

Do we ask the right questions?

An analysis of post-mortem organ donation from the perspective of classical and perfectionist liberalism.



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Abstract

This thesis examines if the core moral issues connected with post-mortem organ donation policies are adequately addressed in the debate on organ donation between classical liberalism and perfectionist liberalism. Three moral issues emerge from the debate on organ donation between these two theoretical schools which are the centre of attention in this thesis. First, the issue of body ownership is addressed. I conclude that nobody owns our body when we are dead. I then analyse the different organ donation systems defended in the debate from an ethical perspective. In this analysis, the concepts of autonomy and manipulation play an important role. Lastly, I address the question if donating our organs after our death is a moral duty or not. I argue that it is not a moral duty, but a supererogatory duty. During the analysis of these three problems it becomes apparent that the core moral issues connected with post-mortem organ donation, the debates about the existence of supererogation and the moral status of deceased individuals, are not adequately addressed in the debate between classical and perfectionist liberalism on organ donation.

Keywords: *Post-mortem organ donation, autonomy, body ownership, supererogation, moral duty.*

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1 Introduction

1.1 The D66 bill

In December 2012, the Dutch social-liberal party D66 introduced a bill that sought to change the organ donation system in the Netherlands (Transplantatiestichting, n.d.). In the Netherlands, people must register if they want to donate their organs after death. This is the so called opt-in system. The bill proposed to change this into an opt-out system. Everyone over the age of 18 would automatically be registered as an organ donor unless he or she actively registers as a non-donor (Transplantatiestichting, n.d.). Similar to the opt-in system, people can choose between four options: I give permission to donate my organs, I do not want to be a donor, my relatives will decide, or a specific person will decide for me (Eerste Kamer, n.d.). According to D66, the pool of donors in the Netherlands is too small. By introducing the Active Donor Registration (ADR) system, the number of donors is expected to increase because everyone who did not register as a donor under the old system would automatically become one in this new system. The Dutch lower house deliberated on this bill in February 2016. In September 2016 it passed with the smallest possible majority: 75 votes in favour and 74 against (Tweede Kamer, n.d.). At the moment I write this thesis the Dutch Senate still needs to vote on the bill. The fact that it passed with the smallest majority already indicates that it was a controversial and sensitive topic.

1.2 The public debate

The proposal triggered an intense public debate. Opponents of the ADR-system used a broad range of arguments. Some of them were of a practical nature, such as the argument that the new system will not guarantee that the number of donors will increase or that it will even reduce the number of donors (Van Beers, 2016). Others argued that more organ donors will not necessarily lead to decreased waiting times. Legal arguments were used as well. For instance, one critic argued that the ADR-system will violate the constitution, because it infringes the principle of physical integrity while this principle also holds after someone has passed away (Van Beers, 2016). Next to these practical and legal arguments, opponents also used ethical arguments. They argued that we do not know if someone can be called dead when the organs are removed from the body (Van Beers, 2016). When someone is not dead, this would create major moral problems. If someone is not dead when we harvest his or her organs, we contribute to his or her death.

Proponents of the ADR-system argued that the system creates more room for people's self-determination (Sneller, 2016). ADR encourages people to think about what they want to happen with their bodies after their death and everybody is still free to decide if he or she wants to be donor or not, or to leave that decision to his or her relatives (Sneller, 2016). In 2016, sixty percent of the population above the age of 18 did not register if they wanted to be a donor or not. You can argue that these

people do not actively use their right to self-determination (Sneller, 2016). When this percentage decreases as a result of the ADR-system, this can be seen as an extension of self-determination, because it supports the ideal that nobody can claim parts of my body without my consent. Opponents claimed that it is often not taken into consideration that the positive freedom of people who wait for an organ is constrained, because they cannot act like they want to act. Positive freedom is important and we must not purely focus on negative freedom (Sneller, 2016). Negative freedom refers to the absence of constraints or obstacles while positive liberty refers to the extent to which a person is capable of self-determination and acting like he or she wants to act (Berlin, 1969). Another argument in favour of the new system was provided by Govert den Hartogh. Donating your organs after you pass away can be considered as a contribution to the collective effort to the relief of severe distress. In other words: it is a sign of solidarity (Den Hartogh, 2008).

If we examine the public debate about the change of the organ donation system in the Netherlands, it becomes clear that religious arguments did not play a large role in the debate about this specific bill. The Christian Democratic Party CDA did not provide religious arguments in order to defend why they voted against the bill, but instead expressed doubts about the efficiency of the new system, and concerns about the consequences of the new law for people who are incapable to make such important decisions (CDA, 2016). The orthodox protestant party ChristenUnie believes that the body does not belong to the government or doctors, but that it belongs to people themselves and is given to them by God (ChristenUnie, n.d.). That is why they are against the ADR-system and want to keep the current opt-in system. However, the state should actively promote organ donation, because it is important that the number of donors increases (ChristenUnie, n.d.). Finally, the reformed Christian party SGP is opposed to the D66 bill. Everyone should make this important and personal decision for his own and one should not automatically become a donor when one does not register (SGP, n.d.). The government should only invest in promotion and create awareness (SGP, n.d.). Looking at the positions the Christian parties in the Netherlands had with regard to the ADR-system, we see that the arguments they use in order to defend their position are a-religious arguments. However, most religions developed a position on post-mortem organ donation.

1.3 Religion and post-mortem organ donation

Jehovah's Witnesses are opposed to blood transfusions. They do not want to receive blood from other people. Moreover, they refuse to receive blood as a whole which means that they also do not want to get red and white blood cells, platelets and blood plasma (Jehovah's Witnesses, n.d). This position is based on several passages from the Bible. In the Bible it is mentioned that 'You must not eat the blood of any sort of flesh because the life of every sort of flesh is its blood' (Lev. 17:14 New World Translation). And: 'Just be firmly resolved not to eat the blood, because the blood is the life, and you

must not eat the life with the flesh' (Deut. 12:23 New World Translation). Therefore, Jehovah's see blood transfusions as a form of cannibalism that should be avoided at all times. Their position on organ donation is affected by this standpoint. They are not opposed to receiving organs from other people, they only want that all the blood is removed from the organs before they are transplanted (Jehovah's Witnesses, n.d.).

Likewise, Catholicism is not opposed to post-mortem organ donation and even encourages it (Oliver *et al*, 2011). Pope Francis stated that The Vatican has no moral or legal objections to it and sees it as a form of charity (Independent Catholic News, 2014). In Islam it is prohibited to violate people's body when they are alive, but this also holds for the body of deceased individuals (Oliver *et al*, 2011). However, altruism is considered highly valuable and saving the lives of others is one of the most important acts a Muslims can do. According to most Islamic scholars post-mortem organ donation is allowed because 'necessity overrides prohibition' (Oliver *et al*, 2011, p. 2). Muslims are allowed to donate their organs, because they can save a life when they donate. However, there is no consensus among Islamic scholars concerning post-mortem donation¹. Most Indo-Asian scholars are opposed to donation (Oliver *et al*, 2011).

Judaism has always had a quite negative and sceptical stance towards post-mortem organ donation, because Judaism ascribes great value to the prevention of any needless violation of a dead body and the importance of leaving the body completely intact when it is buried (Oliver *et al*, 2011). Jewish law prohibits the desecrating of a dead body, burying a dead body too long after death and profiting from a dead body (Oliver *et al*, 2011). Some Jewish scholars concluded, based on these prohibitions, that post-mortem organ donation is prohibited according to Jewish law. Nevertheless, there are also many Jewish scholars who conclude that these rules are superseded by a different rule in Jewish law that states that we should break other rules when we can save a life (Oliver *et al*, 2011)².

Buddhism is another religion that does not have a clear position regarding post-mortem organ donation, with some Buddhist scholars arguing that organ donation is prohibited and others arguing that people are free to decide if they want to become an organ donor (Oliver *et al*, 2011)³.

¹ See Golmakani, Niknam and Hedayat., 2005; Hassaballah, 1996; Gatrads, 1994 for an overview of Islam's position towards post-mortem organ donation.

² See Bruzzzone, 2008; Gillman, 1999; Gallagher, 1996 for other evaluations of organ donation in Judaism.

³ For a more comprehensive evaluation of the Buddhist position regarding post-mortem organ donation see Keon, 2010; Sugunasingh, 1990.

There are also religions, such as Shinto, that are clearly opposed to organ donation. In Shinto, Japan's main religion, a dead body is seen as impure and hazardous (Nahimira, 1990). It is something that possesses certain power. When one interferes with it, for example by removing organs, this will bring misfortune. Relatives often do not give consent for the donation of organs, because they see it as a violation of the body (Nahimira, 1990).

This short overview of the positions of various religions on post-mortem organ donation does not outline the debates between different groups in for example Judaism, Islam and Christianity on this issue. In this thesis I will not elaborate on these religious debates and I will not evaluate religious arguments that can be used in order to defend or reject post-mortem organ donation. This debate falls outside the scope of the research question of this thesis which I will pose further on in this chapter.

1.4 Can we say that someone is dead when his organs are removed?

There exists a complicated debate focused on determining when we can call someone dead. This debate matters, because it has important implications for the debate on post-mortem organ donation. Among members of the Dutch medical profession, someone is considered biologically dead when, during a period of five minutes, the heart does not beat anymore, blood circulation has stopped as well as breathing, someone is not conscious and there is no chance of recovery (Transplantatiestichting, n.d.). You can also be brain-dead. Brain death is defined as the complete and unrecoverable loss of brain functions, including the brain stem and the medulla (art. 1.1 Besluit Hersendoodprotocol, 1997). Someone who is brain-dead does not feel pain anymore, he or she is not conscious anymore and there is no brain activity, but other vital functions still work because they are supported by a heart-lung machine (Transplantatiestichting, n.d.). Objections against post-mortem organ donation are often related to this conception of brain death. After you are officially declared brain-dead and you are registered as an organ donor or your relatives give permission for donation, the surgery to remove the organs will start.

Opponents of organ donation argue that it is misleading to call someone dead when he or she is declared brain-dead. People who are brain-dead are dying. They are in a process that eventually leads to death. This could mean that, because organs are removed from someone who is dying, we may contribute to someone's death (Lodewick 2014). Ger Lodewick (2014) argues that when someone is brain-dead, we cannot speak of a dead person, because he or she shows signs of life. As an example he mentions that the heart is still beating, there is blood circulation, the body temperature is normal and wounds will still heal (Lodewick, 2014). He states that it is unethical and immoral that we do not show compassion with someone who is dying, and that we declare people dead too early so that we can use their organs (Lodewick, 2014). For him, it is indefensible that someone who is brain-dead, and is still in a process of dying, is reduced to nothing more than a dead body that we can use to harvest

organs (Lodewick, 2014). The argument is based on the premise that there is a difference between the body, the soul and the spirit. However, in this thesis I will assume that people are dead at the moment their organs are removed from the body. The philosophical and anthroposophical debate about consciousness and the question if a person who is brain-dead can be considered dead will not be part of this research.

1.5 Research question

In this thesis I will examine post-mortem organ donation from the perspective of a-religious, liberal political theory. I will analyse the debate between perfectionist and classical liberals and the arguments they use in order to defend their position. Within political theory there is an ongoing debate between classical liberalism and perfectionist liberalism. Both theoretical perspectives have different views on property, autonomy and what a state is allowed to do in order to let citizens make the choices the state wants them to make. As we will see later on, these concepts and this question will play an important role in the moral analysis of organ donation systems. Classical liberal theorists want a state that is small and has a limited number of functions. The main task of the state should be to ensure people's property rights and freedom. Perfectionist liberals on the other hand argue that there is no principle that prohibits a state to actively promote a specific conception of the good, even at the moment a significant amount of the population disagrees with it. This position is based on their ideas regarding autonomy. These authors develop theories about autonomy and moral value, how important they are for human excellence and the ways a state could ensure that people achieve these goods. This ongoing and unresolved debate between classical and perfectionist liberalism will be the main focus of this thesis. The tensions between both theoretical perspectives regarding the position of the state and the options it should or should not provide to its citizens are connected to the specific problem of this research. The points of contention between both forms of liberalism materialise explicitly in debates about medical-ethical policies, in this case the debate about which organ donation policy we should implement. However, one could ask if the debate between classical and perfectionist liberals on organ donation systems addresses the core moral problems connected with organ donation. Do these two theoretical schools debate about the core moral problems connected with post-mortem organ donation or do they fail to address them? The research question of this thesis will be:

Are the core moral issues connected with post-mortem organ donation policies adequately addressed in the debate on organ donation between classical liberalism and perfectionist liberalism?

1.6 Scientific and social relevance

The research question of this thesis has obvious social and political relevance. I briefly mentioned the public debate that followed after the introduction of the bill on the implementation of an ADR-system.

This thesis can help to determine if the public debate addresses the core moral issues that are connected with post-mortem organ donation. When it turns out that this is not the case, it can make a contribution towards redirecting the public debate in such a way that the main moral issues concerning post-mortem donation are addressed.

The research question also has scientific relevance. First of all, there is no systematic analysis of a medical-ethical policy such as organ donation from these two theoretical perspectives. Furthermore, this investigation can learn us more about the strength of the arguments of both positions used to defend or reject organ donation systems, and if classical and perfectionist liberalism address the core moral issues connected with post-mortem organ donation. This in turn tells us more about the scope of the moral questions that can be examined in the context of classical and perfectionist liberalism.

1.7 Sub-questions and outline of the thesis

In the next chapter, I will first outline the general debate between classical and perfectionist liberalism. On the side of classical liberalism, I briefly discuss authors such as Mill, Kant and Locke who are considered to have made a major contribution to the development of classical liberal thought. The arguments of modern classical liberals will be discussed more extensively (Kukathas, 2003; Gauss, 2007, 2010; Rasmussen and Den Uyl, 2005). I will also briefly elaborate on perfectionism in general before I continue with the core ideas of perfectionist liberalism. I will explicate the main arguments and concepts of the debate between classical and perfectionist liberals. In the second part of this chapter, I will offer an overview of the classical and perfectionist liberal arguments used to defend and reject various organ donation systems. Out of this overview, three main problems will emerge. In order to answer the research question, these three problems need to be addressed.

The first problem that emerges when we examine the debate about organ donation between perfectionist and classical liberals, is that of ownership of the body of a deceased person. We will see that arguments made in order to defend the opt-out and routine salvaging organ donation systems entail the claim that we do not own our body. But, *can we own our body? Who owns our body when we are dead? Is it possible to argue that someone still owns his or her body when he or she has passed away or does the family, the state or nobody has the right to decide what will happen with it?* In Chapter 3 I will address this problem of body ownership.

The problem will be addressed from two different points of view: the natural rights position, which claims that body ownership is a natural right (Wheeler, 1980; Rasmussen 2008), and the social constructivist view which asserts that socially constructed property rights can be applied to our body (Quigley, 2007). I will examine the social constructivist view, using will and interest theories about the function of rights. Broadly speaking, will theorists argue that a right grants someone control over the

duties other people have to act in a specific way (Wenar, 2005). Clear examples are property rights. If you have a property right over your washing machine, this gives you the power to decide if someone else may or may not use it. An advantage of will theory is that it explicates the link between rights and authority. 'To have a right is to have the ability to determine what others may and may not do, and so to exercise authority over a certain domain of affairs' (Wenar, 2015, p. 1). On the other hand, interest theory argues that a right should serve the interest of the right-holder (Wenar, 2005). It asserts that someone has rights because rights make people better off. Interest theories tend to be more comprehensive than will theories, because they also theorize over the question if people who are incapable of exercising rights may still have interests that need to be protected by rights (Wenar, 2005). In will theory, there are no rights over which a holder does not have power, while in interest theory this is possible. From the perspective of both will and interest theories of rights, I will answer the question whether we own our bodies after we have passed away, or that the family the state or nobody owns my body when I am dead.

Next to the issue of ownership, a second area of contestation between perfectionist and classical liberals concerns the donation system itself. As we will see, many different organ donation systems can be defended by classical and perfectionist liberal arguments. Furthermore, various additional policy proposals can be made that need to increase the number of donors. *From an ethical point of view, what are the problematic elements of the organ donation systems and policies defended in the debate between classical and perfectionist liberalism on organ donation?* Examining this sub-problem is the logical next step we should take in order to answer the research question. After we have determined if the state owns someone's organs after someone's death, we should also identify the main ethical problems of each organ donation system. Chapter 4 of this thesis will be devoted to this question.

The final problem that emerges from the debate between classical and perfectionist liberals on organ donation is the following one: *Is organ donation our moral duty? And if it is, what kind of moral duty is it?* These questions logically follow from the previous sub-problem. All organ donation systems share the characteristic that they regulate the donation of organs. The question then is: is this our moral duty? If it is, what kind of duty is it? In Chapter 5 I will answer these questions. I will analyse four positions: Organ donation is an altruistic supererogatory act (Aurenque, 2016), it is a supererogatory contribution to a system of mutual assistance (Aurenque, 2016), we have a duty to donate our organs based on the principle of fairness (Den Hartogh, 2003) and the position that, based on the Categorical Imperative, we have a duty to become an organ donor (Mendis, 2016). When these three problems are tackled and we have managed to formulate an answer to the questions, we are able to determine if there actually are deeper moral issues that underlie the ones addressed in the debate between

classical and perfectionist liberals on organ donation. In the conclusion I will answer the research question, reflect on the research that I conducted, and I will provide suggestions for further research.

2 Organ donation: The debate between classical and perfectionist liberals

2.1 Classical liberalism: core ideas and their intellectual origins

In this chapter I will first outline the general debate between classical and perfectionist liberal authors within the field of political theory, as well as the most important concepts in this debate. Furthermore, I will elaborate on the different positions of those who can be considered perfectionist or classical liberal authors and their debate about organ donation systems in order to identify the main problems that emerge from this debate. These problems will be the centre of attention in the upcoming chapters.

I start with the core ideas of classical liberalism and their intellectual origins. According to classical liberals, the state's set of responsibilities should be small. First of all, it should protect the freedom and autonomy of its citizens. John Stuart Mill is one of the founders of the idea that the government should not interfere in people's freedom. He became famous for his classical utilitarian theory, in which the harm principle has a prominent role (Mill, 2001). In his well-known essay 'On Liberty', Mill states: 'the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others' (Mill, 2001, p. 13). An individual must be free to do what he or she wishes and only when he or she harms someone else this liberty should be restricted (Mill, 2001). This means that a government should interfere in someone's individual freedom only when society needs to be protected against harm (Mill, 2001). Someone is free to do what he wants with his body and mind (Mill, 2001). We will see that Mill's harm principle will play a role in the debate between classical and perfectionist liberals. Immanuel Kant developed one of the first theories in which autonomy plays a central role (Johnson and Cureton, 2016). Arguments regarding autonomy and the protection of freedom of choice will also play a crucial role in the rest of this thesis.

Another core idea of classical liberalism is that the state should protect people's property rights. Property is an important concept in classical liberal thought. John Locke, one of the founders of liberal thought, argued that one of the things a government needs to protect is the property of individuals. Ensuring the rule of law was another important idea in Locke's work, reflected in his ideas on private property (Uzgalis, 2012). Thus, classical liberalism is a theoretical position that prefers a small state with limited functions centred on ensuring people's property rights, freedom and autonomy. After the debate between classical and perfectionist liberals on organ donation, we will see that questions regarding property, especially body ownership, need to be answered.

2.2 Perfectionist liberalism

Before we can discuss the core ideas of perfectionist liberalism, we should first focus on what perfectionism entails. We can distinguish two perfectionist traditions. First, there is human nature perfectionism (Wall, 2012). This tradition connects perfectionist goods, such as friendship and

knowledge, to the development of human nature. We should foster and promote certain capacities and goods because they are crucial for this development (Hurka, 1993). Furthermore, there is objective goods perfectionism. This tradition does not link perfectionist goods with human nature, but with the achievement of certain objective goods (Wall, 2012). Perfectionist thinkers within the field of political theory reject the idea that it is possible for a state to be neutral with regard to conceptions of the good (Wall, 2012). There is no principle within political morality that prohibits a state to have a specific notion of the good. The state is allowed to foster this conception of the good even if there is widespread disagreement over it (Wall, 2012). This brings us to the core ideas of perfectionist liberalism.

A core idea of perfectionist liberalism is value pluralism. The value of autonomy depends on the value of the options that are available for someone. Therefore, a government must create options that can be considered valuable (Raz, 1986). In other words, the government must make certain good options available, but this does not mean that these options always need to be present (Raz, 1986). A government must only guarantee that options that are not considered valuable or even worthless, are not available anymore. We must favour value pluralism, because when only a single option is considered valuable, this could possibly lead to intolerance. When people consider other values and ways of live that are made available as meaningful, people are willing to let others be autonomous (Raz, 1986). According to perfectionist liberalism, Mill's harm principle is not the most important moral principle. Instead, the autonomy principle is more important (Raz, 1986). A person can only be autonomous if he or she has a range of meaningful options to choose from and meaningful autonomy is valuable (Raz, 1986). This means that when a government ensures that options that are not considered valuable are not available anymore to its citizens, this could be considered as something good. The autonomy principle can be described as follows: Peoples autonomy needs to be respected by the state, but at the same time the state needs to ensure that individuals can be autonomous by creating and promoting the conditions that contribute to autonomy (Raz, 1986).

2.3 Classical liberalism as an answer to perfectionist liberal arguments

As mentioned earlier, classical liberalism wants to have a small state that has limited functions and ensures people's property rights, freedom and autonomy. A state has to make sure that the right of individuals to be free and autonomous is protected but it also has to guarantee property rights. This position can be defended with various lines of argumentation. As we will see, those arguments criticize the perfectionist liberal position that I described above.

First of all, you can make an argument build around the concept of toleration. This argument starts with the claim that toleration is the most important value (Kukathas, 2003). This is related to the importance of conscience. People are motivated in different ways but conscience is the most

fundamental basis for our motivation. This is the case because 'conscience is what not only guides us (for the most part), but what we think should guide us' (Kukathas, 2003, p. 48). Therefore, someone should never be coerced to live and act against his or her conscience. The right to associate and dissociate is the most fundamental freedom people need to have, because this ensures that someone does not need to live in such a way that goes against his or her conscience (Kukathas, 2003). Authority is necessary, because conflicts are inevitable, but nobody should have to live under an authority that he or she does not want to live under. This means that a society can be called liberal when it tolerates the multiple authorities that are created by people who used their freedom of association (Kukathas, 2003). Within these communities, people are free to live as they want, but they must always be free to leave the association and move to another one (Kukathas, 2003). This is a typical classical liberal position. The state should protect the fundamental right of individuals to leave their community or association and the right to associate but a state does not have the task 'to make society more healthy, or noble, or equal or more just. It is not for it to decide which ways of life are to survive and which die out; which traditions are to prevail and which to disappear' (Kukathas, 2003, p. 213). Thus, this argument can be used to reject the perfectionist liberal position.

Another line of argumentation used to defend the classical liberal position can be characterized as a justificatory liberal argument. It is based on several premises. First of all, individuals need to be treated as free and equal (Gaus, 2007). Moreover, individuals must agree with any law or duty that is placed upon its citizens by the state. Finally, when the state uses force or implements laws that create certain duties, this must be justified (Gaus, 2007). Each individual should be able to accept these laws and obligations, because only then individuals are considered free and equal. The political order must have a specific form if we want to be sure that every reasonable individual would agree with it. First of all, a legislative proposal should be evaluated and compared to other options and we should decide if the proposal can be rejected, based on reasonable arguments, compared to other options (Gaus, 2010). This means that, in order to respect liberty and autonomy, if it is an option not to make a law this should always be preferred to making a law (Gaus, 2010). If this is not the case and the proposal is better than the option of not making a law and nobody prefers the proposal above another one, this law should also be rejected (Gaus, 2010). We should reject anarchism and the total absence of the state, because all reasonable individuals would agree with certain rights such as freedom of speech and the right to integrity of the body. Moreover, we should reject paternalism and perfectionism. A state should not develop paternalistic and perfectionistic policies, because reasonable individuals will not accept them. The aim of these policies is to improve people in a certain way. Reasonable citizens would therefore reject certain policies and would prefer that no policy will be developed (Gaus, 2010). Thus, this line of argumentation can also be brought forward in order to reject perfectionist liberalism.

Moreover, one can defend the classical liberal position using perfectionist arguments. The argument starts with the assumption that human flourishing can be considered objective, but it is also something that is very much individualized (Rasmussen and Den Uyl, 2005). Several conditions are necessary for someone to flourish including health, wisdom and moral virtue. When these goods are not present, someone cannot fully flourish. However, flourishing can have many different forms (Rasmussen and Den Uyl, 2005). People have different experiences. It is difficult to order certain ways of life and to judge on what can be considered valuable and what not (Larmore, 1987). Given this plurality, there should be a specific political order. Self-government is crucial in this case. When someone is able to direct him or herself, this can be seen as an element of human flourishing. Everyone needs to be able to be self-governing and this has consequences for the way the political order should be constructed (Rasmussen and Den Uyl, 2005). Individuals should have a right to liberty, because this enables individuals to have self-direction. This right can be protected, for example with a ban on physical violence and other activities that could harm the autonomy of individuals (Rasmussen and Den Uyl, 2005). Moreover, welfare rights should not be granted by the state, because these rights decrease the autonomy of its citizens. Guaranteed welfare by the state would mean that the state interferes in people's lives and restricts their choices (Rasmussen and Den Uyl, 2005). Thus, the state should not promote the good, like perfectionist liberals argue for. The state needs to provide the conditions that enable people to flourish. A state that promotes certain conceptions of the good is unjustifiable, because it will favour specific forms of human flourishing (Rasmussen and Den Uyl, 2005). If we look back at the distinction between human nature and objective good perfectionism, we can see that this position can be categorized as a human nature perfectionist position.

The three lines of argumentation described above show the ongoing disagreement between perfectionist and classical liberalism. As we saw, various arguments are used to defend classical liberalism. One was based on perfectionism and argued that the state should be limited and neutral and should not promote specific conceptions of the good. The others used justificatory arguments or arguments build on the concept of toleration.

2.4 Classical and perfectionist liberals on organ donation

Up until this moment I discussed the general debate between classical and perfectionist liberals and the concepts they focus on. Now that we have a general overview of this debate, I will outline the various positions that exist on organ donation and I will discuss the arguments that can be classified as classical or perfectionist liberal arguments used to defend these positions. After this outline, I will identify the three main problems that emerge from this debate and who will be the centre of attention of the rest of this thesis.

First of all, you could take the position that we should prefer a presumed consent system, which is often called opt-out system. The line of argumentation used to defend the system starts with the claim that our body is not our property. This holds when we are alive and also when we are dead (Den Hartogh, 2003; Audi, 1996; Emson, 2003; Truog, 2005; Kluge, 1989). Further on in this section we will see that other positions make this claim as well. People are not allowed to do with their body whatever they want and therefore we cannot say that our body is our property (Den Hartogh, 2003). A counterargument would be that the right to physical integrity of the dead body is not a property right, but an inalterable right. However, this could be refuted by two arguments. First, the deceased do not have an interest in keeping their organs or keeping their body intact (Den Hartogh, 2003). Therefore, someone who has passed away does not have the right to physical integrity anymore. Secondly, the aim of organ donation, saving lives or improving the quality of life of other people, justifies a violation of the right to physical integrity of the dead body if someone would still have this right (Den Hartogh, 2003). In Chapter 3 I will extensively examine and test the claim that we do not own our body while we are alive and when are dead. Moreover, I will examine if we can say that someone who has passed away still has rights.

The argument in favour of the opt-out system continuous with the observation that we could see post-mortem organ donation as our Samaritan duty (Den Hartogh, 2003). This is the duty to help other people who are in serious distress. We have this duty when three conditions are met: 'it must concern a serious emergency, the costs of helping must be acceptable and the person providing help must be in a unique position to be able to help' (Den Hartogh, 2003, p. 155). One can argue that they are met in the case of post-mortem organ donation. The first condition is met, because someone who suffers from organ failure, for example heart failure, finds his or herself in a life-threatening situation. Furthermore, people who suffer from for example kidney failure and whose quality of life is severely reduced face the risk that they will die due to failure of vital bodily functions (Den Hartogh, 2003). The second condition is also met, because we cannot say that the cost for the person who donates his organs are too high. A dead person no longer needs his organs, while he could save the lives of other people by donating them and therefore the interests of someone who receives a donor organ are considered to be more important than those of the donor (Den Hartogh, 2003). You could argue that the third condition is not met, because the donor is not in a unique position to help. When someone waits for an organ, he or she does not have to rely on one specific donor. However, there is a way to solve this problem (Den Hartogh, 2003). When we create a one-on-one relationship between the donor and the person who needs an organ, by giving an organ that becomes available to the first person on the waiting list who needs that specific organ, the donor is a unique position to help (Den Hartogh,

2003) This makes that we have a Samaritan duty to become an organ donor. It is a perfect obligation 'which in principle is enforceable' (Den Hartogh, 2003, p. 156).

However, organ donation is not a Samaritan duty (Den Hartogh, 2003). It is a contribution to a system of mutual assistance. Everyone could potentially profit from organ donation: not only the people in distress, but also people who do not need help yet but face the risk of organ failure, could profit (Den Hartogh, 2003). It is a primary task of the state to facilitate systems that protect citizens against such a threat to their life and well-being. Because an organ donation system is a cooperative system of mutual assistance, we have a perfect, enforceable duty to donate our organs after our death, based on the principle of fairness. However, we cannot reasonably expect from other people to regard it as such (Den Hartogh, 2003). Therefore, we must accept that people may refuse to fulfil this duty without testing the arguments for their refusal. We cannot determine if someone has sincere objections or that he or she is freeriding. Consequently, we must decide to recognize objections against organ donations without testing if someone is sincere (Den Hartogh, 2003). An opt-out system would fulfil this task. People are still able to refuse to donate their organs and not to fulfil their duty. Thus, we need to implement an opt-out system. In Chapter 5 I will extensively examine and test this line of argumentation. I will, among other things, examine the claim that we have a moral duty to donate our organs based on the principle of fairness.

The position that we should prefer an opt-out organ donation system is criticized by the argument that it actually is a system of 'routine salvaging' (Veatch and Pitt, 1995, p. 1888), because in most countries the state does not claim to presume consent. The state simply takes organs without explicitly asking permission. A system of routine salvaging, which does not claim presumed consent, 'gives more central authority to the state, authorizing it to use the individual for important societal purposes even without individual consent' (Veatch and Pitt, 1995, p. 1888). A system of presumed consent is based on another form of society in which the individual plays a central role and the state can only use its citizens when they consent (Veatch and Pitt, 1995). A presumed consent system with a possibility to opt-out does not presume the consent of individuals who did not register that they do not want to donate their organs, because people might simply forget to opt-out or because people might not have been aware of the procurement policy and its opting-out provisions (Veatch and Pitt, 1995).

One could also argue in favour of a combination of an opt-out system and a so called 'preference system' (Eaton, 1998, p. 166) and thus criticize those who argue only in favour of the opt-out system. In this argument, interdependence and free-riding are important concepts. It starts with the claim that there is 'a contingent interdependence between all persons prior to any particular person becoming identified as either a potential donor or a prospective recipient' (Eaton, 1998, p. 167). We recognize

this interdependence when we implement an opt-out system, because then we assume that when someone does not register that he does not want to donate his organs, he consents with donation. At the same time, an opt-out system also grants people the right that, at the moment they need an organ, they are treated clinically and morally on equal terms with other people who wait for an organ (Eaton, 1998). This 'gives us the justification for a general presumption of consent to organ donation, while the procedures for opting-out ensure the right to individual exception is protected' (Eaton, 1998, p. 167).

However, we should combine this system with a preference system. People who do not want to donate their organs and want to opt-out, are free-riders. They want to receive an organ when they need it, but they do not want to donate and therefore they benefit from the system without making any contribution (Eaton, 1998). In a liberal society people should be allowed to make this decision, but someone must accept the consequences of this choice. It is possible that people who decided not to donate will face discrimination when they need an organ themselves, as expressed by allocating the organ to someone who has made the decision that he or she wants to be donor (Eaton, 1998). Organs are scarce and transplanting them is expensive. Also, when someone who needs an organ does not receive one, he or she suffers severe consequences. Because the number of available organs is very limited, it would occasionally be suitable to use the principle of freeriding to decide which patient should receive an organ. 'Such disadvantage counterbalances the unfairness of free-riding' (Eaton, 1998, p. 168). People who decided that they do not want to donate must be reminded several times of the possibility that it is likely that they will not receive an organ when this would be necessary. This would force people who opted out to evaluate their decision and moral standards (Eaton, 1998). Furthermore, in this system someone's consent can be assumed, which is not the case in a regular opt-out system. When someone did not indicate that he or she wanted to opt-out, we can assume that this person was not a free-rider.

Another alternative is a system of required response. The following argument is used to defend this system: people are obliged to express if they want to be a donor or not and therefore we should prefer it from a moral point of view, because people are explicitly asked for consent and their autonomy is fully protected (Veatch and Pitt, 1995). A possible way to implement the system would be to let people register their preference when they for example renew their driver's license (Veatch and Pitt, 1995).

However, this position is criticized because implementing a required response system is not sufficient to increase the number of donors. In order to increase the amount of available organs, the state must not only force citizens to make a decision, 'but must also force them to choose reasonably' (Spellman, 2006, p. 373). The educational system has to play a role in this. It is necessary to educate citizens about

post-mortem organ donation and to take away widespread misconceptions (Spellman, 2006). Moreover, people should frequently be reminded of their decision in order to let people reflect on their choice (Farsides, 2000). When people stay with their decision, this makes their decision to donate or not more clear, but at the same time this could also increase the possibility that someone who prefers not to donate will change his or her preference due to the feeling that he or she is steered in the direction of donating (Farsides, 2000). Furthermore, we should change the language that we use to talk about organ donation. The body must be presented as intrinsically valuable and we need to stress that someone's body is treated with respect after death when one decides to donate, in order to persuade people to become a donor (Farsides, 2000).

Another critique you could formulate with regard to the required response system is that when it is obligatory to decide if one wants to be a donor or not, people's autonomy is partly eradicated. Someone is not allowed anymore to choose not to make a decision regarding organ donation (Farsides, 2000). However, one could refute this criticism by making two counterarguments. First of all, the loss of autonomy caused by the obligation to make a decisions is 'more than countered by the increased autonomy of one's wishes being honoured' (Farsides, 2000, p. 107). Secondly, the discomfort caused by being forced to choose can be eased by including the option to delegate the decision to relatives. In Chapter 4, I will evaluate this and other arguments about the extent to which we should respect people's autonomous decisions.

It is also possible to defend a system in which only the family is allowed to decide if the deceased will donate his or her organs or not, because we could see the relatives of the person who has passed away as a group with its own autonomy and which preferences may overrule those of the deceased (Boddington, 1998). You can make a twofold argument in order to defend this position. First of all, to a certain degree we can perceive a family in the same way we perceive a state or an organisation. A family is a group of people with its own collective and individual interests and its own structures of power (Boddington, 1998). Secondly, 'a person's identity can be seen as made up of group identities *as well as* individual identity' (Boddington, 1998, p. 77, emphasis in original). This means that we must be sceptical about the idea that we must regard people as isolated atomistic individuals and that we can only speak of autonomy as an ability of individuals. Instead, individuals are members of a family that is autonomous (Boddington, 1998). When we see a family as an autonomous group of people and we do not regard the dead body as something over which the deceased person has the right to self-determination, we must conclude that the preferences of the family have to get priority over the preference of the individual who has passed away (Boddington, 1998). This would justify the implementation of a system in which the next of kin are asked if the organs of the deceased may be used for donation and in which people are not allowed to register if they want to be a donor or not

when they are alive. In order to reject this position, one can make the counterargument that because the moral foundation of organ procurement is the consent of the individual from which the organs will be taken, the consent of relatives is an insufficient substitute (Veatch and Pitt, 1995).

One can also take the standpoint that we should favour an opt-in system in which people need to register that they want to be a donor. It is crucial that organ donation becomes something that people will do because they believe it is something a good person would do and that it is their task as citizens to do so (Etzioni, 2003). We should focus on 'changing people's preferences through moral persuasion, community appreciation of good conduct, and gentle chiding of those who do not do what is considered right' (Etzioni, 2003, p. 4). We must encourage a moral dialogue about organ donation. This dialogue is important, because it changes the moral culture of a society (Etzioni, 2003). In order to start and nurture this dialogue, several policy measures must be taken. First of all, donor registration cards should include texts that mention important moral arguments for organ donation. The texts must persuade people to donate their organs. Furthermore, donor forms must be available at as many places as possible so that citizens are often reminded of the importance of donating. Moreover, someone's decision should be a binding commitment. It must be impossible for the family to change the decision of their loved one when he or she passed away (Etzioni, 2003). Furthermore, public education needs to be changed in several ways (Childress, 2001). First, it must take away feelings of mistrust towards organ donation. This mistrust is often caused by people's misunderstanding of the concept of brain death and we should educate people about this phenomenon. Additionally, public education needs to encourage people to discuss the issue of organ donation with their family to make them aware of the importance of donating (Childress, 2001). You could ask if these policy measures do not contain elements of manipulation. Furthermore, an opt-in system, like the opt-out system, contains a default position. Several ethical considerations should be made before one implements a system that contains a default option. In Chapter 4 I will evaluate the different organ donation systems outlined in this section from an ethical perspective. I will address issues such as manipulation, the use of defaults, but also issues concerning respect for autonomy.

Another position you could defend is that we should have an organ donation system in which people are not allowed to decide if they want to donate their organs after they have passed away and in which the state will reallocate the organs of dead citizens (Emson, 2003). The argument used to justify such a system starts from the assumption that our body is not our property. Someone does not own his or her body, because the body is a loan from the biomass and it will unavoidably return to this biomass (Emson, 2003). As a result of improved medical techniques that make it possible to preserve organs, the dead body became a valuable resource for people who will benefit from donated organs. From a moral point of view, it is unacceptable that relatives of the deceased person refuse that the body will

be used as a resource of transplantable organs, because the urgency of people who need organs outweighs the wish of the family to have a temporary memorial of their loved ones (Emson, 2003). 'The proportionate benefit is too great to be subordinate to anything else' (Emson, 2003, p. 126). 'In this situation, the idea of consent and its corollary, refusal are not morally applicable' (Emson, 2003, p. 127). 'The right of control over the cadaver should be vested in the state as representative of those who may benefit from organ donation' (Emson, 2003, p. 125) and the state can redistribute the organs in the best and most efficient way. We should establish an organisation that has the right and the responsibility to decide how organs are distributed. After the body is used it may, if relatives want this, be returned to the family. This is an extension of the doctrine that it is the responsibility of the state to take care of its citizens when this is necessary and in their benefit (Emson, 2003).

The position that the bodies of deceased citizens should become the property and responsibility of the state can also be defended by another line of argumentation. When an organ is donated, this is not just an exchange between the person who receives an organ and the deceased donor, but it is also a social action since many other people and institutions are involved, such as hospitals and transplant teams (Kluge, 1989; Truog, 2005). These people and institutions have the obligation to ensure that 'all of their patients are treated fairly, and that no one is selected for special treatment that cannot be justified by the circumstances of their medical condition' (Truog, 2005, p. 15). Therefore, an organ should always be granted to the person who is at the top of the waiting list. Thus, directed cadaveric donation should be prohibited (Kluge, 1989). Moreover, it should not be permitted, because we do not have the same set of rights when we are dead than we have when we are alive (Truog, 2005). This can be illustrated by the example of autopsy. Examiners have, in the context of a criminal investigation, the right to remove the organs of a deceased when they find this necessary, even when he or she would have had moral or religious objections against autopsy. This can be justified, because the advantages for society outweigh the wishes of the deceased. When organs become the property of the state when citizens have passed away, the state also has the right to decide that they will be redistributed to the first person on the waiting list who needs a specific organ (Truog, 2005).

2.5 Three main problems emerge

When we examine the different positions regarding organ donation outlined above, three main problems emerge. During the outline, I already briefly mentioned that I will address various issues in the coming chapters, but now I will elaborate more extensively on the exact questions I am going to answer and how they emerge from the debate on organ donation discussed in the previous section.

First of all, we saw that proponents of the opt-out system make the claim that we do not own our body and that this holds when we are alive, but also when we are dead (Den Hartogh, 2003). We cannot speak about the body in terms of property rights and this argument is, among others, used to advocate for

the opt-out system. However, we also saw that one could make the argument that the dead body is the property of the state and that the state has the right to decide how and to whom organs will be allocated (Emson, 2003; Kluge, 1989; Truog, 2005). I showed the different lines of argumentation that can be deployed to support this claim. Moreover, there is the argument that the family of the deceased can be considered as a group which has autonomy and which is allowed to decide if their loved one will donate his or her organs or not (Boddington, 1998). The body is the property of the family. Thus, there is disagreement about who owns the body of a deceased person which also has important implications for the kind of organ donation system one can argue for. This leads us to the following questions: Can we own our body? Who owns our body when we are dead? Is it possible to argue that someone still owns his or her body when he or she has passed away or does the family, the state or nobody has the right to decide what will happen with it? In Chapter 3 I will formulate an answer to these questions.

Furthermore, several policy measures are proposed that are meant to increase the number of available organ donors by stimulating people to become donors. Citizens should be educated about organ donation to take away misconceptions (Spellman, 2006). We should have a preference system in which people who registered that they will donate their organs when they are dead, will first receive an organ when they need it over people who have chosen not to be a donor and people should be reminded of this in order to let people who opted out evaluate their decision (Eaton, 1998). People should be reminded at the importance of organ donation (Etzioni, 2003; Farsides, 2000), or we should have donor cards with moral arguments for donation. Moreover, I already mentioned that the opt-in and opt-out system both use a default position. In other systems, people are not allowed to choose at all if they want to be a donor, such as in the routine salvaging system or the system in which your relatives will make the final decision. In Chapter 4, I will evaluate the organ donation systems outlined in the previous section and the various additional policy proposals that need to increase the number of available organs from an ethical perspective. The following question will be addressed: From an ethical point of view, what are the problematic elements of the organ donation systems and policies defended in the debate between classical and perfectionist liberalism on organ donation?

The final issue that I will address is the deeper question that lies at the basis of the question addressed in Chapter 4. All organ donation systems share one core characteristic: they regulate the donation of organs. The question is then: Is organ donation our moral duty? If it is, what kind of moral duty is it? As we saw, one could argue that we have an enforceable obligation to donate our organs when we are dead, based on the principle of fairness (Den Hartogh, 2003). This refutes the position that we are free to decide if we want to become a post-mortem donor or not. In Chapter 5 I will formulate an answer to these vital questions, but I will first examine the problem of body ownership.

3 Our body and property: A difficult combination?

3.1 Two views of property

Can we say that our body is our property? If we can, whose property is it after we pass away? In this chapter I will examine these questions. First, I will discuss the concept of property and the different points of view that exist within the field of political theory regarding property. After this, I will focus on arguments that are used to defend the position that our body is our property and those used to criticize this point of view.

In political theory we can distinguish two main positions concerning property. On the one hand, there are theorists who argue that the right to property is a natural right (Wheeler, 1980; Locke, 1988). On the other hand there are authors who reject this position and argue that property rights are a social construct (Honoré, 1961; Quigley, 2007). I will first focus on the natural rights position. Although there is some disagreement about how to define a natural right, the following definition is helpful: 'A right is a natural right if its possession is justified only with reference to a certain set of natural attributes of persons- that is, without reference to social conventions, legal institutions, or other special relationships within or among groups of persons' (Christman, 1986, p. 158).

John Locke is one of the most influential thinkers who developed a theory of property as a natural right. In his 'Two Treatises of Government' (1988) Locke argues that 'God . . . hath given to men the world in common' (Locke, 1988, p.18). In the state of nature, all people have the same right to all things nature provides. He describes the state of nature as follows: 'Men living together according to reason, without a common superior on earth, with authority to judge between them, is properly the state of nature' (Locke, 1988, p.14). People in the state of nature may appropriate property. For Locke, 'every man has a property in his own person' (1988, p. 18). This is the idea of self-ownership. Someone owns his or her labour and body. When he or she mixes this labour with something that is provided by nature it becomes his or her property, but this applies only under two conditions. One needs to leave enough for others, and he or she should not take so much that one spoils the products of nature. When someone mixes his labour with something provided by nature and the two conditions are met, it becomes his or her property. He or she 'excludes the common right of other men' (Locke, 1988, p. 18).

In the field of political theory there exists a debate on how to interpret Locke, and based on these interpretations a broad range of arguments is made with regard to the concept of property as a natural right and the role the state should play when it comes to property and taxes (Kearl, 1977; Macpherson, 1962; Nozick, 1974). A Lockean argument that is made in order to defend the position that everyone has a natural right to property is based on the concept of desert. When one uses his or her labour in order to create resources, the labour increases the value of this particular resource. Making something more valuable can be seen as service, and therefore the labourer deserves a reward. When it is

beneficial for the labourer to own the product he created, this can be seen as a reward and thus it should become his property (Becker, 1977). The argument is based on the assumption that we have a natural right to our own labour and it emphasizes the notion of desert. A moral system must use the concept of deserving, because it must entail moral obligations and one of them is that there must be moral sanctions for people who violate moral rules (Becker, 1977). Consequently, these sanctions need to be deserved and 'to ask whether desert is an intelligible concept is to call into question the whole enterprise of moral judgement' (Becker, 1977, p. 49). A comprehensive evaluation of the debate falls outside the scope of this thesis and therefore I will now elaborate on the position that property rights are a social construct instead of natural rights. After this, I will examine the idea of thinking about our body as our property.

The social constructivist view on property asserts that 'ownership is the result of a series of social choices and events' (Björkman and Hansson, 2006, p. 210). According to this position, it is one of the crucial tasks of the state to create a system of rights, including property rights, which produce specific social goods such as justice. Thus, without some form of government, property rights do not exist. Hence, we see the crucial difference with natural rights theorists, who argue that people have a right to property independent from any social context. Property rights are best described as a set of rights, and this set can be different for various objects, because the nature of objects can differ (Björkman and Hansson, 2006). It is important to notice that this type of argument is totally different than rights positivism which entails the is-ought fallacy that what is legally allowed is also morally right. Tony Honore (1961) developed an influential social constructivist theory about property. For him, full liberal ownership consists of eleven relationships. Further on in this chapter I will elaborate on these relationships more extensively when I examine if they can be applied to the human body.

3.2 Self-ownership as a natural right

You could argue that I have a natural right to own my body by showing that this right is independent from any social context and therefore natural. Sam Wheeler defines the natural right to own our body as the right 'to move and use our bodies as we please [which entails] an obligation others have not to move, use or transform our bodies against our will' (Wheeler, 1980, p. 187). The argument that this would be a natural right consists of several elements. First, a person has the right to be an agent. This right is independent from any social context or institution and is therefore natural. It is simply the right to exist (Wheeler, 1980). In order to be an agent, it is of crucial importance that someone has the right to move and use his or her body. Being an autonomous agent is a fundamental moral status that can only be achieved by having body ownership (Wheeler, 1980). Therefore, we have a natural property right to our body.

This position can be criticized by at least two arguments. First, we can try to show that a natural right to self-ownership does not exist by arguing that such a right is always derived from a non-moral fact combined with a moral rule (Rasmussen, 2008). The self-ownership thesis asserts that: 'Each person enjoys moral ownership of himself or herself (his/her body and mind)' (Rasmussen, 2008, p. 86). This self-ownership is not a natural right. It 'is derived from a combination of nonmoral facts about (say) the relationship between a person and his or her body and mind and one or more basic moral principles' (Rasmussen, 2008, p. 90). Libertarians use the self-ownership thesis in order to argue that one also owns his labour and the things that one produces with it, but the core of the thesis is that an individual owns his or her body. The argument presented by Wheeler (1980) entails that autonomous agency is a moral status for which self-ownership is crucial. This position is problematic, because we can imagine situations in which a violation of the right to self-ownership ensures autonomous agency instead of reducing it (Rasmussen, 2008). Suppose that people have gigantic bodies with a great number of arms and legs which makes it impossible for them to be autonomous agents, because they cannot control their bodies. When we would remove all the superfluous arms and legs in order to change their bodies into the human body that we consider to be normal, we ensure their status as autonomous agent by violating their right to self-ownership (Rasmussen, 2008). One could object that when one does not own his or her body and thus has no self-ownership, it would violate my autonomy when I want to change my body. Although this seems to be a valid concern, someone can still autonomously decide to change his body, despite that he is prevented from realizing these plans. So, the self-ownership thesis is not a natural right. It is a right that is derived from the fact that we are dependent on our bodies in their shape combined with the fundamental moral rule that we should be autonomous agents (Rasmussen, 2008).

You could make the counterargument that this argument cannot be used to reject the claim that self-ownership is a natural right, because when a right is derived from non-moral facts it does not mean that it is not natural. If we return to the definition of a natural right provided in the beginning of this chapter, we can see why this would be the case: 'A right is a natural right if its possession is justified only with reference to a certain set of natural attributes of persons - that is, without reference to social conventions, legal institutions, or other special relationships within or among groups of persons' (Christman, 1986, p. 158). You could say that 'a certain set of natural attributes of persons' exactly refers to non-moral facts such as the fact that our bodies have this particular shape. However, here we see the core problem of the idea of natural rights. If we justify the possession of a right based on a reference to a set of natural attributes of people, we do not take into account that we justify the possession of this right not solely based on this fact but on a combination of a non-moral fact *and* a

moral rule. A natural right to body-ownership does not exist, because we cannot justify them solely based on a reference to people's natural attributes.

An argument in defence of the self-ownership thesis could be that we should treat people as ends instead of means. This is a Kantian principle. This argument is problematic in two ways. First, it means that people should have the moral status of an end in itself, and in order to possess this moral status we need self-ownership. As Rasmussen's argument shows, self-ownership is not a fundamental, natural right, but a derived right that is related to the shape of our bodies and a more fundamental moral rule. Moreover, Kant argues that people have dignity. This is the idea that people have unconditioned and incomparable worth (Munzer, 1993). Because human beings have dignity, they differ from other entities that have no dignity and have a market price. When people would own their body and thus would have a natural right to self-ownership, we would treat ourselves in a way that conflicts with our dignity (Munzer, 1993). We are no longer entities with dignity, but merely things with a market price.

The two lines of argumentation outlined above show that the thesis that self-ownership is a natural right is highly problematic and should be rejected. As I mentioned earlier, there are also authors who argue that property rights are social constructs, instead of natural rights.

3.3 My body is my property: a social constructivist view

Earlier on I mentioned Tony Honoré's list of eleven legal relations who, according to him, constitute the bundle of rights that forms property. 'The listed incidents [the 11 components], though they may be together sufficient, are not individually necessary conditions' (Honoré, 1961, pp. 112-113). Honoré's framework of property can be applied to the human body. When we can show that most of the elements of property as described by Honoré apply to our body, we can say that our body is our property (Quigley, 2007). The first element of property is the right to possess, which means that I have the right to exclusive physical control of an object (Honoré, 1961). It could be argued that when we are in exclusive control of our body this implies that other people are not allowed to interfere with it, without our explicit consent (Quigley, 2007). Next we have the right to use and this 'refers to the owner's personal use and enjoyment of the thing owned' (Honoré, 1987, p. 168). This applies to our body as well, because other people need my permission to use my body for their own enjoyment. Thirdly there is the right to manage, which is closely connected to the right to use, because it means that I have the right to decide who is allowed to use my property and how other people may use it (Honoré, 1961). When applied to the body, this means that I have the power to decide which restrictions I put on the use of my body. Moreover, according to Honoré, property means that I have the right to income, earned by using my property. Applied to the body, we exercise this right by receiving payment for our labour (Quigley, 2007). The fifth incident that he distinguishes is the right to

capital and it contains two elements: first, I am able to alienate the object and secondly I am free to consume and destroy it. Alienating the whole, or parts, of the object can be done 'by way of sale, mortgage, gift or other mode' (Honoré, 1987, p. 170) and one can do this while one is alive and when one is dead. Looking at our body, we often alienate parts of it, for example when we cut our nails or donate blood (Quigley, 2007).

Then there is the right to security, which is the insurance that I will continue to be the owner of the object and that I will not be coerced to waive my property without receiving sufficient compensation. This right applies to our body as well when, for instance, relatives of a victim of wrongful death receive an indemnification. This can be seen as an indemnity for the loss of future income for his or her family. The seventh element is the so called right to transmissibility. It is the power to handover your property rights to someone else (Honoré, 1961). 'Applied to the body, it would be the power to transfer our rights regarding our bodies to another by delegating proxies to take vital decisions for us regarding our bodies' (Quigley, 2007, p. 633). This is the case when we ask for medical treatment. We partly transfer the right to decision-making with regard to our bodies to medical personnel. The eighth incident is the right to absence of term, which means that I have the right to own my property for undetermined time (Honoré, 1961). An individual wants to have the right to own his or her body as long as he or she lives (Quigley, 2007). The ninth legal relation is the duty to prevent harm. We should not use our property in such a way that we harm other people. So we are not allowed to use our body in such a way that we cause harm. Besides this, the property of an owner can be seized at the moment one is not able to pay his or her debts (Honoré, 1961). This incident also applies to our body. When I am not able to pay my debts I can be imprisoned, and thus my body is seized (Quigley, 2007). Lastly, there is the incident of residuary. This means that in some cases someone's property rights can end and when this happens they can be exercised by someone else (Honoré, 1961). Thinking of our body 'this expiration of rights seems, most notably, to occur at death. Here our rights with regard to the self must necessarily cease, as we can no longer be deemed capable of possessing any rights' (Quigley, 2007, p. 634) and these rights can then be assigned to the state or our next of kin. Thus, all elements of full liberal ownership apply to the body. This means that, following Honoré's framework, we can say that our body is our property.

The social constructivist point of view that we own our body is not uncontroversial. One can make the argument that some elements of property do not apply to our body, such as the right to capital which entails that we are free to destroy or alienate parts of our body. You could say that we do not have this liberty. Moreover, one could criticize Honoré's framework by arguing that some of the rights and duties are not property rights but 'inalienable or non-tradable rights' (Björkman and Hansson, 2006, p. 212). As mentioned earlier, according to Honoré, not every element necessarily needs to be present

before we can speak of property. Therefore, although there is disagreement about which elements of property are applicable to the body and it is questioned if some of them can be called property rights at all, it is still possible to call our body our property.

3.4 My family should own my body when I am dead

According to the last incident of property Honoré describes, one's property rights can sometimes end and be assigned to someone else. It is argued that this applies to our body. When we are dead, our body is no longer our property 'as we can no longer be deemed capable of possessing any rights' (Quigley, 2007, p. 634) and our relatives or the state would become the owner of my body. One is not clear when one asserts that the state or my next of kin will own my body when I have passed away. The question is how should, from a moral point of view, positive rights look like in this case? In other words, how should the positive right regarding the ownership of the dead body look like? One could argue that my relatives should be the owners of my body, because this would have several advantages (Voo and Holm, 2013). After I have outlined this argument I will argue that we should reject the claim that my family should be the owner of my dead body.

One could justify that the family should own the body of their loved one after he or she has died by arguing that inheritance promotes continuity and intergenerational preservation. Applying this to the body of someone deceased, especially to his or her organs, you could say that family members are the inheritors of the organs and the body. This can be justified 'by the social good of intergenerational family preservation' (Voo and Holm, 2013, p. 59).

When the family owns the body, would this mean that they have the right to waste valuable organs? One could use a utilitarian argument to defend the position that family members should not have this right (Voo and Holm, 2013). Relatives of the deceased might have an interest in maintaining the bodily integrity of their loved one. They might want that the body is completely intact at the moment of the funeral. When they would have the right to dispose the organs, this has the advantage of allowing family members to continue their connection with their relative who has passed away, but at the same time this would have negative consequences, because organs that could be used to save lives or to considerably improve the lives of other people are destroyed. 'Deceased transplantable organs have great human value and significance' (Voo and Holm, 2013, p. 60). Moreover, they are only temporarily available. Therefore, we should not incorporate the right to wastefully dispose the organs of the deceased in the bundle of property rights that relatives have with regard to the body of their loved one (Voo and Holm, 2013). We should not allow family members to waste valuable organs. 'Hence, one could argue there should be no individual and thus no inheritable right to designate transplantable organs for funeral disposal should they be suitable and needed for transplant' (Voo and Holm, 2013, p. 60). Moreover, an argument can be made not to include, or restrict, the right to sell body parts of

the deceased. First, relatives often have a close and moral relationship with the deceased. Consequently, most people would not feel comfortable with the idea that the organs or other parts of the body of their loved one are tradable property (Voo and Holm, 2013). Moreover, more practical arguments can be made as well. Despite highly developed preservation techniques, organs only stay useful for transplantation for a short period of time. The organs might not be useful anymore before the family has found a buyer and struck a deal. One could therefore say that the family should only be allowed to decide if they will donate the organs or not to one specific party: the state (Voo and Holm, 2013). 'The State would be appropriating property, and should therefore provide 'just compensation' to the family, which could function as a solatium at the same time' (Voo and Holm, 2013, p. 60).

3.5 Will and interest theory of rights

The lines of argumentation outlined above assume that when we are dead, our property right with regard to our body 'must necessarily cease, as we can no longer be deemed capable of possessing any rights' (Quigley, 2007, p. 634). I will examine this claim using the distinction between will and interest theory of rights.

According to the will theory of rights, sometimes also called choice theory, the only function of a right is to give the person who holds the right the liberty to control the duties other people have towards him or her (Wenar, 2005). Rights have the function to defend and increase the autonomy of an individual. Herbert Hart famously described the central claim of the will theory as follows: 'The individual who has the right is a small scale sovereign to whom the duty is owed' (Hart, 1982, p. 183). Therefore, we can only call something a right when it has a right-holder. In the will theory of rights one can only hold a specific right at the moment he or she has the capability to waive or withdraw this right (Wenar, 2005). In other words, a right-holder must have the power to exercise a right. An often formulated critique on will theory is that the group of rights-holders would be rather limited if we would hold on to this view. In his 'An Essay on Rights' (1994) Hillel Steiner for example notices that, following will theory, children, people in a coma, unborn children and people with mental disabilities lack rights. Thus, people who are not able to make autonomous decisions are not sufficiently protected within the framework of will theory. When we apply will theory to someone who has passed away we can only conclude that he or she has no rights anymore, and therefore also no property rights with regard to his or her own body, because he or she is not capable to exercise rights. Therefore, he or she is not a right-holder anymore. This would support the claim that property rights with regard to our bodies must necessarily cease when we are dead.

However, it becomes more complicated when we apply the interest theory of rights. According to this view 'the single function of rights is to further their holders' interests' (Wenar, 2005, p. 240). Rights need to improve the wellbeing of the individual who holds them. Interest theory asserts, in contrast

to will theory, that also people who are incapable to make autonomous decisions and exercise their rights can be right-holders, because they can still have interests. Joseph Raz (1986), an interest theorist, argues that it is only justifiable to grant people rights when his or her interests are vital in itself. It is hard to argue that each right always serves the interest of the right-holder. Therefore, interest theory uses the following norm: 'To ascribe to all members of a class C a right to treatment T is to presuppose that T is, in all normal circumstances, a good for every member of C' (Raz, 1986, p. 180). Furthermore, within the framework of interest theory, one can argue that it is in people's interest to be able to make decisions, which means that the rights who are considered to be of main importance in will theory, can be included in interest theory (Wenar, 2005).

Earlier in this chapter I outlined the argument that all eleven legal relations, who together are sufficient but individually not necessary to speak of full ownership, can be applied to the human body. As mentioned, according to Honoré we can still speak of ownership when some of the elements of property do not apply to a specific object. If it could be argued that most of the incidents differentiated by Honoré still apply to our body when we are dead, this is the case when, seen from an interest theory of rights point of view, they still serve our interest, then we can still speak of our body as our property.

Looking at the first three elements Honoré distinguishes, can it be argued that someone who has passed away still has the right to possess, manage and use his or her body? Would these rights serve any interest of the deceased? Although someone who has passed away is not able to exercise these rights, they still serve interests. The right to possess, meaning exclusive control over my body without interference, would still protect my bodily integrity when I am dead. Moreover, when I still have the right to use and manage my body when I am not alive anymore, two incidents which are connected with each other, this would also protect my bodily integrity. It protects my body from interference by others. Although someone who has passed away is no longer capable to exercise these rights, when using interest theory it can be argued that he or she still hold these rights because they serve his or her interests. Moreover, having this right could prevent that my legacy is tarnished. This holds when we assume that deceased individuals have the moral status of someone with dignity.

I would argue that we have no interest anymore in having the right to capital, the right to security and the right to claim income when we are dead. Only my relatives could have an interest in having these rights. One could ask what makes relatives special. What is the moral difference between my relatives and friends or acquaintances? This question would open up a big moral debate about the special position of family. I will leave this debate aside and I will assume for the rest of this thesis that the family does have a special moral position. Someone who has passed away has no interest anymore in the capital earned by alienating parts of his or body, for example by selling his or her organs. This right

could serve the financial interest of relatives or the interest of people who need an organ in order to stay alive or to improve the quality of their lives. The same holds for the right to security, which entails the assurance that someone will not be forced to give up the property without compensation. When someone has passed away, this right would also serve the interest of his or her relatives. The deceased has no interest in receiving compensation for the income he or she could have earned with his or her body, but his or her family does, because the total income of the family has decreased as a consequence of the death of their relative. The right to claim income is not in the interest of the deceased, because he or she cannot profit anymore from any income earned by selling or renting parts of his or her body. Only family members or others could possibly profit. Thus, when we die, seen from an interest theory of rights point of view, we no longer hold these rights with regard to our body. They have no function anymore.

The duty to prevent harm and the liability to execution with regard to our body do not apply to us anymore when we have passed away. We are not able to harm others with our body when we are dead and we cannot pay debts anymore by letting our body being seized, for example by being imprisoned. The same holds for the right of transmissibility. When I am dead I have no interest anymore in, for example, temporarily giving away the property rights to my body to medical personnel. The right to absence of terms is also not applicable, because this right guarantees that I will be the owner of my property, in this case my body, as long as I live and therefore it does not apply when I am dead.

I argued that from an interest theory point of view one could say that when we are dead only the rights to possess, use and manage our body still serve our interests. So, I only hold three of the eleven rights and duties that Honoré differentiates when I have passed away. This means that we cannot speak of full ownership according to this framework. However, it does also mean that the claim that all our property rights with regard to our bodies must necessarily cease when we die can be challenged using the interest theory of rights. We can argue that when I am dead, I still have the right to use, possess and manage my body because they still serve my interest. But I can, using Honoré's framework, no longer be called the owner of my body.

Moreover, we start to see the difficulties with the argument outlined earlier in this chapter that the family should become the inheritors of the body of their loved one. First, it is not specified which elements property contains. Furthermore, it is based on the assumption that all property must necessarily cease when we die. As I tried to show, this is not necessarily the case seen from an interest theory point of view. It was also argued that there are good reasons not to include the right to sell body parts and the right to waste organs in the bundle of rights the family has with regard to the dead

body (Voo and Holm, 2013). As I argued, using an interest theory point of view, someone who has passed away does not hold these rights anymore because they do not serve his or her interests anymore. Voo and Holm start their argument with this correct premise. But does this mean that these rights necessarily transfer to others, according to them to the family who should have the right to donate parts of the body to the state? When I have a certain right, it does not necessarily follow that the right must be assigned to someone else when I no longer hold this right. So, using Honoré's framework of property, it can be argued that neither I nor anyone else, and that would include the state, owns my body when I am dead. However, using the interest theory of rights, it can be argued that someone who has passed away still holds the right to use, manage and possess his or her body, because one still has an interest in keeping his or her bodily integrity and preserving his or her legacy.

4 Organ donation systems: an ethical evaluation.

4.1 Organ donation: the systems

In Chapter 2 I outlined the arguments used to defend different organ donation systems: opt-in, opt-out, mandated choice, routine salvaging and required request of next of kin. In this chapter I will evaluate these systems from an ethical perspective. In Chapter 2 I also showed that policy measures are proposed that need to increase the number of available organ donors. First of all, we should frequently remind people that donation is important. Secondly, we include texts to the donor codicil that provide arguments why people should register themselves as organ donors (Etzioni, 2003). Furthermore, we should create a discourse in which the human body is presented as something valuable and in which the bodies of deceased individuals are treated with respect, in order to persuade people to become an organ donor (Farsides, 2000). Finally, the educational system could play a role as well. People should be educated about post-mortem organ donation and we should take away common misconceptions (Childress, 2001). In this chapter I will answer the following question: From an ethical point of view, what are the problematic elements of the organ donation systems and policies defended in the debate between classical and perfectionist liberalism on organ donation? I will start my evaluation with the opt-in and opt-out system.

4.2 Opt-in and opt-out

Both the opt-in and opt-out system use a nudge. What is a nudge? The term was coined by Richard Thaler and Cass Sunstein in their book 'Nudge: Improving Decisions about Health, Wealth and Happiness' (2008). According to them, a nudge is 'any aspect of the choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives' (Thaler and Sunstein, 2008, p. 6). A choice architect changes the environment in which people make decisions. In their book they defend the doctrine of libertarian paternalism. They argue that institutions, both public and private, are able to change the behaviour of individuals, without limiting their freedom of choice. According to them, this is paternalistic because "it tries to influence choices in a way that will make choosers better off, as judged by themselves" (Thaler and Sunstein, 2008, p. 5). The libertarian element entails that people's freedom of choice should be respected by giving them the opportunity to opt-out and we should not limit the choice set. By using nudges, this can be realized. Thus, a nudge can be used to implement libertarian paternalism (Thaler and Sunstein, 2008). I will leave aside definitional issues with regard to the concept of libertarian paternalism and will instead focus on the nudging technique both the opt-in and opt-out system use: a default position.

In an opt-in system, the default position is that one is not a donor, while in an opt-out system the default position is that I am a donor and I actively need to register that I do not want to donate. Default

positions make use of the psychological principle that, usually, people do not change the status quo and tend to follow the pre-set option (Blumenthal-Barby and Burroughs, 2012). From an ethical perspective, one should take into consideration that, before one uses a default option, someone should be able to opt out of the default option in a relatively simple way, in order to protect his or her freedom of choice (Blumenthal-Barby and Burroughs, 2012). Thus, someone must know that there is a default position, and he or she must understand that it is possible to opt out and opting out must be possible without a significant amount of effort (Blumenthal-Barby and Burroughs, 2012). As we saw, Thaler and Sunstein (2008) also think this is of crucial importance.

One can argue that both the opt-in and opt-out system preserve citizens' freedom of choice: In an opt-out system I am able to register that I do not want to donate my organs and in the opt-in system I am able to register that I want to be a donor (Thaler and Sunstein, 2008). My options are not limited and therefore my freedom of choice is respected. However, as stated above, citizens need to know that there is a default option and how they can opt out. Moreover, opting out from the default position must be possible without a significant amount of effort. Opponents of the opt-in and opt-out system use several arguments to show that these conditions are not met.

In both the opt-in and opt-out system someone needs to register that he or she wants to opt out of the default position. However, in both systems vulnerable groups will be confronted with obstacles when they want to opt out. In order to opt out, someone needs to fill in a register, fill in a box on his or her driver's license, sign a document or express his or her decision to a civil servant at the local City Hall (Jacob, 2006). As a consequence, vulnerable groups in society face obstacles when they want to opt out. For instance, in Belgium citizens need to tell a civil servant at their city hall that they do not want to be a donor. This could lead to several problems. For instance, people who are not sure that they will keep their residence permit, unregistered workers and citizens with a criminal record might want to avoid official institutions as much as possible and are therefore not able to opt out fairly easily (Jacob, 2006). Furthermore, if someone needs to express his or her decision to opt out by filling in a box at his driver's license, passport or identity card, then people who are homeless or do not have a driver's license do not have the opportunity to opt out and might not be aware of the fact that there is a default position (Jacob, 2006). When people need to sign a document, lower- or uneducated citizens are also confronted with major obstacles when they want to opt out of the default position. In the presumed consent system there will be a significant chance that vulnerable groups are excluded from the opportunity to indicate that they do not want to donate their organs. 'Therefore many 'false positives' are likely to ensue from a presumed consent policy' (Jacob, 2006, p. 296). In the opt-in system the same excluding mechanisms are in place which will result in many false negatives. Thus, both systems are likely to exclude vulnerable groups in society from the possibility to opt-out of the

default position. At the end of my evaluation of the opt-in and opt-out system I will return to this argument. Now I will first outline another line of argumentation one could use to argue against both opt-in and opt-out. After this outline I will argue that this argument is highly problematic.

4.3 Both opt-in and opt-out violate our duty to respect autonomy

The line of argumentation that one could use to argue against both the opt-out and opt-in system is centred around the claim that they violate our duty to respect autonomy. One could argue that these systems employ ‘a default rule and so employs reason-bypassing nonargumentative influence’ (MacKay and Robinson, 2016, p. 6). Using a default is an instance of reason bypassing nonargumentative influence, because people have a bias not to change the status quo and to follow the default position (Thaler and Sunstein, 2008; MacKay and Robinson, 2016; Blumenthal-Barby and Burroughs, 2012). This is a moral wrongdoing, because we have a duty to respect autonomy. If one wants to show why this form of influence violates our duty to respect the autonomy of individuals, one should first determine what autonomy means. Autonomy is ‘self-governance—the capacity to govern one’s life on the basis of reasons’ (MacKay and Robinson, 2016, p. 6) and the ability to reflect on the autonomous decisions one has made. When we use reason-bypassing nonargumentative influence, this corrupts ‘people’s decision-making processes by working around or bypassing their deliberative capacities’ (MacKay and Robinson, 2016, p. 6). Thus, when we do this, we do not adhere to our duty to respect the autonomy of others. Assuming that someone has the right to decide what will happen to his or her organs after he or she has passed away, the state should respect citizens’ right to autonomously decide if they want to be an organ donor or not (MacKay and Robinson, 2016).

4.4 The opt-in and opt-out system do not manipulate citizens

As showed, you could make the argument that the opt-in and opt-out system both employ ‘a default rule and so employ reason-bypassing nonargumentative influence’ (MacKay and Robinson, 2016, p. 6). The default bypasses peoples deliberative capacities and therefore corrupts their decision making process (MacKay and Robinson, 2016).

I would argue that when the state implements an opt-in or opt-out organ donation system and thus uses a default, it does not manipulate its citizens. In order to manipulate, one must bypass someone’s capacity for reason ‘by exploiting nonrational elements of psychological makeup’ (Blumenthal-Barby and Burroughs, 2012)⁴. Is this wat a default does? I would say it does not. A default rule exploits a nonrational element of psychological makeup, people’s status quo bias, and thus employs reason

⁴ Other authors who define manipulation as bypassing peoples capacity to think autonomously are Greenspan, 2003; Mele, 2001; Noggle, 1996 and Baron; 2003. For definitions and descriptions of manipulation focused on the intention of the actor who manipulates see Noggle, 1996; Cave 2007. A comprehensive discussion and outline of the debate between these two conceptions of manipulation falls outside the scope of this thesis.

bypassing nonrational influence (MacKay and Robinson, 2016). People have the tendency to follow the status quo and by doing this, they do not use their capacity for reason.

Indeed, status quo bias bypasses people's capacity for reason. People need to make an active decision at the moment they want to leave the default position. If the decision that has to be made tends to be very complex, people will often postpone the decision (Sunstein, 2013). Furthermore, people often believe that the default option is the one that is preferred by experts who set the default position. When someone is not informed, he or she is likely to choose the position that is being chosen by experts (Sunstein, 2013). Thus, because people have a status quo bias, their capacity for reason is bypassed.

However, I would argue that using a default is not an instance of nonrational bypassing influence and thus that it is not a form of manipulation. A default takes advantage of the principle that people tend to follow the status quo and not of the psychological principle 'that people are influenced by novel, personally relevant, or vivid examples and explanations' (Blumenthal-Barby and Burrough, 2012, p.4), like nudging techniques that want to make an option more salient do. These techniques are focused on triggering the emotions of individuals and thus on exploiting nonrational psychological elements. A default however, does not do this. It does not trigger nonrational elements such as emotions. Emotions heavily influence decision-making because the emotional associations that are created are salient when people make a decision (Blumenthal-Barby and Burrough, 2012). When a default option is used, people are not provided with personally relevant and vivid information that influences their decision making. These techniques do not play a role when a default is used. Thus, defaults do bypass people's capacity for reason, but they do not do this by exploiting non-rational psychological elements. Therefore, using a default position is not a form of manipulation. When an opt-in or opt-out system is implemented, citizens are not manipulated by the state.

4.5 We should prefer an opt-out system

One could also make the argument that we should implement a presumed consent system instead of an opt-in system (Gill, 2004). In an opt-out system, there is a significant change that when someone has passed away, his or her organs are harvested while he or she would not have wanted this. Although this is unlucky, it is not worse than the mistake that will be made in an opt-in system, namely not harvesting the organs of someone who actually wanted to donate (Gill, 2004). In both the opt-in and opt-out system mistakes will be made. People who argue in favour of an opt-out system often claim that, relying on empirical evidence that indicates that most people are willing to donate, when such a system would be implemented, the number of mistakes will be lower than in an opt-in system (Gill, 2004). Based on the moral claim that removing organs while someone did not want this and not removing one's organs while he or she wanted to be a donor are equally bad mistakes, we should

prefer an opt-out system. Both systems violate the wish of the deceased and consequently 'they are both morally unfortunate in the same way' (Gill, 2004, p. 41). Thus, we should choose the system that is likely to produce the lowest number of mistakes: the opt-out system.

Proponents of an opt-in system, however, challenge the claim that both types of mistakes are equally unfortunate. They argue that removing organs against the wish of the deceased is worse than not removing them while someone would have wanted this (Gill, 2004). Although mistakes will be rarer in an opt-out system, the number of mistaken removals will inevitably increase. 'The moral harm of increasing the number of mistaken removals is greater than – or trumps – the moral benefit of decreasing the number of mistakes overall' (Gill, 2004, p. 42). We have a duty to respect autonomy and this also means that someone must be able to decide what will happen to his or her organs after he or she has passed away. It is a form of control over one's body. At the moment someone has passed away, and his or her organs are removed while he or she did not want this, this violates his or her autonomy (Gill, 2004). When organs are not harvested while this was someone's wish, this does not violate autonomy. It only fails 'to help bring about a state of affairs the individual desired' (Gill, 2004, p. 43). From a moral point of view, this is not as bad as harvesting organs while someone would not have wanted this.

This argument can be countered when we distinguish two models of autonomy (Gill, 2004). First, there is the non-interference model. According to this model 'it is wrong to interfere with a person's body unless that person has given us explicit permission' (Gill, 2004, p. 44). Second, there is the respect-for-wishes model. 'We ought to treat a person's body in the way that he wishes it to be treated' (Gill, 2004, p. 44). The first model is the one that should apply to the way we treat competent people. In other words, to those we are capable of exercising autonomy and giving consent. Thus, we should not interfere with the body of a competent individual unless he or she expresses consent (Gill, 2004). However, this model cannot be applied to the treatment of people who are brain-dead, because it implies that we cannot interfere, in any way, with their body when they did not express their wishes regarding the treatment of their body when they were alive (Gill, 2004). However, we simply must do something with their body. Therefore, we can only respect the autonomy of someone who is brain-dead when we follow the respect for wishes model (Gill, 2004). Following this model can only lead to the conclusion that both mistakes, removing organs against someone's wish and not removing them while someone would have wanted this, are morally equal. In both cases we do not respect the wish of the deceased and treat his or her body in such a way he or she did not want it to be treated. Thus, we should choose the system that will lead to the lowest number of mistakes and if, based on empirical research, this would be an opt-out system, we should prefer it over the opt-in system.

4.6 Both models apply to the treatment of brain dead individuals

I think that the argument that because both mistakes are, based on a distinction between two models of autonomy, equally bad from a moral perspective and that we should therefore choose the system in which fewer mistakes are made, is highly problematic. The core of the problem is the distinction between the respect for wishes and non-interference model of autonomy. The argument was made that the non-interference model, which says that we should not interfere with a person's body unless he or she gives explicit permission to do so, should guide our treatment of competent people (Gill, 2004). The respect for wishes model, which says that we should treat someone's body in the way he or she wants it to be treated, should guide us when we treat people who are brain-dead (Gill, 2004).

However, I would argue that the claim that *only* the non-interference model applies to the treatment of competent individuals who are able to express consent, must be rejected. Both models apply to the treatment of competent individuals who are able to make autonomous decisions and who can express consent to interfere with their body. When a competent person gives permission to interfere with his or her body, he or she wants his or her body to be treated in this way. Thus, the non-interference model of autonomy is derived from the respect for wishes model. It follows from our respect for someone's wishes regarding the treatment of his or her body that we should not interfere with his or her body without permission. We must respect someone's wishes, and based on these wishes we are allowed to interfere with his or her body or not. Therefore, it is the respect for wishes model that guides the treatment of the body of competent individuals, not the non-interference model. This has consequences for the way we should treat people who are brain-dead. If someone who is brain-dead had a wish to be a donor or not when he or she was alive, then this wish refers to the interference with one's body when one is dead. I agree that the respect for wishes model applies to the way we treat the body of someone who is brain-dead. He or she is no longer able to give permission to interfere with his or her body. However, the non-interference model also applies to the body of brain-dead people because it is derived from the respect for wishes model. When we do not know if someone wanted to be a donor or not, we should not interfere. When we do not remove organs while someone wanted to be a donor, we violate the respect for wishes rule, but not the non-interference rule. When we remove organs while someone did not want to be a donor, this would be morally worse because we violate someone's respect for autonomy by not respecting one's wish with regard to the removal of organs and we violate the non-interference rule that is derived from the respect for wishes rule. Thus, both mistakes are not morally equal.

Does this mean that, like proponents of the opt-in system argue, we should prefer the opt-in system over the opt-out system? We have to return to the argument that both the opt-in and opt-out system create obstacles for vulnerable groups when they want to opt out of the default position (Jacob, 2006).

If people know that there is a default position and that it is possible to opt out of this position, both systems still create obstacles for vulnerable groups. No matter what people need to do to opt out, each method will create a problem for some group. However, for most citizens it will be relatively easy to opt out. However, in an opt-out system the number of donors will increase and the number of mistaken removals will be lower. From a utilitarian point of view, we should therefore choose the opt-out system, despite the fact that in an opt-in system mistaken removals would be avoided and that this mistake is worse than a mistaken non removal. However, as I argued, from a deontological point of view, one could argue that we should prefer the opt-in system.

4.7 Salience techniques to increase the number of donors

Now that we have discussed the opt-in and opt-out system, I will evaluate techniques that make use of the principle ‘that people are influenced by novel, personally relevant, or vivid examples and explanations. The emotional associations elicited by these items remain readily available in memory and as a result powerfully shape decisions and behaviors’ (Blumenthal-Barby and Burroughs, 2012, p. 4). From an ethical point of view, several aspects are important to consider before these techniques are used. First, it must be determined if they manipulate individuals. When they do, we must determine if it is justifiable or not. One manipulates someone, and here I refer back to the definition of manipulation presented earlier in this chapter, ‘when one influences another by *bypassing their capacity for reason*’ (Blumenthal-Barby and Burroughs, 2012, p. 5, emphasis in original). One does this when one exploits ‘nonrational elements of psychological makeup’ (Blumenthal-Barby and Burroughs, 2012, p. 5). Manipulation also bypasses autonomy, because it ‘blocks the consideration of all options and threatens the agent’s ability to act in accordance with her or his own preferences’ (Blumenthal-Barby and Burroughs, 2012, p. 5).

In the introduction of this chapter I briefly summarized the policy measures that, as was argued, can be implemented in order to increase the number of available organs. These policies use salience techniques. One argued that we should, on a regular basis, send people a reminder when they did not fill in their codicil yet and that a text should be attached to the codicil that must persuade people to become a donor (Etzioni, 2003). Moreover, we must tell people that their body will be treated with respect, because the human body is valuable (Farsides, 2001). Furthermore, education must play an important role as well. Common misconceptions about donation should be taken away and people ought to be educated about post-mortem donation (Childress, 2001).

Do these policies manipulate citizens? I would say that when citizens are often reminded of the fact they are not a donor and when a text is included to the codicil that provides arguments in favour of becoming a donor, they are not manipulated. When the text provides rational arguments and does not include stories or anecdotes that trigger people’s emotions, the state does not take advantage of the

principle that people develop emotional associations that heavily influence their decisions and behaviours. Thus, people's capacity for reason is not bypassed. These policy measures would make organ donation more salient, but citizens are not manipulated, since they are persuaded to become a donor. The same holds for educating people about donation. This makes the topic more salient, but when people receive factual and rational information and when they are not influenced by information about organ donation that is focused on triggering their emotions, they are not manipulated. We do not bypass their capacity for reason.

However, when people are frequently told that their body will be treated with respect when their organs are removed after they have passed away, because we consider the human body to be valuable (Farsides, 2000), I would argue that people are manipulated. They are influenced by a narrative about the treatment of their body after their death, and by giving them information that is focused on the triggering of emotions with regard to their own body, it takes advantage of the psychological principle that people's decisions are deeply influenced by this kind of information, because the emotional associations that are made are readily available when they make the decision to become a donor or not. The question is: is this justifiable? One could justify this manipulation if and only if one is an utilitarian using the argument that it will increase the amount of available organs, which means that the lives of people who are waiting for an organ are saved or that their quality of life will significantly improve.

4.8 Mandated choice

In a system of mandated choice, one must decide if one wants to be a donor or not. This system does not use a default position, like the opt-in and opt-out system do. Citizens do not have the choice not to make a decision. It can be argued that mandated choice systems 'do employ coercion: People must make a choice between donor or nondonor status or face a sanction' (MacKay and Robinson, 2016, p. 4).

Indeed, such a system coerces citizens to make a decision about organ donation. One could argue then that I contradict my claim made in Chapter 3 that neither I, nor anyone else, and that includes the state, is the owner of my dead body and can make a valid claim on my organs, because I here assume that people must decide if they want to be a post-mortem organ donor or not and thus that others have a valid claim on my organs. However, I would argue that when we force people to make the decision if they want to be a donor or not, this does necessarily mean that we assume that others have a valid claim on my organs after my death. It means that we assume that it is reasonable to force people to make this decision. It is reasonable because donation is a morally good deed. We save the lives of other people by doing it. Thus, we could make the assumption that people need to make a

choice about donation without making the assumption that others have a valid claim on my organs after I have passed away.

You can argue that in a mandated choice system people's freedom of choice is partly restricted, because they cannot make the choice not to make a decision. On the other hand, their autonomous decision to be a donor or not will be respected. Thus, we respect people's autonomy. Furthermore, and this is a more practical argument than a moral one, if it is the case that the majority of the population wants to donate his organs, then the number of donors is likely to increase, because citizens need to express this preference. These arguments can also be used to justify the coercion employed in a mandated choice system.

4.9 Routine salvaging

Another possible organ procurement system would be a system of routine salvaging. In such a system, the state would harvest the organs of deceased citizens without any form of consent. Citizens would have no choice at all. Their organs are removed, regardless to whether they wanted to be a donor or not. One can make the argument, as I showed in Chapter 2 of this thesis, that such a system can be justified. We do not own our bodies, because it is a loan from the biomass, and the bodies of deceased citizens should become the property of the state, because they are a resource for transplantable organs and the state can redistribute the organs in the most efficient way (Emson, 2003). From a moral perspective, it is not acceptable not to use the cadaver as a resource for organs because the need of people who wait for an organ outweighs everything (Emson, 2003). 'The proportionate benefit is too great to be subordinate to anything else' (Emson, 2003, p. 126). I think this argument is highly problematic.

First of all, in the previous chapter I argued that we do own our body when we are alive. However, I showed, by using Honoré's framework of property, that neither I nor anyone else, and that includes the state, owns my body when I am dead but this does not necessarily mean that these rights transfer to others. Thus, I reject the claim that the state can become the owner of my body and thus of my organs, because nobody owns my body and its organs when I am dead.

One could say that this is only a critique on the method by which we should salvage people's organs, but that this does not refute the claim that the benefit of saving the lives of people who suffer from organ failure outweighs everything else. That this would outweigh everything does not only mean that it trumps the wish of the family to have burial, but it that it would outweigh that citizens do not have the freedom to choose if they want to be a donor. In a routine salvaging system the deceased cannot make a decision about organ donation. Furthermore, it would outweigh that we disrespect someone's

autonomous wishes. We would not respect the autonomous wish of people who did not want to be a donor.

Emson does not explain why the benefits of saving the lives of people who suffer from organ failure outweigh the wish of the family to have a burial, the absence of freedom of choice regarding organ donation and the violation of wish of those who autonomously decided that they do not want to be a donor. However, that he does not defend this claim does not mean that we should reject it. Which argument could support Emson's claim? It would be the utilitarian argument that saving lives outweighs everything, because saving lives by organ donation is an act that produces the greatest amount of good for all. The cost of the mandated choice system: people do not have the freedom to choose if they want to be a donor or not, disrespecting the autonomous wishes of those who do not want to be a donor and disrespecting the wish of the family who wants to have a funeral, do not outweigh the benefit of saving lives.

However, this is a slippery slope. According to Emson, saving lives outweighs everything. This is the principle upon which his position is based. Intuitively it sounds convincing. However, it would mean that when we have a situation where we can save a live by transplanting an organ, for example a kidney, from a living, healthy person to someone who suffers from kidney failure, we should do it. Following Emson, we should transplant no matter if this healthy person would want this. We would violate his or her autonomy, freedom of choice and his or her bodily integrity. The right to physical integrity, the right to freedom of choice and respect for autonomous decisions are not guaranteed when we hold on to the principle that saving a life trumps everything else.

4.10 Letting the family decide

In Chapter 2 I outlined the argument that the family of the deceased should decide if his or her organs will be donated (Boddington, 1998). We can regard the relatives of the person who has passed away as a group with its own autonomy and because the deceased have no self-determination over their body, the decision made by the family should get priority over the preferences of the deceased (Boddington, 1998).

As is the case with a routine salvaging system, this system is problematic, because when they are alive, citizens can decide if they want to be a donor or not, but it is possible that their choice is not respected. One could argue that when the deceased did not express their preference while they were alive, their autonomy is not violated, because there is no autonomous decision that is disrespected. Hence, the family should decide if organs will be harvested from the body of their loved one, but letting the family decide is not unproblematic. However, specific problems that do not rise when we would implement a routine salvaging system arise when this system would be implemented. In the United States for

example, Organ Procurement Organisations train their employees to nudge the relatives of someone who did not register as an organ donor to give permission for organ removal and they receive money when the family gives permission for donation (Truog, 2012). They use language 'that rushes families along the preferred decisional pathway' (Truog, 2012, p. 43). The danger exists that the family will be manipulated, because the language could trigger emotions and bypass their capacity for reason. Even when family members are not influenced by external factors, for example by members of the medical team, they have to make a decision within a short period of time. This could mean that they make a decision they would not have made when they would have had more time. Moreover, the decision could result in disputes between family members.

The systems evaluated above have one thing in common: they regulate the donation of organs. The question arises: why should we donate our organs? Is it our moral duty and if it is, what kind of moral duty is it? I will focus on arguments regarding the nature of the moral duty to donate our organs, fairness and solidarity.

5 Organ Donation: A moral duty?

5.1 Altruism, solidarity and organ donation

Is it our moral duty to donate our organs when we are dead? If it is, what kind of moral duty is it? In this chapter I will formulate an answer to these questions. First, I will discuss and test the arguments used to defend the position that post-mortem organ donation is a supererogatory altruistic act. Next I will examine the argument that it is a supererogatory contribution to a system of mutual aid. One could also argue that we have a duty, based on the principle of fairness, to donate our organs or that we have this duty based on Kantian ethics. I will critically examine these arguments as well. Thereafter I will formulate an answer to the questions I posed above.

Altruism is a prominent concept in political and moral philosophy (Nagel, 1970; Blum, 1980; Ricard, 2015; Aurenque 2016; Saunders, 2012). We can understand this concept in two ways: ‘as a *motivation* to act in a certain (altruistic) way, but it may also refer to an (altruistic) *outcome* or result regardless of whether the motivation was also altruistic’ (Aurenque, 2016, p. 62, emphasis in original). I will focus on altruism as a motivation.

There is an extensive debate in the literature about the definition of altruism and what type of concept altruism is. For example, Nagel (1970) thinks that altruism is a rational concept, while Blum (1980) relates it to our emotions. Others connect altruism with evolution (Batson, 2011). A comprehensive evaluation and examination of this debate falls outside the scope of this thesis. Therefore, I will discuss the elements of altruism on which there seems to be agreement. First, altruism ‘is a motivated action that is performed for the benefit of somebody else’s wellbeing’ (Aurenque, 2016, p. 63). It is the opposite of egoism, which means that someone does something purely because he or she wants to increase his or her own happiness and wellbeing. When we act altruistically, we are sincerely worried about other people’s well-being (Aurenque, 2016). Furthermore, altruism is characterized by a lack of self-interest. So, when I act altruistically I do something out of concern for the wellbeing of other people, while I do not look for any form of personal gain (Aurenque, 2016). This also means that it is possible that someone who behaves altruistically risks significant personal costs while he or she does something for someone else’s benefit. All this ‘entails the presumption that altruism is a genuine disposition’ (Aurenque, 2016, p. 63). Thus, if I do something that is beneficial for other people while I am motivated by external factors, we do not speak of a truly altruistic act. For example, when I do something for the wellbeing of someone else because other people expect this from me, I do not behave altruistically.

Thus, when one acts with the motivation to improve the well-being of other people without self-interest, we speak of an altruistic act. These are the necessary and sufficient conditions of altruism (De Wispelaere, 2002). However, this description is not unproblematic. First of all, there is the

epistemological problem that we can never know for sure if an individual was only motivated to improve someone else's well-being (De Wispelaere, 2002). A moral problem that could arise when we adhere to this characterisation of altruism is that someone could have other morally objectionable motivations, while he or she still acts altruistically. For example, when you wander across a lake and you see two people who are drowning, a man and a woman, and you only have the time and energy to save one of them and you decide to save the man, because you are a sexist who is deeply convinced that men are in every way better than women, you still act altruistically, while you could also see this as a violation of the duty to consider everyone as equal (De Wispelaere, 2002). On the other hand, one could use the consequentialist argument that this is not relevant, because one person is rescued while otherwise two people would have died. However, post-mortem organ donation is a different case. Because I do not know who will receive my organs, I cannot have other objectionable motivations as is the case in the example.

One can try to defend that post-mortem organ donation is a supererogatory altruistic Samaritan act of giving (Aurenque, 2016). First of all, that it is an altruistic act of giving, appeals to two moral intuitions. First, it appeals to our intuition that our body is valuable. This is related to the idea that our organs are not a product. We cannot manufacture or create them and therefore we must not distribute organs in the same way as we do in a market system. Human body parts such as organs are special and instead of a market system they should be redistributed in a system of giving (Aurenque, 2016). When we give our organs to other people in such a system this is an altruistic act, because it is 'voluntary and solely a result of good will' (Aurenque, 2016, p. 62) and because there is no self-interest. There is no self-interest because we donate our organs when we are dead and then we cannot gain anything with it. Secondly, it appeals to our intuition that we have control over our own bodies (Aurenque, 2016).

This altruistic act of giving one's organs is a supererogatory Samaritan act (Aurenque, 2016). Supererogatory acts are 'the class of actions that go beyond the call of duty' (Heyd, 2015). They 'are morally good although not (strictly) required' (Heyd, 2015). An example of such an act is the Samaritan act and one could argue that organ donation is such an act. We act in a Samaritan way when we help another person who severely suffers. As I already mentioned in Chapter 2, three conditions must be met before we can speak of a Samaritan act. First, the other person is in serious need. Second, when one helps the other the costs of the help are low. Third, the person who helps is the only one who can help the person in need (Den Hartogh, 2003). In the case of organ donation all these conditions seem to be met. Someone who needs an organ is in serious distress, because not receiving a donor organ can lead to one's death. Even if this is not the case, someone's quality of life is often significantly lower than it is for people who do not suffer from organ failure. Moreover, because we do not need our organs when we are dead, there are no costs attached to donation, while at the same time the benefit

for the people who need our organs are enormous (Den Hartogh, 2003). There is also a possibility to meet the final requirement. Despite that the donor is not in a unique position to help, this situation could be altered when we ensure that organs are directly donated to the first person on waiting list who needs the specific organ (Den Hartogh, 2003). Thus we could argue that donating one's organs when one has passed away is a supererogatory altruistic Samaritan act of giving.

This is an unqualified supererogationist position. According this point of view, supererogation is intrinsically valuable. People have the power to make moral decisions and it is precisely this capacity to decide if one wants to live according to the moral law or not what makes morality valuable (Heyd, 1982). When one does something that is not one's duty, one uses one's power to make decisions. Good conduct that was not dictated is, from a moral point of view, inherently valuable. Thus, supererogatory acts are good, because on the one hand they produce good outcomes and on the other hand one is free to decide if one wants to perform them and this freedom makes them intrinsically valuable (Heyd, 1982). Hence, we see that the argument that organ donation is a supererogatory Samaritan act motivated by altruism is an unqualified supererogationist position. Someone must decide for him or herself if one wants to donate or not. We have no duty to donate and someone is completely free to decide if he or she wants to be a donor.

However, I reject the position that donating one's organs is a supererogatory Samaritan contribution to a system of giving motivated by altruism. Post-mortem organ donation is not a system of purely altruistic giving. While I am alive, I could profit from other people's decision to donate their organs when they have passed away. I could potentially profit, but I can also give something back to others when I contribute to the system by donating my own organs when I am dead. Everyone could potentially benefit from organ donation, not only those people who already suffer from organ failure. Thus, an organ donation system is a cooperative system of mutual assistance.

The question is: is our contribution to this system our moral duty or is it supererogatory? One could argue that organ donation is a supererogatory act of cooperative solidarity (Aurenque, 2016). Solidarity is a 'feeling of belonging' and 'pulling together for the sake of mutual interests and performing tasks' (Schischkoff 1991, p. 673). Not only other people profit from organ donation, but I could benefit from organ donation as well (Aurenque, 2016). Someone could benefit from other people's willingness to donate their organs after they died, when he needs an organ himself. 'Organ donation should therefore be regarded as a cooperative and solidary practice and not as a supererogatory action' (Aurenque, 2016, p. 66). The position that organ donation is a supererogatory contribution to a cooperative system of mutual aid is, like the one I discussed earlier, an unqualified supererogationist position. Someone must decide for him or herself if one wants to donate or not. Someone is completely

free to decide if he wants to donate his organs after he died. One could propose that in this cooperative system people who need an organ and who have indicated that they want to donate their organs when they are dead, should get priority over other people who do not want to be a donor (Eaton, 1998). Individuals who do not contribute to the cooperative system but still want to profit from it are free riders and should be discriminated when we reallocate the available donor organs. This is the reciprocity option.

However, I reject this position as well. It is not a supererogatory contribution to a system of mutual aid. It is our moral duty. In order to defend the claim that post-mortem organ donation is not supererogatory but our moral duty, I will first outline the argument that we have a moral duty to donate our organs after our death, based on the principle of fairness. Then I will show that this argument is highly problematic. Then I will outline and examine a Kantian line of argumentation that one could use to argue that organ donation is our moral duty. I will explain why this argument is problematic as well. Based on this evaluation I will argue that donating one's organs after one has passed away is a supererogatory duty.

5.2 It is our moral duty to donate

In Chapter 2 I already briefly discussed Den Hartogh's (2003) argument that we have a moral duty to donate our organs, but here I will discuss it more extensively. Everyone could potentially profit from organ donation. It is not an act of altruism like the Samaritan act. Not only people who need an organ, but also everyone else could profit, because we are all at risk of suffering from organ failure. In this situation, there is the principle of fairness which makes that we have a duty to contribute to the system of assured reciprocal assistance (Den Hartogh, 2003). Appealing to the principle of fairness is allowed when five conditions are met. They are: there is 'a collective effort for something that benefits everyone; the benefits balance the costs; everyone should be able to count on another person's contribution; everyone knows the arrangement' (Den Hartogh, 2003, p. 156) and the expected contribution meets the requirements of fairness. One can argue that these conditions are clearly met when it comes to post-mortem organ donation. Everyone could potentially benefit from the system, because we are all at risk of getting organ failure. Furthermore, the benefits of post-mortem organ donation are enormous and outweigh the costs of the donor. Someone who has passed away does not need his or her organs anymore and we save or significantly improve the quality of life of people who suffer from organ failure (Den Hartogh, 2003). People know that there is an organ donation system and the expected contribution meets the requirements of fairness, because everyone who wants to receive an organ when he needs one should also be prepared to donate his organs (Den Hartogh, 2003). Therefore, and here he makes a big leap in his argumentation, everyone could reasonably expect that everyone will contribute to the system. This leads to the conclusion that there is a duty to

donate our organs, based on the principle of fairness, that is enforceable, because it is a perfect duty (Den Hartogh, 2003). However, we cannot reasonably expect from all citizens to see matters like that. Therefore, citizens must be able to refuse to recognize the duty to donate our organs. As a consequence, we should implement an opt-out system, which gives citizens the opportunity not to fulfil their duty (Den Hartogh, 2003). Furthermore, we are not able to test if someone really has conscientious objections. This makes the opt-out system the appropriate organ donation system.

5.3 Den Hartogh and supererogation

I would argue that the argument outlined by Den Hartogh that, based on the principle of fairness, we have a duty to donate to our organs when we are dead, is a qualified supererogationist argument that is also highly ambiguous. I will first defend my claim that he actually argues that donating one's organs is a supererogatory act and not an act that holds the middle between an enforceable duty and a supererogatory act, before I will show the ambiguity in his argument.

What is qualified supererogationism? According to qualified supererogationists there are supererogatory acts, because there are particular conditions under which we have no duties anymore (Heyd, 1982). For example, there are theorists who assert that supererogatory actions are actually our duty, but when someone would be sanctioned or disciplined when he or she fails to comply with this duty, this harm would outweigh the good that the fulfilment of the duty would produce. When we do not act according to these supererogatory duties, this is condemnable and will lead to criticism, but not to formal punishment (Heyd, 1982). Another way to argue that there are supererogatory acts is to point at the moral weakness of most individuals. Supererogatory acts are obligatory, but we cannot expect that everyone will behave in such a way. Most people are not perfect and often exhibit moral weakness and therefore they do not have to do what is actually their moral duty. An often formulated critique on this argument is that it is highly subjective, because someone can decide which moral duties he or she has. Moreover, it is stated that it is condemnable, because it divides moral agents in different classes: those who are morally weak and those who are strong (Heyd, 1982). One could also defend the existence of supererogatory acts by arguing that it is sometimes accepted not to act according to our moral duties because there are strong reasons not to fulfil them (Heyd, 1982). It could be that there are strong reasons why we should behave in a specific way, but that there are also strong reasons not to act in such a way, for example when such an act would violate other duties (Heyd, 1982).

Den Hartogh argues that we have a duty to donate our organs, because we need to contribute to a cooperative system of mutually assured assistance, based on the principle of fairness. This duty is in principle enforceable, but *we cannot reasonably expect that everyone* will fulfil this duty, because people could have conscientious objections and we are not able to test if these objections are sincere. According to him (2003) there is a range of actions that, when they are not performed, legitimize social

criticism and sanctioning such as condemnation. These actions keep the middle between enforceable moral duties on the one hand and supererogatory acts on the other hand (Den Hartogh, 2003). Organ donation is such an action.

Now we see that he actually argues that organ donation is a supererogatory duty. It is not, like he argued, an act that we should place between enforceable moral duties and supererogatory acts. He argues that we should not enforce the duty to donate, while it actually is enforceable because it is a perfect duty. When one does not donate this is condemnable, but people should not be forced to donate. Thus, donation is required, but when one does not fulfil the duty to donate this will not lead to any formal sanctions. This is exactly an argument used to defend the position that there are, under some conditions, supererogatory acts. It is a form of qualified supererogationism.

However, as we will see now, his argument that we should not enforce the in principle enforceable duty to donate contradicts a position that he takes earlier. When he would have argued that when the duty would be enforced, the costs for the donor would outweigh the benefits for the person who receives an organ he would have an argument that can be used to defend that organ donation is a supererogatory duty. However, earlier he argues that the benefits for a patient who receives an organ are much higher than the costs for the donor (Den Hartogh, 2003). Thus, because he argues that organ donation is a moral duty that only leads to social condemnation when not fulfilled, because we should not enforce this duty, he actually argues that it is a supererogatory duty. He undermines his own position, because is not an act that holds the middle between enforceable duties and supererogatory acts. He actually defends a qualified supererogationist position.

Moreover, he contradicts his own position that that the benefits of organ donation outweigh the costs for potential donors, because the consequence of making this argument would be that the harm for the donor caused by the enforcement of the duty to donate would outweigh the good that is produced by donation. But earlier he uses the argument that this is not the case. It is exactly the opposite according to him. Thus, he undermines his own position that there are acts that hold the middle between supererogatory acts and duties. In fact, the kinds of acts he describes are supererogatory duties. He actually defends a form of qualified supererogationism and at the same time implicitly contradicts his own argument that the benefits of donation outweigh the costs of donation by arguing that we should not enforce the duty to donate.

Secondly, he argues that we cannot reasonably expect from all citizens that they will fulfil their duty to donate their organs when they die. Because we cannot expect this, we should not enforce the duty to donate that actually is enforceable (Den Hartogh, 2003). Instead, we should implement a system of

presumed consent, because then it is still possible for people with objections to opt-out (Den Hartogh, 2003). Here, the ambiguity in his argumentation becomes visible.

As I argued, he actually defends that post-mortem organ donation is a supererogatory duty, although he does not recognize this. The argument he uses to justify the position that it is a supererogatory duty is also an argument in favour of qualified supererogationism, because according to him, there is a condition that makes that we are allowed not to fulfil our duty to be a donor. This condition is that we cannot expect that everyone will see it as his or her duty to be a donor. Arguing that we cannot expect everyone to consider organ donation as a duty due to moral weakness is an argument one can use in order to justify the existence of supererogatory acts, since it gives people an excuse not to do what is their duty. Organ donation is our moral duty, but people do not have to fulfil it. The ought in 'we ought to donate' does not apply anymore. Thus, he tries to defend a qualified supererogationist position, namely the existence of the supererogatory duty to donate our organs, but he uses the wrong argument to defend this position. Instead of arguing that we cannot expect that everyone will consider it as his or her duty to become a post-mortem organ donor, he should have argued that the cost of enforcing the duty would be higher than the amount of benefit the fulfilment of the duty would produce. Also, his position that we should not enforce the duty to donate, which as I argued makes it a supererogatory duty, implicitly contradicts his own argument, because the reason not to enforce the duty to donate would be that the harm caused by the enforcement would outweigh the benefits of fulfilling the duty. However, Den Hartogh argues the opposite. Thus, the argument that we have a moral duty to donate our organs after our death is highly problematic. Now I will outline a Kantian line of argumentation that one could also use to defend the claim that we have a moral duty to donate.

5.4 A moral duty to donate: A Kantian argument

According to one famous formulation of Kant's Categorical Imperative we should 'Act only according to that maxim whereby you can at the same time will that it should become a universal law' (Ellington, 1993, p. 421). We have a moral duty to help those who are in a severe distress, because the opposite maxim, not providing aid to someone who needs it, does not survive the test of the Categorical Imperative (Ellington, 1993). It would entail a contradiction in the will and it would be irrational. It contradicts the will, because during our lifetime there could always be situations in which we need the help of other people and when everybody would live according to the maxim that we do not provide help to others, we would not receive help at the moment we would need it (Ellington, 1993). This argument is about need. You could argue that this ignores the issues of desert. We should take into account who deserves our help and who does not. However, I would argue that we can leave this issue aside here, because the question if we must provide help is a different one than who deserves help.

It is rational to fulfil the duty to help those who are in severe need, because it is very likely that there will be a moment that I will need the help of others. However, not fulfilling this duty would be irrational, no matter if I will need help during my lifetime (Herman, 1984). Even if I knew that I would never need the help of others, it would still be irrational not to live according to the maxim to provide aid to those who need it. This is the case, because we cannot rationally omit those ends that are required for 'a person's continuing function as a rational, end-setting agent' (Mendis, 2016, p. 55). I am only allowed not to help others who are in distress when helping them would threaten my own life. This would mean that we have a duty to donate our organs when we are dead. A patient who needs a donor organ is in severe distress, because when he does not get an organ, there is a chance that he will die (Mendis, 2016). The donor is dead at the moment of donation and therefore he does not end his existence as a rational agent when he donates his organs and provides help.

This Kantian argument is an anti-supererogationist position. According to anti-supererogationists, we cannot make a distinction between what is right and good on the one hand and that what is obliged and mandatory on the other hand. If we can achieve something that is good and eligible, we must act in such a way that this good is realized (Heyd, 1982). Moreover, in reality people do not always live in accordance with moral duties, because they have an imperfect personality. However, this does not weaken the force of our moral duties (Heyd, 1982). What is good must be done. Supererogatory acts do not exist. Furthermore, because supererogatory acts are not obligatory, they are partial. We do not equally expect them from everyone. This means that there are no strict guidelines for the individual who acts in a supererogatory way and the person who profits from this act (Heyd, 1982). For example, we cannot easily determine which individuals or groups have the right to get help from charity or who should give to charity. Hence, we see that the argument is anti-supererogationist. We have a duty to donate our organs, because we should live according to the maxim that we should help other people who are in need. According to Kantian ethics there is a moral law that covers all human conduct and it regards a duty as the only manifestation of moral value. This is not compatible with supererogation, because in that case someone can decide for him or herself if one wants to act in a praiseworthy way or not (Heyd, 1982). Thus, according to Kant supererogation does not exist.

5.5 Organ donation is our supererogatory duty

I would argue that this Kantian position is too strong. Yes, following the Categorical Imperative we have a moral duty to donate our organs when we are dead, because we have the duty to help someone who is in severe distress and when we provide this help we do not face the risk to end our existence as a rational agent, given that we are already dead. *However*, in the case of organ donation there are some conditions that bring forward a situation in which we do not have to fulfil this duty. In other words, I will argue that post-mortem organ donation is a qualified supererogatory act.

Like I showed, Den Hartogh (2003) tries to defend, although he does not realise this, the qualified supererogationist position that organ donation is our supererogatory duty using a highly problematic argument. I defend the same position, but my argument is different. People are allowed not to fulfil their duty to become an organ donor, because there are also strong reasons not to fulfil this duty. In Chapter 4 I showed that the duty not to interfere with someone's body is derived from the duty to respect someone's wishes. This means that we have a duty not to interfere with the body of an individual, also when he or she is dead. When someone did not want to be a donor and we would still harvest his or her organs this would mean that two duties would be violated when I would fulfil my duty to donate my organs. Thus, there are strong reasons why someone should be allowed to decide if he or she wants to fulfil his or her duty to be a donor. If I want to be a donor and decide to fulfil my duty this is a supererogatory act, because there are strong reasons why I should be free to decide if I want to be a donor or not. The ought in 'I ought to be a donor' does not apply anymore. It is praiseworthy to donate, however it is not obligatory anymore. The anti-supererogationist, Kantian argument does not take this into account.

Thus, I have argued that we have a supererogatory duty to donate our organs when we are dead. To be clear, this is a different argument than the one that is provided by Den Hartogh (2003) in order to defend the position that we have a supererogatory duty to donate. He argues that people can choose not to fulfil their duty to donate, because we cannot reasonably expect from every citizen to see it as their duty, due to their moral weakness. This conclusion implies that organ donation laws may not force people to become a donor. People must be free to decide if they want to be a donor or not.

6 Conclusion

6.1 Answering the research question

This thesis was devoted to the following research question: *Are the core moral issues connected with post-mortem organ donation policies adequately addressed in the debate on organ donation between classical liberalism and perfectionist liberalism?*

In order to answer this question I first outlined the general debate between classical and perfectionist liberalism. Then I explicated the various positions regarding organ donation defended by arguments that can be classified as classical liberal or perfectionist liberal arguments. Three main problems emerged from this debate. First of all, there was the problem of body ownership. Can we own our body? And, if we can, who owns my body when I am dead? In Chapter 3 I formulated an answer to these questions. First of all, I rejected the position that we have a natural right to self-ownership, because this position is highly problematic. However, based on Tony Honore's framework on property, which is a social constructivist view on rights, one can make the convincing argument that we own our bodies (Quigley, 2007). Next, I answered the question who owns our body when we are dead, using both the will and interest theory on the function of rights. Using will theory, we could only conclude that all our property rights with regard to our body must necessarily cease when we are dead. However, from the point of view of will theory one can make the argument that although we cannot say that I own my body when I have passed away, I still hold the right to possess, use and manage my body. That the other property rights regarding my body cease when I am dead does not necessarily mean that they transfer to others. Thus, I have concluded that neither I nor anyone else, and that includes the state, owns my body when I am dead. Those who argue that it is highly problematic to speak about our body in terms of property will be very sceptical towards this conclusion. Moreover, authors who argue that we have a natural right to self-ownership will not be convinced by the analysis of property rights to our body from the social constructivist point of view.

In Chapter 4 I discussed the different organ donation systems from an ethical perspective. I discussed the opt-in and opt-out system and rejected the claim that both systems manipulate citizens and I argued that the argument that we should prefer the opt-out system over the opt-in system is problematic as well. Furthermore, I evaluated policy measures that are meant to increase the number of donors, the mandated choice system, routine salvaging and required request of the family.

The following questions emerged from the evaluation conducted in Chapter 4: Is post-mortem organ donation our moral duty? If it is, what kind of moral duty is it? In Chapter 5 I concluded that donating our organs when we are dead is a supererogatory duty. As I showed, one could make the argument that post-mortem organ donation is a supererogatory Samaritan act motivated by altruism. However, this position does not take into account that donating one's organs is a contribution to a cooperative

system of mutual assistance. I also discussed and examined the argument provided by Govert den Hartogh that post-mortem donation is a supererogatory duty and I concluded that this argument is highly problematic. The same holds for the Kantian argument one could use to defend that we have a duty to donate. This position is too strong. Instead I argued that, following the Kantian position, we have a moral duty to donate, but that there are strong reasons that make that the 'ought' in 'one ought to donate' does not apply anymore. Organ donation is a supererogatory duty. In other words, I have defended a qualified supererogationist position. This conclusion will not convince those who adhere to anti- or qualified supererogationism.

Thus, I have formulated an answer to the main moral issues that emerged from the debate between classical and perfectionist liberals on post-mortem organ donation and that needed to be analysed in order to be able to formulate an answer to the research question. Before we can answer it, we first of all need to look at the partial conclusion that post-mortem organ donation is a supererogatory duty. The question if organ donation was our duty emerged from the ethical evaluation of the organ donation systems that can be defended by means of classical and perfectionist liberal arguments. While answering this question it became evident that there is another, more fundamental moral debate about the existence of supererogation that lies underneath this debate. As I showed, one could also defend that organ donation is our duty by means of a Kantian anti-supererogationist argument or that organ donation is a supererogatory contribution to a cooperative system of mutual aid. Under the debate about the question if post-mortem organ donation is a moral duty lies the debate about the existence of supererogation. However, there is an even deeper moral problem that lies at the heart of the debate on organ donation. In order to see this we need to see the link with the question if we own our body after our death.

Before we can answer the question if we have a duty to become a post-mortem organ donor we must assume that we are the owners of our dead body. However, in Chapter 3 I have concluded, based on the social constructivist view on rights, that neither I nor anyone else owns my body when I am dead. On the first sight, this seems contradictory. However, I argued from the point of view of the will theory of rights that *all* eleven rights and duties that together make that we own our body when we are alive cease when I have passed away, but I also concluded, using the interest theory of rights, that *not all* property rights and duties we have regarding our bodies cease when we are dead. I still have the right to use, possess and manage my body, because I still have an interest in keeping my bodily integrity and in preserving my legacy. Because I still have these rights, I can still fulfil my duty to donate my organs when I am dead. This holds when we assume that people who have passed away still have a moral status, namely the status of people who have dignity. Hence, we see that we can only ask the question if we have a duty to become a post-mortem organ donor when we still see deceased individuals as

people with the moral status of human beings with dignity. Thus, the debate about the question if we have a duty to become a post-mortem organ donor and the question if there are supererogatory acts come after the debate about the moral status of deceased persons.

Both the debate about the moral status of deceased individuals and the debate about supererogation are not adequately addressed when we discuss the debate about post-mortem organ donation in the context of classical and perfectionist liberalism. Thus, we can conclude that we do not adequately address the core moral problems connected with post-mortem organ donation policies, those of the moral status of deceased individuals and the existence of supererogatory acts, when we analyse them in the context of classical and perfectionist liberalism. Both theoretical perspectives have different views on property, autonomy and what a state is allowed to do in order to let citizens make the choices the state wants them to make, but it turns out that these are not the core moral concepts and moral issues that need to be taken into account when one analyses post-mortem organ donation policies.

6.2 Merits and disadvantages

Various debates are connected to post-mortem organ donation. I made the choice to exclude the debate about the question if we can actually call someone dead at the moment his or her organs are removed from his or her body. Moreover, I decided not to discuss and analyse the religious debates that take place about post-mortem organ donation. This helped to limit the scope of the research. Furthermore, I have used analytical political philosophy to answer the research question I have posed. This contributed to a clear and logical structure of this thesis and a clear methodology. Despite the clear scope and boundaries of the research and the clear overall structure, there are some disadvantages and difficulties which surfaced during the research. During this thesis I developed some arguments based on a specific definition of autonomy and manipulation. Within the field of political theory there exist extensive debates on how we should define these concepts and what their core features are. A comprehensive evaluation and examination of the debates on the conceptualisation and definition of autonomy and manipulation could show the strength of the definitions I choose and could therefore make the starting point of my arguments more convincing. The same holds for the assumption I made that one could argue that the family of deceased individuals has a special moral position.

6.3 Further research

I have concluded that two moral problems lie at the heart of post-mortem organ donation: the debate about the moral status of deceased individuals and the debate on the existence of supererogation. I concluded that these debates are not adequately addressed in the context of classical and perfectionist liberalism. Further research is needed in order to analyse the relationship between these two debates in the specific case of post-mortem organ donation. By this I mean that we should look at the moral

status of deceased individuals and the relationship of this moral status with the existence of posthumous rights. We should examine if it is possible to argue that, even when it would not be possible to convincingly claim that people who have passed away still have a moral status, deceased individuals have a duty to donate. If it is possible to build this argument, we need to look more extensively into the debate about the existence of supererogation in order to discover if anti-supererogationism or qualified/unqualified supererogationism provides the most convincing arguments. Furthermore, future research is needed in order to examine if an analysis of other medical-ethical policies, such as abortion or euthanasia, in the context of classical and perfectionist liberalism addresses the core moral problems connected with these policies. This would give us more insight in the scope of policies that can be analysed from the perspective of these two theoretical schools while at the same time this would learn us more about the applicability of two forms of liberalism that receive a significant amount of attention in political theory.

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