delivery staff is diverted from the crucial stages of the baby’s first breaths and the delivery of the placenta, when the woman is most at risk of hemorrhage. The actual function of the “waste” claim—made, to be fair, not by Munzer but by private cord blood banks—is to mask the mother’s rights in the cord blood, making it appear to be something abandoned, which is open to the private bank to process and store for a considerable fee. Here we should be reminded of the similar tactics used to claim property rights in “discarded” tissue by commercial interests in the Moore case, where the claim that a $3-billion cell line was mere waste was accepted by the California Supreme Court in denying the donor (Moore) any property rights in the line developed from his tissue. Those who, like Munzer, have expressed “unease” about markets in body parts should assiduously assert the mother’s rights in the cord blood as a bulwark against the operations of private commercial interests in this new sphere.
It appears that Munzer has given little or no consideration to the possibility that the mother does invest labour not only in pregnancy and childbirth—as one childbirth manual says rightly of the second stage of labour, “You’ve never worked so hard in your life” (Klitzinger 2004)—but in the additional procedure and possible ensuing risk necessary to extract cord blood. If, as Marx thought, productive labour is distinguished by intentionality and control, the decision to allow cord blood to be extracted requires both those qualities. Women must decide in advance that they intend this additional procedure to be performed, and that they will be undergoing it at a time when they simply want childbirth to be over as quickly as possible, because they intend to confer a benefit on their baby. (In fact, although the fact does not undermine the argument from intentionality and control, mothers are probably mistaken in thinking that benefits outweigh risks. The RCOG report makes it clear that early clamping puts the baby at extra risk of anaemia and other harmful sequelae, as does subsequent research summarized in a comprehensive evidence-based survey: Weeks 2007. The countervailing benefits are still largely speculative, although there have been advances in the past year in cord blood transplantation.)

Nor does Munzer seem fully aware of the physiological basis advanced by the RCOG reports as evidence that cord blood belongs to the mother. To begin with, cord blood is extracted from the mother’s side of the clamp, not the infant’s. At times Munzer’s reasoning seems so deductive and a priori, flying in the face of the medical facts of which he is normally such a master, as to be almost Scholastic:

The term “cord blood,” used loosely, applies both to blood in the umbilical cord and to blood within the embryonic part of the placenta. This loose usage creates an ambiguity as to whether, after birth, blood is harvested from the placenta, or umbilical cord, or both. The ambiguity hinders a precise description of the harvesting procedure, but otherwise is of no consequence, for it is always the blood of the newborn that is at issue. (1999, 500)

There is actually no ambiguity or loose usage in what the term “cord blood” properly denotes: blood extracted between the second and third stage of labour from the umbilical cord. What Munzer apparently means is the distinction between the in utero method of collection, while the placenta is still attached to the uterus, and the ex utero method, when the placenta has been delivered. Public banks such as the UK national cord blood bank more often use the ex utero method (RCOG 2006) because there is less risk of maternal hemorrhage and of distraction for delivery room staff from the baby’s first breaths. In the in utero method, the blood is still pulsing from the placenta, which remains attached to the womb, highlighting the improbability of calling it anything but the mother’s blood. With the ex utero method, the placenta is delivered and taken away so that blood can be collected from the portion of the cord that remains attached to it. In both cases, however, the blood is extracted from what is or was the maternal side of the clamp, not the baby’s.

Yet although Munzer claims there is an ambiguity where there is none—which one would think might disturb him into questioning his unexamined assumption—he simply defines it away by insisting “it is always the blood of the newborn.” I have been unable to find any indication that he has considered the alternative position, either here or in his later article with Smith (2001). Unyielding commitment to the idea that the blood belongs to the baby sometimes leads Munzer into some very tortured contortions:

Perhaps the closest analogy of cord blood is blood lining the uterus, which either can serve to nourish an implanted fertilized ovum or leaves the body during menstruation. Yet the analogy is imperfect. Blood lining the uterus is the blood of a menstruating woman whose body surrounds it. Cord blood is different because, though it is fetal/neonatal rather than maternal blood, it is often circulating outside the normal contours of the body of the fetus or newborn, and further is, prior to birth, surrounded by the body of the pregnant woman. (1999, 511)

Likening the conscious and voluntary donation of cord blood to the involuntary mechanism of menstruation is a denial of a woman’s agency in deciding to undergo an additional procedure, with its possible risks, for what she believes will be a benefit to the baby. And one might well think that blood which is “surrounded by the body of the pregnant woman” simply is the woman’s blood. In physiological reality, there is constant exchange of gases, glucose, and antibodies between mother and fetus during fetal development. Maternal and fetal circulations are entirely intertwined, separated only by a layer of endothelium one cell thick. In genetic and immunological terms, the placenta and cord blood combine traits of both the mother and the fetus. So there is little basis in biology for assuming that cord blood belongs to the baby, and in any case genetic identity, as we have already seen, is rarely the basis of property rights.

Against the physiological reality, why assume that cord blood belongs to the baby? In Munzer’s case this assumption seems particularly strange, given his usual clinical accuracy and his insistence that we must use our lateral thinking caps to find a new model for property rights in umbilical cord blood, rather than relying on old analogies (Munzer and Smith 2001). To this call for innovation and appropriateness to the specific case, I am entirely sympathetic. Munzer and Smith rightly insist that “all relevant factors” should be examined in our search for new models that do justice to the new reality; yet they begin by closing off any consideration of the extremely relevant factors that make cord blood rightfully the mother’s property. More accurately, and worse still, they do not close off that avenue; they simply do not seem to see it on the map. Why has it so entirely escaped their notice?

Elsewhere in his work, from his theory of property to his most recent article on chimeras, I would argue that Munzer has also evidenced limitations in gender awareness, lessening the rigour and relevance of his important work. Rather than the universalism to which he aspires, in, for example, his attempt to create a general theory of property, he is at risk of moral particularism. His failure to consider the possibility that cord blood rightfully belongs to the mother is symptomatic of a deeper-rooted difficulty. I will illustrate that problem in another specific case from bioethics, chimeras, before turning my attention to its manifestation in Munzer’s general theory of property.

The case of chimeras

In his recent article on chimeras in stem cell research, Munzer insists that policy decisions must “above all...take into account the effects on the life chances of the least well off in society and on those most burdened by chimeras” (Munzer 2007, 136). Presumably, this calculus should also consider the effects on those most burdened by the alternatives to chimeras.

In somatic cell nuclear transfer stem cell research, which involves inserting a body cell into an enucleated egg, the vast number of human eggs required to produce a single potential stem cell line has motivated two teams of UK researchers to
request and obtain permission from the Human Fertilisation and Embryology Authority (HFEA) for the use of cow or rabbit eggs rather than human ones—creating a variant of chimeras sometimes called animal-human admixed embryos or cytoplasmic hybrids, “cybrids.” (That permission has now been given statutory form in the recently revised UK Human Fertilisation and Embryology Act, although a court challenge was issued in late November 2008, asserting that the HFEA had exceeded its statutory authority and demanding that the two teams undertaking that research cease operations under the HFEA licence, until the statute takes force in 2009.) One such researcher, Stephen Minger of Kings College London, has justified his team’s request in terms of alleviating the burden on women donors, who must undergo the risks and discomforts of egg retrieval, which is even known to have produced fatalities from ovarian hyperstimulation in some instances (Minger 2008).

Whether or not one approves of animal-human admixed embryos, the effect on demand for women’s eggs surely is a major factor to be considered. That is particularly true in the U.S. system, where women providing eggs for research purposes are allowed to be paid for their “donation.” It seems plausible to assume that it will be less well-off women who will be tempted by the sums involved in selling eggs for research (Vogel 2006, Sexton 2005). That may not be true for IVF, where middle-class college women are targeted more intensively than poorer women, but it is likely to be true of egg selling for research. Eggs sold for IVF can command extra premiums if they come from women with “desirable” traits including hair and skin color, which are obviously related to social status; in the case of eggs sold for research, however, the genetic content is irrelevant because the egg is enucleated. Particularly given the two-tier system legitimized by the latest International Society for Stem Cell Research guidelines (Baylis and McLeod 2007), it can therefore be expected that women from poorer backgrounds, including African-American women and possibly even Third World women, will be more heavily represented among those selling eggs for research. Since SCNT stem cell research also requires larger quantities of eggs than IVF, possibly entailing higher dosages of ovarian stimulation, the poorer women will be the ones put at greatest risk (Dickenson 2002, 2006, 2007, and 2008; Dickenson and Alkorta 2008; Walby and Cooper 2008).

One might advocate the use of chimeras in SCNT research to prevent this stratified market in women’s eggs from developing and thus harming “the effects on the life chances of those least well off in society,” as Munzer puts it. Or—as I tend to do—one might oppose chimeras on the grounds that if SCNT research can use animal eggs to improve its presently meager success rate and shed the miasmic aura associated with it after the false claims made by Hwang Woo Suk (2004 and 2005), it will become all the keener to use women’s eggs in greater numbers. Either way, one would think that the question of cybrids for SCNT stem cell research, or animal-human embryos, would be prominent in Munzer’s consideration.

Yet none of Munzer’s scenarios replicates the SCNT situation, even though that was the most important reason why UK researchers wanted to create animal-human admixed embryos—provoking one of the only national policy decisions so far legalizing a form of chimera. Rather oddly, he appears to classify the case of an embryo produced by introducing a human nucleus into a non-human egg along with other possibilities which, he says, have little interest for researchers and little relevance to his framework. Since the introduction of a human nucleus into a non-human egg was, in fact, the instance that prompted most pressure for new legislation in the UK, Munzer seems to have made his framework less relevant than it could be to the UK situation, at least, and arguably elsewhere as well. As in the case of umbilical cord blood banking, he also seems to have failed to consider a factor that should have been obvious from either a scientific or a feminist point of view.

Property and Moral Particularism

These limitations should matter to Munzer, I think, because he rightly aims at relevance, as well as comprehensiveness and empirical accuracy. (As he writes, ‘...[M]aking the case for better property institutions is not an optional intellectual endeavour but a practical imperative.’ [1990, ix]) That threefold ambition is evident in his Theory of Property (1990), which relies on crucial psychological assumptions about motivation and agency in the acquisition of property. In chapter one of my Property, Women and Politics (1997), I tested the empirical basis of these presuppositions against women’s experience in other cultures and other periods in our own culture. Feminist anthropological, psychological, and historical accounts, I argued, would allow us to begin piecing together a theory of property which is more genuinely general than Munzer’s, but which, like his, applies a normative reconstruction of property to real-world policies, particularly in bioethics. This is the project which I have continued to pursue in Property in the Body (2007) and elsewhere. It is one to which I would hope Munzer should be sympathetic, just as I am sympathetic to his ambitions.

Munzer’s theory of property stands in the developmental, psychological tradition that links property to enhanced subjectivity and agency. Munzer relies very heavily, by his own admission, on what he presents as universally applicable motivational background factors, even though he intends his book not as a factual survey but as an original theory of property. He is therefore vulnerable to evidence showing that these psychological arguments are not generic, but are applicable mainly to men’s experience of property-holding.

A Theory of Property begins with a thought-experiment: we are asked to imagine a “no-property world.” This is not an environment which lacks the objects of property; rather, the relations of property-holding and property transfer are absent. Artefacts exist, but there are no rights of excluding others from their use, and no means of transferring them through inheritance, gift, or sale. Munzer intends this picture to startle the reader, to reveal just how central property is to human society and motivation. Without exclusive property rights in artefacts, the technological level of production would remain primitive because “people would probably not make the necessary sacrifices unless they could be confident of substantial control over the use and disposition of these things” (1990, 15-16). Not only are “stable possession and use…necessary to achieve the technological level of production…conducive to some of the virtues.” So in the no-property world we would have much to lose: our most cherished projects and sacrifices unless they could be confident of substantial control over the use and disposition of these things” (1990, 15-16). Not only are “stable possession and use…necessary to achieve the technological level of production would remain primitive because “people would probably not make the necessary sacrifices unless they could be confident of substantial control over the use and disposition of these things.” (1990, 15-16). Not only are “stable possession and use…necessary to achieve some abiding ends” (1990, 79), but property-holding is also conducive to some of the virtues. So in the no-property world we would have much to lose: our most cherished projects and a portion of our moral identity.

Yet what is really startling is not Munzer’s picture of a propertyless world but his apparent failure to realize how very ordinary this world is and has been: how many women have lived and still live in such a world. The Athenian wife of Aristotle’s time, for example, had no control over the use and disposition of any personal property, not even the clothes on her back; nor did she have custody rights over her children. Yet she was expected to manage and fructify the household’s wealth, including wealth in the labour of her children, for whom she was expected to make “the necessary sacrifices.” In her propertylessness, she was in much the same position as married women under the Anglo-American law of coverture, which dominated at the time. Locke was writing his theory of property and which persisted in tax regimes and divorce settlements until nearly the present day (Basch 1982; Pateman 1988; Salmon 1986). Similarly, women in...
many parts of sub-Saharan Africa, who produce up to 80 percent of their societies’ food, have lived under customary property regimes in which they have no “substantial control” over the disposition of the products of their labour, few or no rights in land, and often limited rights over their own persons (Boserup 1970 and 1990; Burman 1984).

Women in these no-property worlds still exercised moral agency and practiced moral virtues, but they did not do so in the expectation of stable control over the outputs of their labours. If not for property rights, then, what do women in patriarchal economic regimes produce and reproduce for? Given the reliance which Munzer’s supposedly general theory places on supposedly universal motives, which do not fit women’s propertyless in such diverse societies, this difficulty places his “general” theory of property at risk. Property and stability of expectation cannot be a universal human need, and a naturalistic account of property as an objective need must fail. This is not to deny other, non-naturalistic accounts of why men and women ought to have property: for example, a developmental, Hegelian account of property as enhancing human agency (Dickenson 1997, chapter four). But this is not the line Munzer has chosen to pursue. Instead, in his view, the possession of property is crucial not only to the frugal, enterprising motivation that builds a higher technological level in the economy—a utilitarian justification of property—but also to a Kantian emphasis on moral agency and personality. Is this to say that propertyless women cannot be full moral agents or virtuous persons? When and now, have tended to hold less property than men. Does that make them less than full moral subjects? Or, as I ask in Property, Women and Politics, do they hold less property because they are not construed as such subjects?

Perhaps it might seem unfair to charge Munzer with ignoring anyone’s particular historical and legal situation, women’s included, when he has purposely chosen to count history out by following a strategy of thought experiment in A Theory of Property. But the result of Munzer’s thought experiment is meant to apply to the world we actually inhabit, and to have something to say about the very specific legal applications which constitute much of A Theory of Property and of his work in applied bioethics. That it cannot do with the full efficacy it should be able to muster, until Munzer begins to “count women in” more completely throughout his theoretical and applied work. Like much “mainstream,” “canonical,” or “mainstream” political theory and jurisprudence, Munzer’s theory is not genuinely universal, but particularist. A true universal theory of property will reflect the insights of feminist theory and of women’s situations, and a genuinely relevant set of applications to biotechnology will do the same. In this commentary I have tried to provide a constructive set of suggestions that may enable Munzer to better achieve the empirical accuracy, relevance, and comprehensiveness which is such an admirable set of ambitions in his work.1

Endnote

1 I am grateful to Dr. Susan Bewley, lead obstetrician at Guy’s and St. Thomas’s Hospital Trust, London, for clinical detail on the physiology of cord blood, and to the Ethics Committee of the Royal College of Obstetricians and Gynaecologists, of which I am a member. All opinions expressed in this article are my own.

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that some philosophers might find my account of the identity that is a great deal more complex (Munzer 1977). I dare say away some intuitively attractive understandings in favor of one controversial. The analysis of the concept of retroactivity pushes over time (Munzer and Nickel 1977), I take positions that are constitution, as a text-based institutional practice, can change legally valid (Munzer 1973) and that the meaning of the U.S. he finds in my “moral and political philosophy.” In arguing that that exhibit not at all the compromise and irenic tendency that he illustrates his reservations by pointing up some difficulties, go far deeper than his mention of a “kitchen sink” theory would suggest. His challenges go to (1) the nature of moral pluralism and (2) its limitations in dealing with intractable, or seemingly intractable, moral and political problems.

As to the first challenge, my brand of moral pluralism holds that no single principle, or any master principle, governs all of moral analysis and judgment. So no version of Kantianism, or utilitarianism, or any other competitor can fill the bill. Although I nowhere claim to have proved that the three central principles—utility and efficiency, justice and equality, and desert based on labor—that I employ in the philosophy of property are either irreducible or incommensurable, I believe them to be both irreducible and incommensurable. As I have said, Penner correctly identifies the influences of Rawls and Smith on my work. He does not explicitly bring out the influences of J.O. Urmson, whose intuitionism is at bottom a kind of pluralism and thus differs in significant respects from that of G.E. Moore (Urmson 1974-75; Moore 1903), and of Norman Daniels, whose work on wide reflective equilibrium as a way to sort out wayward intuitions exerts continuing force on me (Daniels 1979 and 1980).

In contrasting my moral pluralism with “value” or “interest” pluralism, Penner says that “the former [mine] might be said to be meta-ethical, [and] the latter a position in substantive ethical theory.” This statement requires qualification. If “metaethical” is understood in a traditional way as relating to the meaning of moral judgments, my pluralism is not a metaethical position at all. It is a substantive, normative theory, even though it involves different moral commitments from the value or interest moral pluralism that Penner describes. If, moreover, one thinks that a moral theory is metaethical if and only if it takes a stand on the objective status, or lack of it, of morality, my pluralism is not metaethical in that sense either. I do not claim to know, nor do I take a stand on, the truth of moral judgments or the objectivity of moral principles, or the competing positions on related issues (e.g., moral naturalism vs. moral non-naturalism, moral realism vs. moral anti-realism, and moral cognitivism vs. moral noncognitivism).

If, however, we think of metaethics as marking out the nature of a particular substantive theory, I agree that my moral pluralism is “metaethical” in this third sense. If morality

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**Moral, Political, and Legal Thinking: Property and Bioethics**

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After reading the three essays by John Christman, Donna Dickenson, and James Penner, my initial reaction was: How fortunate I would have been to have these thinkers as my colleagues over the years! This reaction was not merely the selfish thought that my work would have been better had its detractors and dress been burned off in the cauldron of their criticisms but the evident intellectual pleasure that would have issued from being around them on a regular basis. I would like to hope that they might have got some slight profit from having me around on a similar basis.

The business at hand is to respond, in a like critical and constructive spirit, to the essays they have composed. I take them up in this order: Penner, Christman, and Dickenson. Because each of them raises widely different issues, it is not possible to give this response the thematic unity and smooth transitions that I would like. My critics’ topics range from pluralist moral theory and problems with its application to biotechnology, to social-relations theories of property and the nature of autonomy, and finally to feminist bioethics and property rights in umbilical cord blood.

**Pluralist Moral Theory and Its Limits**

Penner begins by noticing the centrality of moral pluralism to my moral and political writings. He observes, correctly, that it is a kind of intuitionism, and he marks the influence of John Rawls and M.B.E. Smith on my views. He carefully distinguishes my variety of moral pluralism from what is often called “value” or “interest” pluralism, and he teases out some implications of the distinction for my approach to morality. These implications are not always and everywhere to the good, for too often, Penner suggests, my pluralism rushes to an irenic compromise on issues so fundamental as not to be responsive to any such treatment. In the latter half of his essay he illustrates his reservations by pointing out some difficulties, or at least apparent difficulties, with a recent article of mine on human-nonhuman chimeras.

Salient features of Penner’s commentary are the accuracy and insight of his exposition. Only in a few places does he ever so slightly misread me, of which I will say more in a moment. I begin, though, by drawing attention to those aspects of my work that exhibit not at all the compromise and irenic tendency that he finds in my “moral and political philosophy.” In arguing that each of two conflicting legal rules might nevertheless both be legally valid (Munzer 1973) and that the meaning of the U.S. constitution, as a text-based institutional practice, can change over time (Munzer and Nickel 1977), I take positions that are controversial. The analysis of the concept of retroactivity pushes away some intuitively attractive understandings in favor of one that is a great deal more complex (Munzer 1977). I dare say that some philosophers might find my account of the identity of organs across time and transplantation quite unconvengial (Munzer 1993a and 1994). In the philosophy of religion, my efforts to defend voluntary poverty, a form of mendicancy in attitude, and even a qualified version of self-abandonment as intellectually sound and a viable Christian piety might strike some theologians as deeply misguided (Munzer 1999a, 1999b, and 2005).

If this self-prepared account of some of my other work is fair, an obvious question is why my writings in moral and political philosophy exhibit the compromise and irenic tendency that Penner rightly says they do. The main answer is that I could not see any other way to make intellectual and practical progress on the issues I discuss. In dealing with their practical dimensions I have tried, as Donna Dickenson observes in her paper, to achieve some measure of “empirical accuracy, relevance, and comprehensiveness.” On the intellectual side, pluralism does not strike me as the posture of someone who cannot make up his or her mind, or as a temporary truce whose sole philosophical interest derives entirely from its components. At this stage of confronting problems in the theory of property rights, bioethics, and law and biotechnology, it seems undesirable to go “all in” and wager one’s entire philosophical resources on a single moral vision.

Penner need not, I think, disagree with anything I have said thus far, but he would, I believe, contend that it does not come to grips with the challenges that he raises, which go far deeper than his mention of a “kitchen sink” theory would suggest. His challenges go to (1) the nature of moral pluralism and (2) its limitations in dealing with intractable, or seemingly intractable, moral and political problems.

As to the first challenge, my brand of moral pluralism holds that no single principle, or any master principle, governs all of moral analysis and judgment. So no version of Kantianism, or utilitarianism, or any other competitor can fill the bill. Although I nowhere claim to have proved that the three central principles—utility and efficiency, justice and equality, and desert based on labor—that I employ in the philosophy of property are either irreducible or incommensurable, I believe them to be both irreducible and incommensurable. As I have said, Penner correctly identifies the influences of Rawls and Smith on my work. He does not explicitly bring out the influences of J.O. Urmson, whose intuitionism is at bottom a kind of pluralism and thus differs in significant respects from that of G.E. Moore (Urmson 1974-75; Moore 1903), and of Norman Daniels, whose work on wide reflective equilibrium as a way to sort out wayward intuitions exerts continuing force on me (Daniels 1979 and 1980).

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If, however, we think of metaethics as marking out the nature of a particular substantive theory, I agree that my moral pluralism is “metaethical” in this third sense. If morality

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consists in part of moral principles that are incommensurable and irreducible and also with regard to some particular moral problems locked occasionally in ineliminable conflict, then my moral pluralism is not only a substantive normative position but also a view of the nature of morality. On the latter point it is loosely akin to the views of Nagel (1979). For me moral pluralism is centrally a matter of justification and the grounds for accepting moral principles. Thus, my use of wide reflective equilibrium as a means for figuring which moral principles apply, say, to property rights is an account of justifying the acceptance of these principles. Yet, as I acknowledge in various places, convergence in wide reflective equilibrium is neither necessary nor sufficient for having “proved” that these moral principles are objectively correct, but it is a reason for accepting them (Munzer 1990, 308-09; Munzer 2007, 141).

I doubt that I have done as much as Penner would have liked to clarify and elaborate my moral pluralism—to give “a more tangible feel of the nature of this morality,” as he puts it. But I hope to be taking steps in that direction. So my calling attention to affinities between my moral pluralism and various works by Daniels, Nagel, and Urmson (see Munzer 1990, 3, 308-09) is not a backhanded faulting of Penner’s scholarship. It is an effort to make a start on making my position a little clearer.

Can I do better than I have so far? Perhaps. For at least fifteen years, it has seemed to me that the acute use of hypothetical examples can help us to draw distinctions and clarify our moral intuitions. The article on chimeras tries to do a bit of this (Munzer 2007, 129-53) but a more successful effort, perhaps, is an attempt to take Kant’s argument from self-respect as it applies to putative property rights in bodily parts and assess that argument in light of some hypothetical examples (Munzer 1993b, 328-41). Still, as we know, Penner has some grave concerns about the chimeras article, and perhaps he would not find the essay on Kant any more convincing.

I shift now to Penner’s second challenge, which has to do with intractable moral problems, “where opposing moral positions are adamantly, even fervidly, held.” Examples would include the moral permissibility of abortion under various circumstances and of assisting in the suicide of terminally ill patients who, in a lucid and informed decision, request the aid of others in bringing their lives to an end. In such cases, says Penner, “Settling down and being reasonable are precisely what is not wanted.” He adds that “pushing even unreasonable points (so long as they are otherwise apparently logically unimpeachable) is exactly what is required to assess the logical validity and conceptual cogency of various theoretical claims, and to slap our (and others’) intuitions around a bit to see if they can take it.”

This delightfully phrased challenge is not one I can answer satisfactorily, but I am more sanguine than Penner is about my approach. Now, in one respect, nobody is likely to be able to meet Penner’s challenge, because often people’s moral beliefs pertaining to abortion and assisted suicide, for example, are so passionately held that there is scant possibility of getting opponents to discuss their differences rationally. So, to have a fair test of moral pluralism or any other substantive moral theory, we have got to have discussants who are willing to listen to each other and examine carefully what the other person is saying. Let’s call this the rational discussion condition. This condition might rule out some of Penner’s suggestions relating to “unreasonable points” and slapping intuitions around, because doing so might provoke just the irrational and overly emotional responses that are often the enemy of rational discussion. But I won’t insist on getting rid of these suggestions, for I recognize that some advances in moral and political philosophy come from the daring souls who formulate and defend counterintuitive positions. A fine illustration from the philosophy of property is Proudhon’s assertion that property is theft (Proudhon 1970). An illustration from the philosophy of the criminal law is Herbert Morris’s well-known essay “Persons and Punishment” (Morris 1968).

So let us keep all of Penner’s suggestions and assume that nonetheless the rational discussion condition is satisfied. Then, I think, some hope of resolution exists. I do not claim that I would be able to produce moral agreement in such cases. But I believe that some philosophers would be capable of doing so, or at least of generating a situation in which those who take one side or another in regard to abortion or assisted suicide rationally should reach moral agreement. Think back to my recommendation that the acute use of hypothetical examples would help. Now lodge that recommendation explicitly within an account of wide reflective equilibrium to be used to construct moral pluralism. If we do so, able, calm followers of this method of justification could receive counterintuitive proposals with equanimity. They could allow moral intuitions, from all sources, to be slapped silly. And still they could return to the table unperturbed in their efforts to argue for the principles that seem to them to be correct after giving thorough, dispassionate consideration to the arguments of others. I am not the best person for this job. Sharir and intertemporare arguments all too quickly throw me off stride, and I lack the tenacity in argument and the creativity in coming up with examples and counterexamples that are prerequisites to making this recommendation work, but the fact that others could do it gives me hope.

It is time, at long last, to consider Penner’s examination of my principles for the regulation of human-nonhuman chimeras. As I see it, his critique makes three main claims. One, the vocabulary of “basic,” “enhanced,” and “dramatically enhanced” human-nonhuman chimeras is “wholly misleading” and to call these expressions terms of art is “utterly baffling.” Two, the distinction between accession and specification, which are legitimate terms of art from the law of property, can be useful in picking out whether the human cells and organs dominate in the chimera, or whether the nonhuman cells and organs do so, or indeed whether they are in equipoise (i.e., neither dominates). Three, the moral framework I devise for regulating human-nonhuman chimeras, even if we get rid of the problems with my vocabulary, is unsatisfactory, and is moreover unsatisfactory because of some of the same methodological infirmities in my moral pluralism that Penner claims to have exposed earlier.

Penner’s first claim is well taken. The labels are misleading in the context in which and for the purpose of which I employed them. They mislead because, for example, it is hard to see what is “dramatically enhanced” about the late Senator Jesse Helms once he had a defective heart valve replaced by a porcine valve. The context and purpose of my three-fold distinction had to do with the mental and emotional faculties of a human-nonhuman chimera, and it’s hard to see how receiving a pig’s heart valve could have improved Helms’s brain. Nevertheless, I do wish to hold onto the distinction, even though I would use different terms for the labels.

Specifically, I would now use the following terms and characterize the three categories in the same way:

1. Low-level chimeras have some human cells, some nonhuman cells, and, in special cases, some hybrid human-nonhuman cells. Such chimeras do not have cognitive capacities higher than those of a dog or a pig.

2. Mid-level chimeras have similar combinations of cells from different species, but they possess cognitive capacities roughly equivalent to those of a
chimpanzee—which is selected as the definitional threshold for the middle level because of its relative proximity to human cognitive capacities in the animal order.

3. High-level chimeras have similar combinations of cells from different species, but they have cognitive capacities—including intelligence, linguistic capacity, self-awareness, emotions, and the ability to form and maintain social relationships—that approximate the cognitive capacities of a human being.²

There is, I believe, nothing wrong with this threefold distinction. Nor do I take Penner to suggest that there is. Thus, by getting rid of my misleading and inapt vocabulary about enhancement as the terminology for capturing this distinction, the first problem identified by him goes away.³

I believe, though, that there is room for using the vocabulary for enhancement in a quite different way that is related to my purposes. How we treat a human-nonhuman chimera should turn in large part on its cognitive capacities. If we have such a chimera that is distinctly nonhuman in appearance, and if we incorporate human cells into its brain so that it now has cognitive capacities that approach those of a human being, then we ought to treat it similarly to the way that we treat humans. For instance, if this particular chimera asked whether it wishes to participate in a medical or psychological experience, we should as a matter of policy require informed consent and the other measures that we insist on for human subjects.

Penner’s second claim, if I understand him correctly, is that the concepts of accession and specification from the law of property can help in deciding whether a human-nonhuman chimera is dominantly human, dominantly nonhuman, or neither. These concepts fall under the broader concept of mixing. In accession, “one item of property loses its identity” when it attaches (“accedes”) to another item of property. For instance, paint correctly applied to an automobile becomes part of the car and is no longer an item of property itself. In specification (generally known as “confusion” in American law), both of two initial items of property lose their separate identities. For example, your water and my malt, when combined in the correct way, become an entirely different item of property, namely, whisky. Penner’s concern is not the detailed rules of property that govern accession and specification but the use of these concepts in the analysis of chimeras. I read him as offering a friendly suggestion in light of the infirmities and limitations of my distinction between enhanced and dramatically enhanced chimeras.

The evaluation of this suggestion turns in part on whether human-nonhuman chimeras can be dominantly human, or dominantly nonhuman, sans plus. Ordinarily I do not think it is helpful to say that they can be. Rather, any such chimera can be dominantly human in one respect and dominantly nonhuman in a different respect. To illustrate, suppose that all valves in the heart of a particular human being are replaced by porcine heart valves. Then this chimera is dominantly nonhuman with respect to cardiac valves but dominantly human with respect to cognitive capacities. Suppose, instead, that a cadaveric human liver judged medically unsuitable for a human recipient is transplanted into a sheep and becomes engrafted. This chimera is dominantly human with respect to liver function but dominantly nonhuman with respect to cognitive capacities. Penner might reply that these contrasting examples do not prove that we must refrain from a global judgment as to whether the two chimeras are, all things considered, dominantly human or dominantly nonhuman. Any such reply would ascribe to me a stronger position than I wish to take. My point is that it is ordinarily more useful to mark out the various respects in which the human part or functions or capacities are dominant and those in which they are not.

Assume arguendo that Penner would accept my linguistic modifications—dropping “basic,” “enhanced” and “dramatically enhanced” in favor of “low-level,” “mid-level,” and “high-level”—in regard to the three categories of human-nonhuman chimeras. Assume also that he would allow a different and vastly reduced role for the terms “enhanced” and “dramatically enhanced” as applied to modifications that increase the cognitive capacities of the chimeric creature. In that case, I could make use of his remarks about accession and specification, as qualified above, in determining the respects in which a given chimera is variously human-dominant or nonhuman-dominant. My development of our combined thoughts in this way is not an effort to secure peace at any price but an attempt to make good on my stated aim of having this reply be critical as well as constructive.

It remains to address Penner’s third claim: that my moral framework for regulating human-nonhuman chimeras does not satisfy because of the methodological difficulties and other problems he has pointed to earlier. This final claim covers a number of different alleged faults: (i) a failure to look at the moral issues from “first principles”; (ii) a failure to address one first principle, viz. the accession/specification distinction; (iii) a failure to use that distinction in a particular case; and (iv) reposing too much confidence “in a method of ethics which regards achieving a peaceable consensus as the hallmark of success.” I am largely unrepentant on the first three points and have only modest sympathy for the last.

Pace Penner, I do look at first principles. I enumerate and defend six such principles (Munzer 2007, 136-41, 149-53). Admittedly, these principles as formulated use the misleading vocabulary of basic, enhanced, and dramatically enhanced chimeras. Yet, as argued earlier in this reply, these three categories are highly sensible, and once we use the different vocabulary of low-level, mid-level, and high-level chimeras, the difficulties of which Penner complains fall by the wayside. We can, moreover, still hold onto a subordinate use of the enhanced/dramatically enhanced distinction, which is perfectly acceptable given that it focuses on any positive change in the chimera’s cognitive abilities.

Furthermore, the accession/specification distinction is not, in my judgment, a first principle at all. For one thing, it is frequently unhelpful to use it in the global way Penner has in mind. Sometimes it may be impossible to do so—and not because the human and nonhuman elements are in equipoise but because both accession and specification can occur in a chimera with some human cells, some nonhuman cells, and some fused cells containing both human and nonhuman DNA and expressed proteins (Munzer 2007, 176-77). For another thing, once we use the accession/specification distinction in the more precise way I suggested, which would allow us to say that a given chimera is dominantly human in one respect but dominantly nonhuman in another respect, we are already at the level of a secondary principle.

With the adjustments to which I have agreed regarding enhancement, moreover, the cases of the mouse that serves as a blood supply for a replacement human outer ear and of the cheerful, obedient chimera that does housework (Munzer 2007, 131-32, 145-49) are properly analyzed. Here Penner’s efforts to solve these cases with his accession/specification distinction twist him in knots and come to naught. They do so because his determination to apply the decision globally, rather than with respect to different respects in which the chimeras are variously human-dominant or nonhuman-dominant, is too blunt an instrument to do justice to these cases. A finer-grained analysis, which my moral framework supplies, does much better.
As to Penner’s last point, I concede that I ought to have pressed harder on the intuition that it’s morally odious to create an intelligent organism for the purpose of forced labor. He does, though, misapprehend my mood in quoting from the statement of my thesis (Munzer 2007, 126-27). He quotes at length to illustrate the reservations I express, and yet is careful to stress that there is a note of optimism immediately following the passage quoted. I felt no tension between what he calls “a sort of despair” and a “brighter side.” Rather, judged against a possible objective of formulating a set of necessary and sufficient conditions for sorting all cases of human-nonhuman chimeras into permissible and impermissible (which, of course, might not be the right standard to aim at), I was simply recording that I had not been able, even in my own estimation, to achieve that. I like to think that I made more progress than Penner allows on a very difficult topic. Yet there are surely limitations on the methods I used, and it seemed only proper to acknowledge them.

Property, Autonomy, and Moral Character

One’s early philosophical training, as a graduate student and in a beginning faculty position, often exerts a continuing hold on one’s approach to philosophical problems. In my case, that training was in the Anglo-American analytic tradition in the mid 1960s through the mid 1970s. Part of that training involved an approach to philosophical texts: paying attention to every word, taking the argument to bits, exposing every equivocation and logical gap, getting to the root of the matter, and then seeing what is left for reassembly at the end of the process. Cheap shots and tendentious readings were out of bounds, but after meeting all the demands of fairness one was entitled to take the text as it stood. This approach is manifest in “Property as Social Relations” (Munzer 2001).

John Christman can take apart a philosophical text at least as well as, if not better than, I can, but he has a quality which I lack, or at any rate possess only to a much lesser degree: the ability to figure out what the author is trying to do despite some clumsy language and lapses in rigor, and then in light of that read the text in a more generous spirit that rehabilitates the author’s position or furthers a closely related philosophical project. Christman puts this quality to good use in his essay, which takes my 2001 article as a point of departure. He shows that the work of Jennifer Nedelsky is open to more sympathetic treatment than I gave it and that relational and social views of autonomy are more plausible than I had thought. In doing so, Christman exhibits another admirable quality: the ability to articulate an account of autonomy that aids our understanding of social-relations views of property. There is almost nothing in his paper that I wish to confute. Instead, I want to follow his lead constructively by developing some thoughts about moral character as it relates to property and how a person’s moral character might be improved in that respect.

First, though, I need to set the stage. There are many ways of understanding property. One way is to see it as a set of social relations. This way is evident, and sometimes explicitly argued for, in legal realists such as Felix S. Cohen and Robert L. Hale, in the Canadian political philosophers C.B. Macpherson and Nedelsky, and in those associated with the critical legal studies movement such as Duncan Kennedy and Joseph William Singer. My paper on “Property as Social Relations” found a mixture of insights and serious flaws in the work of these various thinkers, who, of course, were not all saying exactly the same thing. My chief complaints were that none of authors explained or justified which social relations constitute property and that most of them made mistakes concerning freedom, coercion, and autonomy. As to Nedelsky, my reservations had to do with an overemphasis on the social constitution of the self and the use of vague metaphors as replacements for the law and the self as “boundaries.”

Although I made some effort to adjust Nedelsky’s project by suggesting that boundaries could be both essential and threatening to the creation and maintenance of interpersonal and social relationships (2001, 57), Christman’s adjustments are far superior to mine. He suggests that the “contrast class” to the “bounded self” is, for Nedelsky, “not an unbounded self but rather a connected one whose projects, interests, activities, and deepest identity depends on connections with other people, groups, institutions, traditions, and so on.” He suggests also that if one sees property rights as centrally connected to privacy, the development of individuality, and the exercise of control over one’s life, then much of importance falls to a lesser status.

In particular, those aspects of the self and its identity which require relations with others will be reduced in status or even masked. These aspects include caring for elderly parents, raising children, helping strangers in need, protecting one’s native language and culture, and belonging to a religious community. Christman is well aware that normative arguments must establish which aspects of the self it is most important for property rights to protect, and he points out that Nedelsky (1989, 21) addresses not so much the concept of or the conditions for autonomy but “the forms of human interactions in which [autonomy] will develop and flourish.” Christman’s clarifying interpretation of Nedelsky comes not only from his examination of Nedelsky (1990), with which I was chiefly concerned, but also his careful discussion of Nedelsky (1989). The immediate point is that he constructs out of Nedelsky’s work views that are deeper and more plausible than I had managed to do.

Notably, Christman draws on work published after 2001 that develops the relational and social aspects of autonomy—in particular that of Oshana (2005 and 2006) and Honneth and Anderson (2005)—as well as some earlier items of which I was unaware such as Honneth (1995) and Wong (1988). He also exploits his own insights (Christman 1994a, 1994b, 2004, 2005), which will culminate in his new book (Christman forthcoming) (to be published October 31, 2009). The main points he draws out of others are these:

1. “Relational” and “social” autonomy are not identical. The former emphasizes interpersonal dynamics. The latter stresses as well broader factors such as institutional settings and cultural patterns.
2. Oshana (2005 and 2006) combines the foregoing into a “socio-relational” account of autonomy.
3. Honneth (1995) and Anderson and Honneth (2005) develop a Hegelian understanding of the self as seen through a partly Habermasian filter. They emphasize those relational elements that are “recognition.” Among them are self-esteem, self-respect, and self-trust. Christman (2004) resists the “perfectionist” stance evident in their work.

By no means does Christman borrow his key ideas from others. Indeed, he is among the most distinguished independent thinkers working this new vein of inquiry into the nature of autonomy and its relation to property. Long ago he identified the centrality of what he calls “control rights” to property and autonomy (1994, 173-74). Building on his subsequent work, he developed more carefully than Nedelsky and others a chain of arguments that captures at least some key elements of a social-relations approach to property. The chain starts with particular social relations that sometimes constitute the identities of persons, proceeds from these identities to self-government and the role that property, especially control rights over property, plays in either undergirding or undermining
Applying Aristotle’s point to generosity, we see that if someone is potentially man, but earth is not potentially man (Aristotle C. In his quaint example, earth is potentially seed, and seed potentially B, and B is potentially C, but A is not potentially do were you starting from very far away from this goal. It does, of course, lie within the enterprise by bringing out some connections among property, self-governance, moral character, and the transformation of one’s character as it relates to property. I fear that my approach might be tilted more toward the individual than Christman would approve of, but at least my speculations will make this a constructive, though not quite collaborative, enterprise.

Christman observes that I define “autonomy” as the psychological capacity to be self-governing (Munzer 1990, 39; 2001, 66). He considers this definition unproblematic, but says that “the idea of ‘self-government’ in the definiens would need to be unpacked.” Let me try to do so by saying that self-governance (my preferred word) is determining, guiding, and controlling one’s behavior and character over time based on reasons (cf. Bratman 2007, chs. 1, 8, 10, and 11).

Elsewhere I devoted a chapter to the subject of property and moral character (Munzer 1990, 120-47). I understood a virtue as a more or less abiding character trait that disposes a person to think or act in ways that are generally beneficial both for the person having the trait and for others, and that either enhances some positive feature or corrects or modifies some shortcoming of human beings (121). I proposed a classification of virtues that includes “localized virtues,” which are virtues only in some societies. If a society had no private property at all, then while one could be generous with one’s time and attention, one could not be generous with one’s money or other property. If a society has private property, one can also be generous with one’s money and other material resources. One can take a cue from Aristotle’s position that a virtue is a mean between extremes, and then suggest that in such a society, generosity (liberality) would be a localized virtue in between the extremes of stinginess on the one hand and of profligacy or extravagance in sharing one’s property on the other.

Suppose that you are a person of significant financial means and come to the conclusion that you are stingy in every sector of your life—with your time and effort as well as your money and other property. Having come to this realization, you resolve to become generous. To develop the virtue of generosity or liberality, you must of course take time and expend effort to help others, but since we are here concerned with property let us concentrate on how you might become generous with your financial resources.

A first step is to make an honest accounting of where you are right now. This kind of self-examination is difficult. It may itself require many sub-steps. A reason for proceeding in this way is that the distance between where someone now is and the goal of generosity varies considerably across persons. If you judge yourself to be quite close to this goal, then what you need to do to attain it may differ greatly from what you would have to do were you starting from very far away from this goal.

Underlying this step is a point that Aristotle makes about potentiality. He suggests that some cases arise in which A is potentially B, and B is potentially C, but A is not potentially C. In his quaint example, earth is potentially seed, and seed is potentially man, but earth is not potentially man (Aristotle 1984, vol. 2, 1656-57). He thinks there is a failure of transitivity: Before earth can become man, it must first become seed. Applying Aristotle’s point to generosity, we see that if someone is now very far from attaining generosity, he or she may need to undergo intermediate changes to get there. If, right now, you are stingy beyond belief, and miserly and cheesesparring to boot, then it is not in the cards for you to change in a single move into a generous person. You will need to go through intermediate transformations to develop a generous character (Jacobs 2001).

A second step is to come up with a plan for making generosity a part of your moral character. If your honest accounting tells you that you are nearby there, then it will be easier to draw up a plan. If that accounting reveals that you are well short of the goal, then the task will be much harder. Suppose that you envision present and future states of your character $S_1$, $S_2$, . . ., $S_n$, where $S_i$ is your present character (not remotely generous) and $S_n$ is your goal (a character with the virtue of generosity). For simplicity’s sake, leave aside issues pertaining to the identity and individuation of states of character, and assume that we know why $S_1$ is a distinct state of character from $S_2$. If $n$ is large, there will be many states of character through which you must pass. In light of Aristotle’s point about potentiality, it might not be the case that $S_1$ is potentially $S_2$. Rather, it might be that $S_1$ is potentially $S_2$, and $S_2$ is potentially $S_3$, and $S_3$ is potentially $S_4$. Perhaps a person of extraordinary insight into human character would be able to see a clear path from $S_1$ to $S_2$ to $S_3$ and finally to $S_n$. But if you are like most people, you may be able to see only that you need to get to $S_2$ with no clear vision of how many additional states of character you will need to pass through to attain $S_n$. If that is the case, you may need to revisit the first step once you get to $S_2$ that is, make an honest accounting of your character at $S_2$, and then consider whether you need to adjust your original plan for acquiring the virtue of generosity.

A third step is to consider whether to seek any help with the project of transforming your character so that you become generous. On the one hand, this is your project. To preserve your autonomy and self-governance, you might be leery of trusting anyone else to guide or monitor your progress. Others might seek to advance an agenda of their own, or misunderstand your goal and plausible means for achieving it.

On the other hand, you have limited knowledge and strength of will. Through ignorance, self-deception, or weakness of will, you could misapprehend your starting point and the nature of your goal, devise an unwise plan, stray from a wise plan, or lose courage. In most religious contexts, which Christman mentions occasionally in his essay, the person seeking to change his or her character would have periodic meetings with a spiritual director. Those who wish to pursue generosity as a strictly secular project might seek aid from a wise friend or a sympathetic psychoanalyst. Perils exist with each choice. A spiritual director might not be like-minded. A wise friend might lack the skills to guide you. An analyst might lead you on a voyage of self-discovery but decline to help you reach your goal. Plus, for autonomy and self-governance to remain intact, if you ask for help from a spiritual director, friend, or analyst, you have to decide whether this other person is enabling you to attain a goal that you endorse, not some other goal with which you disagree. It does, of course, lie within your autonomy and self-governance to revise your goal in light of further information, experience, and reasons. So you might come to accept a goal with which you once disagreed.

There are limits to the ability of human beings to transform their moral character—and not merely because of the brevity of human life and Aristotle’s point about potentiality. For stingy persons to become generous requires changing or re-creating not just their actions but also their desires, thoughts, motives, dispositions, emotions, and decisions. A large part of the
project, to be sure, consists in acting as the generous person would act—to the point, indeed, where it becomes a habit or second-nature. The stingy must also pursue this project for the right reasons, which include remaking their moral character for the better because that is the kind of character they believe they ought to have rather than, say, because other people will think more highly of them if they are generous.

Christman (2005, 336-40) indicates, I think, that he would find fault with my little meditation on property, virtue, autonomy, and self-governance, for at least two reasons. One is that self-examination often issues in “self-doubt and diminished motivation” (337). The other is that “our introspective judgments fail to reflect our settled, authentic selves” (337). In unpacking this second reason, he underscores that self-examination of this intimate and intense kind can lead to self-misunderstanding and a “systematic tendency to mis-estimate the role of either personal characteristics or environmental factors in explaining one’s own or others’ behaviors” (338-39). Christman does not seem to share the verdict of some postmodern authors that “a transparent, unified, fully rationalized self-conception” (339, 354) is unrealizable or fails to exist. He does, though, believe that the reasons cited undermine many liberal conceptions of autonomy. This belief appears to make him receptive to interpersonally and socially informed understandings of autonomy. In the wake of these understandings would come similar positions on self-governance and the transformation of one’s moral character.

It seems to me that one way out of the difficulties described is to draw on the well-springs of communal and social life. As much is evident in religious communities that form their members spiritually. Members can witness in the behavior of others in the community the types of behavior that are admirable and virtuous. This spiritual formation and development often hinge significantly on practices of prayer, guided meditation, and self-examination. One can see something akin to this phenomenon in studies of finding one’s identity and flourishing in secular communities (Wong 1988).

The path from a relational or socio-historical conception of autonomy to a social-relations theory of property seems less clear to me than it does to Christman. For me the root problem is that I don’t yet grasp which social relations constitute property. Christman advances the ball by sketching the building blocks of a more plausible social-relations account of property than was available at the turn of the millennium. Social relations that are autonomy-promoting would, ceteris paribus, presumably be among the relations that help to justify a particular system of property law. Even if the implications of his account are not ideally clear with regard to the law and theory of property, he persuades me that autonomy must be seen in a more relational way than I thought in 2001. All the same, the presence of a larger group of persons who show and guide one in developing virtues and correcting vices can produce a heavy overlay of conformity. For this reason, I would like to see the acquisition and development of such property-related virtues as generosity guarded by a more individualistic understanding of autonomy and self-governance than Christman might find congenial.

Bioethics, Feminism, and Moral Particularism

As to human-nonhuman chimeras, I hope not to be churlish in declining to take up Dickinson’s concerns about those “less well-off women who will be tempted by the sums involved in selling eggs for research.” The connection she has in mind is the use of human ova, whether in stem cell nuclear transfer or in other ways, in coming up with human-nonhuman chimeras for purposes of research. The effects on women so tempted are not something that I have thought enough about to have a well-justified opinion about them. Dickinson quotes me accurately: policy decisions “should take into account of the effects on the life prospects of the least well off in society and on those most burdened by decisions about chimeras” (Munzer 2007, 136).

But she takes this quotation out of context. My article as a whole is concerned with the moral, legal, and social policy aspects of chimeras that are or might be created, not with the means of acquiring “inputs” into their creation. Moreover, earlier in the same paragraph of the article, I point out that questions of risk and risk assessment are difficult and say that the “difficulties mount when we consider risk distribution” (135). I add: “Although the issue [of risk distribution] is beyond the scope of this Article, I doubt that decisions involving such uncertainties surrender entirely to consequentialist considerations . . .” (135-36). After that comes the sentence Dickenson quotes. This sentence does not state a central thesis of my article. It is but a brief remark made in the context of excluding risk distribution from systematic treatment. My article ran to fifty-six pages. By the end the reader deserved mercy, and there were some issues I just couldn’t pursue. By not taking up the chimera issue she raises here, I hope to consider more carefully than would otherwise be possible her criticisms of my work on umbilical cord blood.

Dickenson devotes considerable attention to property rights in cord blood. We agree that cord blood is not, in many contemporary medical contexts, waste; that moral dangers lurk in allowing it to be either “objectified” or “commodified” (though she worries more about commodification than I do); and that limited property rights in cord blood can be justified (Munzer 1999c). We disagree on at least two questions: Who, if anyone, has property rights in cord blood, and on what grounds do these rights rest?

To the first question Dickinson answers that the mother has these rights, which she usually gives to the newborn through whose umbilical cord and fetal part of the placenta the cord blood once flowed. I answer, instead, that it is the limited property of the newborn, though the mother and father have an equal right to control the cord blood in the best interest of the newborn if they agree, and if they do not agree then a court-appointed guardian exercises these rights of control. In rough outline, the case for my answer is: cord blood is medically valuable; it would be unseemly to have a scramble in the delivery room that awards this valuable resource to the first possessor; cord blood should not belong to the state; genetically, it has the DNA of the newborn; developmentally and biologically, cord blood arises from the maturing hematopoietic system of the fetus; and so any property rights in cord blood belong to the newborn. I specifically allow that it is sometimes permissible for the parents, or the guardian, to donate the newborn’s cord blood to its present or future sibling. It is even permissible to donate to unrelated persons through a public cord blood bank when that would be in the newborn’s best interest. It could be in the newborn’s interest if there were in place a system of such banks that could offer cord blood, perhaps on multiple occasions if required, to prior donors (Munzer 1999c, 524-33).

I lay to one side technical matters pertaining to the extraction of cord blood and the timing of this extraction. My knowledge of these matters dates to U.S. practice in the mid to late 1990s. Dickinson’s knowledge—which is deeper, more current, and more extensive than mine—deals mainly with U.K. practice in the first decade of this millennium. I am grateful to Dickinson for pointing out that some methods and timing of extraction pose risks to the mother as well as the newborn. Insofar as she contends that one should not increase risks to the mother without the mother’s informed consent, I agree.

We come now to the second question: On what grounds do these limited property rights in cord blood rest? We may
ignore the views of those who claim that no such rights exist, for those views are not pertinent to the disagreement between Dickenson and me. If I read Dickenson aright, she gives grounds of the following sorts for her position: linguistic, conceptual, legal, gynecologic policy, and feminist theory. I examine these in order.

Dickenson’s case for the maternal ownership of cord blood appears to be partly linguistic. She says that the mother “invest[s] labour not only in pregnancy and childbirth”... “but in the additional procedure and possible ensuing risk necessary to extract cord blood.” In regard to “the second stage of labour,” she quotes Sheila Kitzinger as saying, “You’ve never worked so hard in your life.” I readily agree that the process of labor and delivery requires enormous physical exertion to a point sometimes reaching exhaustion and often with accompanying severe pain.

Yet this “labor” is not that called for by a labor-desert principle for acquiring and justifying property. Elsewhere I define “labor” as “exertion of effort in order to make or physically appropriate something” (Munzer 1990, 256-57). There is reason to make explicit that “make...something” means making a product and to expand the definition to cover the provision of a service. In amateur athletics, running a marathon or playing rugby or American football involves enormous physical exertion and, sometimes, severe pain and effort that reaches exhaustion, but nothing that justifies a property right in anything. Perhaps in the work done by traditional coal miners we see the trio of great physical exertion, exhaustion, and substantial physical pain, which justly property rights in their wages. The extraction of cord blood, like the extraction of coal by traditional methods, carries risks—to the mother and newborn, and to the miners, respectively. But, save in cases of surrogacy, the individual who goes through pregnancy, labor, and delivery is not providing a service that merits a financial recompense. Neither is she making a “product” in any obvious sense, for the chief intended result is the birth of a baby, and neither Dickenson nor I would want to count a baby as a product in which anyone has a property right. As for a distinctly secondary intended result in some cases, namely, the provision of cord blood, it will not count as a product if reserved for the infant’s possible eventual use or possible immediate use by a sibling, or if donated to a public cord blood bank. Both Dickenson and I would regard as undesirable the rare case in which a mother produces cord blood with the intention to sell it after extraction. It is an interesting feature of her position—that the mother has property rights in the cord blood—that the mother could apparently treat the blood as a commodity and sell it, without the restriction imposed by my position, namely, that the parents or guardian could sell the blood only if doing so were in the best interest of the child.

Despite some textual evidence of a linguistic argument in Dickenson’s essay, I hesitate to ascribe such an argument to her. She is too acute a thinker to accept an argument that would equivocate on the words “labor” and “work.” Still, we need to see what a linguistic argument would look like and to appraise it. For simplicity, let’s concentrate on “labor,” which is more favorable to a linguistic line of reasoning. The Oxford English Dictionary (2nd ed. 1989, vol. 8, 559-61) picks out eight senses of the noun “labor.” Of these, senses 1 through 5 are pertinent to a labor-desert principle. Only sense 6—“the pains and efforts of childbirth; travail”—pertains to the process of labor and delivery. As to the verb “labor,” the OED identifies 17 senses. Of these, senses 1, 2, 3, 11, and 12 are pertinent to a labor-desert principle. Only sense 16—“to suffer the pains of childbirth; to travail”—pertains to the process of labor. Once the equivocation on the word “labor” is exposed, the linguistic argument seems to collapse.

Moreover, the plasticity of the English language, with its employment of a single word in so many different ways, might lead astray those who find a linguistic argument tempting. This error would be less likely to occur with some other languages. In Latin, for example, the noun labor means, variously, work, hardship, fatigue, distress; opus means a work or a finished work; and opera means trouble, pains, service, and/or exertion. The Latin verbs laborare (work, toil, labor, strive), opus facere (to make a work), and contendere used intransitively (to exert oneself) are all potentially relevant to a labor-desert principle but don’t have anything specifically to do with a woman’s labor and her delivery of a child. The Latin nouns relating to the latter are quite distinct: partus means the bringing forth of a child, and nissus and nitus refer to the pains of childbirth. And it is the Latin verb parturire that means to have the pains of childbirth or to labor in childbirth. Similarly, German vocabulary exhibits the sharper separation of Latin rather than the plasticity of English. The most frequently used noun for “labor” in the sense of “work” is Arbeit, with körperliche Arbeit for manual labor and Zuwangsarbeit for hard physical labor. The most common verb form is arbeiten, with variants such as sich anstrengen and sich bemühen to indicate special exertion, care, or diligence in working. To talk about labor and delivery, one usually has to resort to other German words: the noun Wehen, which means woes generally but labor-pains in some contexts, and the verb entbinden (to deliver a child) with related nouns such as Entbindung (labor and/or delivery) and Niederkunft (delivery, confinement). It would not be impressive to have a linguistic argument that might, just barely, seem to work for English but would be obviously broken-backed in such languages as Latin and German.

Given these manifest infirmities with a linguistic argument, it is more charitable and plausible to read Dickenson as proposing a conceptual argument. This argument is not wholly clear to me, but the main lines of it seem to go something like this. A woman has physical control over her body. This control includes some say in regard to what her body generates—for instance, deciding to sell her hair so that it can be made into a wig. If a woman becomes pregnant, then she has control with respect to what her body generates over the usual nine months of gestation. She bears the burdens of morning sickness, eating and drinking properly, putting up with the physical and emotional demands of carrying a baby, and, finally, enduring the difficulties and risks of labor and delivery. These facts do not indicate that she has property rights over a baby who is born alive, for a baby is a separate individual who is not a fit candidate for ownership. These facts do, however, make conceptual space for rights over what remains after the cord is clamped and cut. In particular, there is conceptual space for the fetal-neonatal cord blood that remains in the placenta or in the umbilical cord on the maternal side of the clamp. That blood is physically separate from the newborn after the cord is clamped. But until the placenta is expelled, the cord blood outside the newborn’s circulatory system is not physically separate from the mother. Until expulsion, the mother might well seem to have not only physical possession of the cord blood but possibly some rights to it.

I put forward this line of reasoning as conceptual rather than normative. It only suggests how to make conceptual, as distinct from linguistic, room for cord blood rights for the mother. It is not a normative argument for maternal cord blood rights because we don’t know which normative premises are to be inserted and where they belong. One obvious way of transmuting the argument from conceptual to normative is vaguely Lockean: A woman owns her body. She also owns what her body generates during the course of pregnancy. Therefore, she owns not only her hair but also, after clamping but prior to
expulsion of the placenta, the cord blood that remains either in the placenta or in the umbilical cord on the maternal side of the clamp.

I suggest this conceptual argument and its normative counterpart quite tentatively. Dickenson does not draw a tripartite distinction among the linguistic, the conceptual, and the normative. She might disapprove of, and surely might improve on, my tentative sketches. Bits of the text of her essay support the conceptual and normative arguments sketched, and my reconstruction seems to capture a core part of her project. Yet, not all of her text supports my reading, and my sketches omit, or at least water down, the distinctively feminist cast of her thinking. I reserve the arguments sketched for the moment but will invoke them when we come to the feminist portion of her case.

Let us now turn to the law. Dickenson’s legal case appears to rest on the common law and a few recent decisions. She invokes “the traditional common law view that tissue outside the body is res nullius, no one’s property.” Traditional though this view may be, it is no longer good law in situations where tissue removed or expelled from the body has medical uses and value. Even if this position were legally sound, it would not favor her view over mine, for each of us needs there to be property rights in cord blood, whether those rights belong to the mother, as she contends, or the newborn, as I contend.

Dickenson also invokes the decisions in Moore v. Regents of the University of California (1990), Greenberg v. Miami Children’s Hospital Research Institute, Inc. (2003), and R. v. Kelly (1998), though it’s not evident to me that she endorses them. Neither Moore nor Greenberg stands for the proposition that no property rights exist in tissue removed from the body. All these two cases might establish is a default rule that “tissue donations are made altruistically and with no expectation of compensation” unless the tissue provider and the recipient agree otherwise (Korobkin 2007, 215-16). Moore holds that John Moore lacked a property interest in his spleen, body, and other tissues sufficient to sustain a claim of conversion, but his treating physician’s failure to disclose his financial interest prevented Moore from giving informed consent. Some sorts of property do not qualify as “property” for purposes of the tort of conversion, but they are nevertheless property. Greenberg says that property rights in a tissue sample “evaporate once the sample is voluntarily given to a third party” (1075). Neither decision holds that patients cannot sell their own tissues to medical researchers or treating physicians. Even if this were not so, a most bizarre feature of both Moore and Greenberg is that, on an unduly broad reading of those cases, medical researchers would have property rights in the tissues (stealing the tissues from their laboratories would be a theft offense, which assumes property) and could sell them to other researchers—only the patients would lack property rights! Both cases have drawn much criticism for precisely these reasons.

R. v. Kelly is simply not relevant to the current dispute. Kelly and his accomplice, Lindsay, removed parts of corpses from the premises of the Royal College of Surgeons. Kelly then proceeded to make casts of these body parts for artistic purposes. Kelly and Lindsay were convicted under the Theft Act 1968. The Court of Appeal upheld the convictions. Although under British law corpses and parts of corpses are generally not property, the court says that they can be under Section 4 of the Act if, as here, parts of corpses acquire different attributes by virtue of application of skill, such as dissection and preservation techniques. Kelly involves body parts all of whose cells have died. It is therefore distinguishable from cases in which the cells of a removed body part remain alive. The court mentions that human body parts might be “property” for purposes of Section 4, “even without the acquisition of different attributes. This may be so if, for example, they are intended for use in an organ transplant operation....” (750). So the holding in Kelly is not germane to body parts whose cells are still alive, and the court in dictum explicitly recognizes that living tissue intended for transplantation is a likely case in which the tissue might be property. In any event, even if the law currently had the content that Dickenson appears to suggest, the law is not self-justifying. Existing legal decisions are always open to criticism, and sometimes they are later overruled. My article on cord blood was partly a moral inquiry and partly an inquiry into what the law ought to be. What the law now is does not settle either inquiry (cf. Dame and Sugarman 2001).

Dickenson’s argument from gynecologic policy is odd in part. In June 1966 the Science Advisory Committee of the Royal College of Obstetricians and Gynaecologists published an opinion paper entitled “Umbilical Cord Blood Banking” (cited as RCOG 2006). Section 6 of the paper discusses property rights in cord blood. Dickenson maintains that “legal advice” received by the Committee “decisively rejected the assumption that cord blood belongs to the baby by virtue of genetic or immunological identity.” The oddity, to my way of thinking, lies in the idea that a piece of legal advice should determine an issue of gynecologic policy. Of course, securing legal advice may be relevant to an overall gynecologic policy, but such a policy would seem to require input from other sources, too, such as medical ethics, obstetric practice, and so on.

The argument is, I submit, not merely odd but of comparatively little weight. Section 6 of the opinion paper does not cite any legal advice, though a long note at the end of the paper lists Mr. Bertie Leigh, a solicitor in London, as one of the thirteen individuals who “produced” the report. Anyway, Section 6 does not decisively reject the view that cord blood is the property of the newborn. Here is part of what it actually says:

The issue of whose [sic] owns cord blood has yet to be tested in the courts. On the one hand, it has been suggested that the cord blood sample is more likely to be the property of the child on the basis that it is developmentally, biologically and genetically part of the child [citing Annas 1999 and Munzer 1999c]. On the other hand, it might be proposed that it is more likely that the sample is the property of the mother once the cord is cut: e.g. the mother’s unfettered right to consent to what is done to her own body means that once the cord is cut she is free to refuse to consent to the removal of the afterbirth. Legal rights of property are not usually founded on genetic identity. The cord blood consigned to storage may be the subject of a gift from the mother to her child depending on the terms of the consignment. If right, this raises further issues as to the use of the products deriving from the sample taken. (RCOG 2006, Sec. 6.2, p. 7)

Let’s inspect this paragraph. Two sources favor the newborn as the property holder. The paragraph cites no sources that favor the mother as the property holder. The paragraph stresses, correctly, the mother’s autonomy over her own body; her autonomy right to give or withhold consent is better understood, as I suggest below, as a personal, not a property, right in her body, and by itself does not justify her having property rights in cord blood. The paragraph states, correctly, that “genetic identity” is not generally a foundation for legal rights of property. Of course it isn’t! It’s hard to imagine how genetic identity could be the basis for property rights in automobiles or houses, in paintings or sports equipment, or copyrights or trademarks. The point is that cord blood is a very different sort of case, and cord
blood is genetically that of the newborn, not that of either the mother or the father. Notice, too, that the remark about genetic identity has left out of account two matters mentioned earlier in the paragraph, namely, that cord blood is developmentally and biologically part of the child, which forms part of my case for assigning property rights in the cord blood to the newborn. In sum, the quoted paragraph does almost nothing to show why property rights in cord blood should belong to the mother.

It is Dickenson’s feminist argument that carries the most weight. It could make use of the tentative conceptual and even more tentative normative argument sketched earlier, and the mother might base her claim to property rights in cord blood partly on these foundations. In any event, Dickenson’s feminist line of reasoning, which appears in more satisfying detail elsewhere (Dickenson 2007 and 2008), makes four points. First, only women can become pregnant and give birth, and once this fact is taken to heart it alters our perception of the woman’s role in the biological development of cord blood and should heighten our sense that it belongs to her. Second, too often women are producing tissue of commercial value, such as ova and cord blood, without adequate appreciation of their “agency and labour.” Third, women bear the risks of pregnancy and childbirth as well as the risks that attend the extraction of cord blood. Fourth, against an historical background in which men often treated women as property and in which women, especially married women, sometimes could not own property, the three preceding points underscore the “injustice” in not assigning property rights in cord blood to the mother.

This argument does lead me to revise my position, though not, I suspect, in the way Dickenson wishes. Perhaps I earlier paid enough attention to why there should be any property rights in cord blood at all and why it should not be subject to a rule of first capture by delivery-room personnel (Munzer 1999c, 511-16). Yet, I did not specifically consider the possibility that the mother, rather than the newborn, should have these rights, or the possibility that the mother and the newborn should share them. In light of the four points distilled above, I now explicitly agree with Dickenson that the mother has a significant stake in this matter, especially because of her exposure to the risks of pregnancy, labor, delivery, and extraction of cord blood.

Elsewhere I distinguish between personal rights in the body and property rights in the body (Munzer 1990, 44-56). The former are body rights that protect interests and choices other than the choice to transfer, and the latter are body rights that protect the choice to transfer. Given the potential risks to the mother, she ought to have a personal right to choose, on the basis of informed consent, whether to have cord blood extracted and, if so, which method of extraction and time to use, though in exercising this right she ought to consider the impact of her choice on the newborn. I make a further distinction between weak property rights (to transfer gratuitously) and strong property rights (to transfer for value) in the body (Munzer 1990, 48-49). I still hold to the claim that it is the newborn who has limited property rights in the cord blood, but at least the mother has partial authority to give the cord blood to a sibling or to a public cord blood bank if doing so is in the best interest of the child. This authority in effect gives her a weak property right in the cord blood. Because, moreover, the mother is at risk in a way that the father is not, I would now allow the mother’s personal right and her weak property right to trump the father’s weak property right (also circumscribed by the interest of the newborn), if the mother and the father disagree, to donate the newborn’s cord blood. So far as a strong property right is concerned, I don’t see how either the mother or the father, or both acting jointly, have such a right to sell the cord blood to someone else unless that is in the best interest of the newborn.

To Dickenson these may appear to be grudging modifications. But at least they bring the mother within the realm of rights and bespeak sympathy for the substantial risks she bears.

I come, lastly, to Dickenson’s call for a universal theory of property—under which all persons, whatever their sex or gender—as contrasted with what she considers my “moral particularism,” under which my account is said to be “applicable mainly to men’s experience of property-holding.” Her preferred approach (Dickenson 2007) springs from a desire to bring women fully into the picture. Only when women occupy a role equivalent to that of men will “moral universalism” in the theory of property reign. In this section of her paper lies her strongest feminist contribution to the discussion. I agree with much of what she has to say here, and to make progress in this exchange it will help to separate out a few points that seem to me not to be well-taken.

Dickenson rightly perceives an intention to startle the reader in my depiction of a no-property world early in A Theory of Property (Munzer 1990, 15-16). Material objects, and even simple artifacts, would still exist, but no one would stand in relation to them as people now do to property. To move into a property-world is, in part, a transition to a society in which individuals, or at least some individuals, can satisfy their material and psychological needs, achieve stability of property-related expectations, take on more capital-intensive projects, and develop their agency and autonomy. So far, so good.

But then Dickenson glides over a distinction that seems to me to be important: between (1) a propertyless world (no one has any property whatever) and (2) a world in which some have no property or very little property and others have a great deal of property. Her neglecting to draw this distinction allows her to say: “Yet what is really startling is not Munzer’s picture of a propertyless world but his apparent failure to realize how very ordinary this world is and has been: how many women have lived and still live in such a world” (italics in original). The world about which she complains is not (1) but (2). So when she laments women’s lack of ownership in ancient Athens, under the Anglo-American law of coverture, in sub-Saharan Africa, and elsewhere, she is voicing a justified grievance that pertains to a feature of the world as we know it, viz. the subordination of women.

Once we draw the distinction I recommend and we notice that Dickenson is attacking (2) rather than (1), the two of us are converging on a view which matters greatly to both of us: equality for women. By “equality for women” I do not mean merely legal equality as regards the capacity to own property. I mean also something approaching equality of income and wealth for men and women at similar stages of the life-cycle. Relevant here is the principle of justice and equality that I regard myself as a moderate egalitarian, and Dickenson might favor radical egalitarianism. I see as misguided her claims that I am a moral particularist, that I don’t adequately “count women in” in my theoretical and applied work, and that my views are “malestream’ political theory and jurisprudence.”

All the same, Dickenson and I can, to a significant extent, join hands in what she calls “a genuine spirit of collaboration.” Her many constructive suggestions should encourage me to achieve more fully comprehensiveness, relevance, and empirical accuracy in future work.
Endnotes

1. I would be happy to hire Frances Kamm, among some others, for this purpose. Her writing on moral issues of great difficulty, including abortion and assisted suicide, is intuitionistic in some sense and indicates that she would be good for the job. But I don’t know that she would endorse a method of wide reflective equilibrium, and in any case I can’t afford to pay her what her time would be worth.

2. As Penner correctly points out, chimeras are not the same as transgenic creatures. The former have cells from different species. The latter have genes from different species. For present purposes, chimeras also differ from hybrids. The former result from biotechnological or surgical intervention. The latter, such as mules and ligers, result from sexual intercourse between members of different species (Munzer 2007, 124).

3. How did I come to make such a blunder? After a presentation of a draft of the paper, a member of the audience asked why I regarded Jesse Helms as an enhanced chimera. I replied that I did not such thing and that cognitively Helms was no brighter than before the surgery. My interlocutor then pointed out that Helms nonetheless fit my specification of the highest cognitive category. He was right. I thought I could get around the problem by saying that the words “enhanced” and “dramatically enhanced,” as used in the article, were terms of art (Munzer 2007, 133, notes 37 and 38). I was wrong, as Penner has amply demonstrated.

4. Science fiction and fantasy offer interesting ways of testing moral intuitions, but space precludes analysis of Penner’s examples of the happy cow in Adams (1986, 227-28) and the service-oriented elves in Rowling (1999).

5. This definition does not commit one to any particular current theory in the philosophy of action.

6. For the role of plans in future-directed activity, see Bratman (1987, 1999).

7. For illustrations from the Jesuit tradition, see Loyola (1992, 1994b). I suspect that Aschenbrenner would dismiss my meditation on becoming generous as slipping “to the level of self-reflection for self-perfection” (1972, 15).

8. Pace Dickenson, I do not agree that the passages quoted from Munzer (1999c, 500, 501) are “almost Scholastic” (“real ‘angels on the head of a pin’ stuff,” as she puts it in Dickenson (2007, 97)) or a “tortured contortion” (“defines away the little biological difficulties” and requires use of “Occam’s razor,” as characterized in Dickenson (2007, 98)), respectively. The former passage clarifies an ambiguity that existed when my article was written—viz. whether at the time of extraction the blood was located in the placenta or in the umbilical cord. The latter passage is not metaphysical—just a concise description of physical and medical facts.

9. Though it’s a bit jarring, I use British spellings when quoting English sources or referring to English institutions and American spellings otherwise.

10. RCOG 2006 replaced RCOG 2001, which said nothing about property rights in umbilical cord blood. As of February 2009 the American College of Obstetricians and Gynecologists (ACOG) had no position on who, if anyone, has property rights in cord blood. It does have opinions on gene patents (of which cord blood could be a source) and on cord blood banking (ACOG 2007, 2008). As of January 2007 the American Academy of Pediatrics - statement on cord blood banking voice no opinion on who, if anyone, has property rights in cord blood (AAP 2007).

11. Dickenson 2007 (100, note 58) cites “Bertie Leigh, Umbilical Cord Stem Cell Banking: Legal Review, report to the Royal College of Obstetricians and Gynaecologists Umbilical Cell Cord (sic) Banking Committee (September 2005).” The UCLA reference librarians were unable to locate this work. When they contacted Mr. Leigh, he told them that the work was unpublished and referred them to RCOG 2006. My personal inquiry about the document addressed to Mr. Leigh went unanswered. Of course, the document may be subject to attorney-client privilege. At any rate, because I have been unable to get hold of his report, it is impossible for me to evaluate any advice he might have given to the RCOG.

12. Coverture severely limited the right of married women to own property. Single women were in the same legal position as men in regard to property. From this legal point it does not, of course, follow that in fact single women owned as much property as single men.

13. For research assistance I am indebted to Mark Woodhead.

References


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