Bodily rights and property rights

To know the value of everything—a critical commentary on B Björkman and S O Hansson's "Bodily rights and property rights"

J R Karlsen, P L de Faria, J H Solbakk

Though the authors of this commentary have deep felt doubts about the fruitfulness of Björkman and Hansson's analysis of bodily rights, they do not doubt their capacity to develop both creative and provocative thoughts

It is always welcoming to be confronted with thoughts that, even though one wholeheartedly disagrees with them, have the effect of stimulating one's own reflections on matters, which without such confrontations, would have been less distinct, less critical—and we would gladly admit, less polemical. Thus it is thanks to Barbro Björkman and Sven Ove Hansson's article, "Bodily rights and property rights", that we have been able to set our present course into these murky waters. The issue they want to address is by no means of a kind that lends itself easily to theoretical speculation. This has, perhaps, as much to do with the inherent intricacy of the issue itself as with the controversy it has managed to arouse. The issue is: is it possible to have ownership over one's own body—that is, is it appropriate to treat the body and its components as property? What are the implications of conceptualising the body and its parts in terms of property? Should one, as a general rule, be able to sell and buy human biological material? If so, who should be allowed to buy and sell it? Does the sale or donation of one's own bodily parts imply a transfer of ownership rights to the buyer or receiver, or is it rather that ownership of human bodily parts can only be acquired after the material has been, say, manipulated in a laboratory?

Contrary to Björkman and Hansson, who see "the primary normative issue" to be "what combination of rights a person should have to a particular item of biological material", we believe that their decision to construe the human body and its parts in terms of property rights, and whether this is "ethically appropriate", is a more primary normative issue still. Especially since this decision arises from their view that "a

person's right to sell an entity" is "the core feature of ownership to that entity". One question that comes to mind is whether it is legally possible to treat the body and its parts in terms of ownership and property; and another one is whether that is ethically justifiable, or morally praiseworthy to pursue. It is our opinion that these questions must be put into the context of the realities of health care, patients, medical practice, and research, if they are to have any true meaning—a meaning that to a large extent is absent in the analysis of Björkman and Hansson. Thus, the analysis fails to recognise that there are other and more important values at stake here than those of economic interests. Irrespective of one's opinions on these matters, however, one should agree that today's biotechnology and biomedicine pose more questions than they themselves are able to answer. In this sense, Björkman and Hansson have sought to frame a possible answer to "the complex issues of commerce and remuneration" that is in accordance with "modern capitalist societies" and the liberal states that facilitate this economic system: "property rights should be arranged such that they promote a proper combination of social goods such as justice and economic productivity". Although we think that the ideological framework of modern capitalism is inadequate for addressing these issues in a medical or bioethical context, this does not necessarily mean that we are altogether against remuneration for biological material.

METHODOS—THE ROAD TO PURSUE

Therefore, we will first investigate whether a redistribution of rights and power, in the manner suggested by Björkman and Hansson, in fact allows

us to "successfully deal with the complex issues of remuneration and commerce", or whether it only addresses the problem as a technical one. Second, owing to the fact that informed consent has been included in their principles of bodily rights (principles 1–3), we must ask what new meanings and functions informed consent might take on in a context of economic and material transactions. Third, if we acknowledge that "bioethics has much to learn from the analytical tradition in liberal political thought", we must carefully assess which insights are contained in its teaching. A closer attention to some of the insights in John Locke's theory on property might help us to shed a different kind of light on the role of bioethics which, perhaps, will be in better accordance with the role implicated by Björkman and Hansson's analysis: should bioethics provide ethical legitimisation for the distribution of external goods? Fourth, is a theoretical framework a sufficient or even a necessary precondition to settle these matters—that is, do we really need an all embracing theory of bodily rights and property rights? We advocate that a more particularistic approach be taken. To reduce the complexity of these issues, however, we also suggest that a governmentalist approach be adopted.

We hope our critical commentary will function as a vehicle for further inquiry into the truly "complex issues of commerce and remuneration", as well as for the direction we propose such an inquiry ought to take.

THE COMPLEX ISSUES OF COMMERCE AND REMUNERATION

According to Björkman and Hansson, the lack of aptness of the solutions given to these issues, so far and for the most part, should be attributed to the fact that they have been addressed as binary questions of either/or—that is, either you have property rights to an object or you do not. Locating this binary view within the natural rights tradition on property represented by the philosopher and medical doctor, John Locke, they transpose and rephrase these issues into the theoretical frameworks of liberal political theory. Lacking a corresponding name, they suggest we call it the "social constructivist" view on property. Drawing on the inspirational works of Felix Cohen, Tony Honoré, and others within this tradition, they ask whether it might be more appropriate to treat property rights as *bundles of rights*. For instance, a "person's ownership of a piece of land includes rights which entitle her to exclude others from entering the land, rights to charge them

for doing so, rights to sell the land and so forth. The rights and obligations that make up the bundle may vary depending on the nature of the object in question". We would like to include: depending on the national legislation. In Norway, for instance, the right to exclude others from entering a piece of land is restricted by law, thus providing a partial right to trespass to persons who do not own it.

Another major difference between these traditions is to be found in Locke's theory of property, where property is designated according to the labour one has "mixed" with an object. While this feature of Locke's theory "provides criteria to determine whether or not a certain person owns a particular object", Björkman and Hansson's claim is that "it lacks the power to determine the exact nature of the property right in question"—a feature the social constructivist theory has. Hence, the main asset of their theory is that it provides criteria for determining different forms of ownership, for instance, intellectual property such as patents or ownership of material objects. Moreover, it can explain why different persons can have different rights to the same entity. These features make their theory more adaptable to a discussion on ownership and biological material.

Although the two theories are different in terms of how they address and designate the origin and nature of property—which is a task for philosophy—both views can, nevertheless, be pragmatically encompassed within common law, which uses a range of legal sources. For juridical experts on property it is a commonplace to treat property rights as bundles of rights. Although there might be shortcomings in bioethicists' reception of this attribute of law. Björkman and Hansson's analysis seems, nevertheless, at risk of conflating philosophical speculation with law proper. Rather, their contribution to bioethics is to show how the bundle of rights model and its conceptual richness can, with some ingenuity, be used to construct appropriate "bundles of rights to biological material". Indeed, they state that the paper's main purpose is to provide "a general analytical framework for discussions on ownership of biological material". There is, however, another and far more controversial purpose here as well, because they also want to "successfully" deal with "the complex issues of commerce and remuneration"—but successfully for whom?

We suspect that the construction of the major components of bundles of rights to biological material sets the scene for a slippery slope argument. The problem is related to their division

between the *descriptive* task of constructing such bundles of rights, and the *normative* task of selecting *which* components of rights ought to be included in their five moral principles of bodily rights: "By a bodily right we mean a right that regulates a person's privileges with respect to her own body". We think that the decision to treat the body and its parts in terms of property is a far more normative issue still; especially because the normative right to sell human biological material seems to be inextricably contained in the underlying premises of the authors' descriptive framework. There are at least *three* underlying premises that substantiate our suspicions. First, "a person's right to sell an entity" is "the *core feature of ownership* to that entity"—that is, if you ask whether you can have ownership to human biological material, you will automatically imply that you can sell such material. Second, "trading on a market is known to be an efficient means to distribute commodities to people who need them (...) a general prohibition against selling biological material may be unnecessary and even counterproductive". Third, "ownership is a precondition for (the standard forms of) economic transactions". Though a "bodily right may, but need not, give rise to a property right", this is nevertheless the direction their analytical framework forces us to take.

We can readily see why it is important for them to clarify "to what extent biological material can be owned". We also see why the issue of bodily rights and property rights can be both controversial and complex—but do we really get any insights into its complexity? In fact, their discussion is sparse when it comes to insights into the broader, as well as deeper, consequences for the implicated parties. *Complexity* can be narrowly conceived as a property of intricate and unpredictable mechanisms, behaviours or interests. *Thick complexity*, on the other hand, emerges when one also has to take into account the diversity of perspectives, values, and life projects of different actors within different contexts, such as patients, researchers, healthcare professionals, politicians, and ourselves as actors within the system, etc.¹ A major challenge of thick complexity is that we must reach decisions in situations where this information, for the most part, is unknown. Hence, a possible response to this challenge could be to invite the parties involved to share and discuss their values, interests, and perspectives. Roughly speaking, this is what we mean by *governance*. All too often bioethicists assume they represent the interests of patients, an assumption

that has been rightfully criticised by Tod Chambers.² We cannot assume that we know a priori what people want before we have asked them. In this sense, Björkman and Hansson seem to be in agreement with those who see the task of bioethics as being to provide ethical legitimisation to top down models of distributing rights, power, and external goods. This might also account for the embarrassment we feel about their discussion of possible negative outcomes of their own principles, revealed by their assumption that the "desperately poor", unlike us who are wealthy, by necessity would be exploited if they were to receive money for their own biological material.

Possible exploitation indeed represents a profound challenge. It would be very difficult, however, to make and to regulate a distinction between exploitative trade and non-exploitative trade, and such a distinction would be even more difficult to manage. A moral principle of bodily rights that speaks against such practices, as indeed their fourth principle does, would neither be a necessary nor a sufficient measure to either identify or terminate such practices. We agree with Björkman and Hansson that current practices of donating organs to relatives, in some instances, may be equally exploitative. This observation does not, however, provide ethical grounds for introducing practices that may lead to other forms of exploitation. Exploitation is a wrong; a second wrong does not set the first one right. Though the principle introduces an empirical criterion for whether the bodily rights "to sell for removal in life" or "to sell for posthumous removal" should be included in this particular bundle of rights, at least two fundamental questions remain to be answered. First, who should define the criteria for when a practice becomes exploitative? Second, what should the actual content of such criteria be in terms of meaning and function? We doubt that these challenges can be adequately met within the confines of the authors' analytical framework. Indeed, they acknowledge that "for the final analysis, ethical principles will have to be combined with empirical information about the actual consequences of different procurement and distribution procedures, both for the individual from whom the biological material is taken and for those who depend for their health on the availability of such material".¹ Nevertheless, the introduction of the empirical criterion has the normative implication that we must embark on a large scale social experiment if we are to find out.

Without insight into the thick complexity of these matters, we suspect “the complex issues of commerce and remuneration” will present themselves as merely complicated—that is, issues that can be addressed as a set of *technical problems*. Although we agree that Björkman and Hansson’s general analytical framework *can* be useful for bioethicists, we are nevertheless sceptical about any application of it that refrains from addressing the specific purposes of health care, medicine, and research in terms of broader perspectives, which raise such questions as: what kind of medicine and health care do we, as a society, actually want? Without such broader perspectives we fear that bioethics will remain blind, and efforts to solve the “complex issues of commerce and remuneration” will merely add to the current chapter of arbitrary theoretical solutions. In the open ended process of coming to practical solutions of these matters, we sincerely hope that the values, interests, and viewpoints of the “desperately poor” will be carefully listened to, in these, as well as in more urgent matters. If paternalism is a bad thing in medicine, then it probably is so in bioethics, too.

INFORMED CONSENT AND ECONOMIC TRANSACTIONS

An important feature of Björkman and Hansson’s proposed principles of bodily rights is that they include informed consent (principles 1–3). “Just as in current practice (and in accordance with our first principle), informed consent should be a prerequisite for any such procedure.” Hence we must ask whether the bodily rights they propose are compatible with the prerequisites of informed consent. Informed consent emerged as a measure against inhumane treatment of patients and research subjects in a clinical context. It has since been subjected to a range of revisions and has also found its way into contexts where the risks for physical harm are minimal—for example, research biobanking. Its applicability outside its original context is, however, problematic. Its merits within the clinic are connected to its meaning and function as a doctrine. First, the introduction of informed consent has had the long term effect of making patients and research subjects become visible as persons with their own interests, values, and indisputable right to make decisions concerning their own lives. Second, it gives ethical legitimacy to medical interventions and research that otherwise would be illegal as well as unethical. Third, it has also been an

important device for criticising paternalism within the medical community.

Essential to this doctrine, however, is the right to withdraw one’s consent at any given time and without retribution. This right has been extended with respect to research biobanking where the donor retains some form of *control* over his or her material. For instance, in the Norwegian Act Relating to Biobanks it is stated that “If consent is withdrawn, the person who gave such consent may require that the biological material be destroyed. Similarly, the donor of the material in a research biobank may require that health and personal data collected together with the material or obtained by analysis or investigation of the material are erased or returned.”³ It is interesting to observe that this right does not apply if the data is anonymised, has become part of a biological product, or has been used in a scientific publication. Hence, the challenge for Björkman and Hansson would be to explain whether selling one’s biological material would imply that the right to future control is forfeited, or whether this is indeed a right that cannot be traded?

JOHN LOCKE AND THE ROLE OF BIOETHICS

At present there exists a broad consensus, typically stated in national legislations as well as in international declarations and conventions, that commodification of the human body and its parts is both illegal and unethical. To question any form of consensus, especially when it stands at risk of degenerating into dogmatism, is a proper task for philosophical criticism. The focal point of their criticism is directed against the natural rights tradition on property. The current consensus on the non-commodification of the human body and its parts, however, has not been properly discussed in Björkman and Hansson’s paper. Instead, we are presented with a kind of *counter declaration* of bodily rights. While it may be constructive as well as important to formulate declarations, one should not forget that the main function of such declarations is to distribute rights as a means to attain justice. We believe, however, that both Björkman and Hansson’s reading and criticism of Locke is to a large extent misconstrued. Indeed, we argue that their view may be more in accordance with a Lockean perspective than they seem to admit. Moreover, we shall argue that our alternative reading of Locke’s theory can help us to put their “general analytical framework for discussions on ownership of biological material”

into a larger perspective that also has implications for the role of bioethics.

To appreciate the implications of Locke’s theory it is useful to see it in relation to at least two historical sources: 1) the *Nicomachean Ethics* of Aristotle and 2) the philosophy of Francis Bacon. In Book I of the *Ethics*, Aristotle distinguishes between three forms of goodness: that which is good for the soul, that which is good for the body, and external goods. Concrete forms of goodness that correspond to these distinctions would for instance be virtue, health, and money. Aristotle recognises the importance of all three forms of goodness for attaining a blissful life. That which is good for the soul is nevertheless the most important one: we can not attain virtue by hoarding external goods.⁴ Bacon’s philosophy, on the other hand, may represent the modern man’s desire to actively control his surroundings. Through experiments and observation, science discovers the operations of nature: “Human knowledge and human power come to the same thing, for where the cause is not known, the effect cannot be produced. We can only command Nature by obeying her, and in contemplation represents the cause, in operation stands as the rule.”⁵ Such knowledge provides man with the means to alter and intervene in natural processes that, as a consequence, give him power to control Nature. Hence, scientific progress will improve his condition, for the benefit of himself and for the prosperity of society at large.

While labour for Aristotle has no inherent value, Locke recasts the value of labour altogether: mixing one’s labour with something, removes it from “the common state Nature put it in, it hath by this labour something annexed to it that excludes the common right of men. (...) and thereby makes it his property”.⁶ Through labour, Man improves his conditions according to the plan of God. “God, who hath given the world to men in common, hath also given them reason to make use of it to the best advantages of life and convenience. The earth and all that is therein is given to men for the support and comfort of their being.”⁶ The ingenuity of Locke was to transpose the instrumentalism of Bacon into a general theory of labour and property. The implication of this transposition is that only *one* of the Aristotelian forms of goodness—that is, external goods, is being recognised as a real value in man’s pursuit of a better life: “God commanded, and his wants forced him to labour”.⁶ In this respect, Locke’s theory seems not to be as remote as one might have expected from the views

of those who see the role of bioethics as a supplier of justification to the distribution of external goods.

The premise of this theory, however, is that resources are unlimited. When resources become sparse, man, “by consent”, creates societies and laws to regulate the acquisition of property. He can then no longer acquire property according to his wishes. In the natural state, man tends to acquire external goods only to the extent of his immediate needs. With the introduction of money, however, he is able to hoard more than he can use, though squandering one’s resources remains an affront to God’s intention, according to Locke.⁶ In respect to this latter aspect, Björkman and Hansson’s criticism of Locke appears to be redundant. Their charge against Locke is that not all labour “necessarily yields added value”. Evoking Robert Nozick’s criticism, they go on to quote him: “If I own a can of tomato juice and spill it in the sea (...) do I thereby come to own the sea or have I foolishly dissipated my tomato juice?” The point, however, is that such a “labour” in effect would have amounted to *squandering* your tomato juice. Locke appears to have been perfectly aware of the fact that not all labour yields added value, as in his example of the inland farm in America.⁶

FROM A DIFFERENTIATION OF BODILY RIGHTS TO A DIFFERENTIATION OF PRACTICES

Do we need an all embracing theory of bodily rights and property rights? For instance, there appears to be a qualitative difference between the John Moore *v* The Regents of the University of California case¹ and gene-epidemiological research biobanking, both in terms of economic implications, practical issues to do with assessing the economic value of a singular biological sample, and also in terms of differentiating between types of biological material.

Hence, instead of focusing on a differentiation of property rights, we suggest that one should rather focus on a differentiation of biological mate-

rial, its actual economic potential, and the practices needed to bring about a fair remuneration. The Moore case was settled, amongst other considerations, on the basis that the exchange of scientific materials, still being relatively free and efficient, would be compromised if each cell sample became the potential subject matter of a lawsuit.⁷ First, Moore’s proprietary interest was denied on the grounds that he was claiming ownership of the results of socially important medical research to which he had not added any labour. Second, it was denied because it would have been an implicit acceptance of a right to sell human tissues for profit, which is illegal. Third, Moore’s property allegations were inconsistent with the patented cell line and its products which are “factually and legally distinct” from his cells.⁷ According to some commentators “this was necessary (...) to encourage venture capital”.⁸

From an ethical viewpoint, there are at least three problems attached to the events preceding the actual law suit. First, intuitively, it might seem unfair that Moore was not remunerated. Second, the doctor’s perception of Moore’s cells as a potential economic asset undermined his obligations toward Moore as a patient, since he advised Moore to keep on returning for more tests than were necessary to secure Moore’s health. Third, after having removed Moore’s spleen, the doctor did not inform Moore about his interest in his cells. We think that Moore should have been told about the economic interest in a way that took Moore’s interests, values, and perspectives seriously. An open dialogue between the parties involved should be an ethical prerequisite. One should also consider the involvement of lay persons with no economic interest in the subject matter, but who might have other interests, such as health. This approach would have two additional benefits: it would increase civil involvement in this issue and it would also encourage a more even structure between the parties concerned. A dialogue of this sort may also lead to negotiations about concrete business proposals. Contrary to current practices of keeping one of the parties involved on the outside and at a distance, these proposals should encourage participation. This is also consistent with the donor’s right to some form of control over his or her biological material. A similar approach might even be taken when it comes to some types of stem cells, such as the HeLa line. As a result of these measures, we might manage to reduce the thick complexity: but would we also get more inefficient practices? We must distinguish between

inefficient practices that are acceptable and inefficient practices that are irresponsible.

There are good reasons for not introducing inclusive governance as a general ideal of practice in hospitals. One such reason is that it would lead to irresponsible actions. There are, however, equally good reasons for not transforming hospitals into marketplaces for human biological material, which we fear would be a side effect of Björkman and Hansson’s theory. Their theory seems to have built into it the anthropology of the atomistic consumer. The essential attributes of this anthropology may be summarised as follows: The consumer, by definition, puts his own interests first and has no other social obligations. His foremost interest is to pursue external goods that fill his life with meaning. In his isolation he is naturally distrustful, but also vulnerable. Therefore he needs contracts to restore trust, and rights to protect his interests. Presupposing his perfect health, he is able to make rational choices in a market of supply and demand. Can we assume, however, that this anthropology is generally true, let alone in a context of suffering: how should we do commerce with the sick?

The main purpose of medicine is to alleviate the sick and restore health. As Georges Canguilhem noted, medicine exists because there are sick persons who—loving as healthy life—want to be alleviated from their suffering and brought back to health. Sickness reduces the living being’s normative capacity to adapt to new circumstances in an ever changing environment. The sick person suffers; he is immobilised, and consequently must lead a different form of life from the healthy person. To be healthy is in one sense to live in the silence of one’s organs, in another, it is to have a greater normative capacity to direct one’s own life in face of obstacles and diversity.¹⁰ The difference between health and sickness is essential to medical practice and research. Historically, the incapacitating effects of sickness often have been used as a pretext for paternalism in medical practice. Similarly, it would be problematic to use it as a pretext against any form of remuneration for human biological material. The difference between sickness and health should, however, be reflected in the practices developed to insure a fair remuneration. A right to sell one’s own biological material does not annul the realities of the context in which such transactions take place.

Donating organs, blood transfusions, and diagnostic tests all imply that biological material is removed from the body. When the purpose of such practices

¹John Moore underwent treatment for hairy-cell leukaemia at the Medical Center of the University of California. He claimed that his physician and other defendants used his cells in potentially lucrative medical research without his permission and that he had a proprietary interest in each of the products that any of the defendants might ever create from his cells or the patented cell line. The court held that the complaint stated a cause of action for breach of the physician’s disclosure obligations, but not for “conversion” which is a legal term for a “wrongful act of dealing with goods in a manner inconsistent with the rights of the person entitled thereto, with the intention of denying his title or asserting a right inconsistent with it.”

is not to "mine" for economic resources, they should, as a rule, not be treated as such, because there are other and more important values at stake than economic ones. In this respect, sound and responsible medical judgment is a necessary premise for the distribution and utilisation of biological material. It is rarely sufficient, however, because such practices involve intervention in the physical integrity of persons.

A general provision of commerce and remuneration would endanger the medical and humane interests a physician has in her patient and the trust the patient has in her physician. An atmosphere of commerce would conflate the doctor/patient with economic interests. Although economic interests may not always be present, the patient might, even so, suspect this to be the case thus diminishing the vital value of trust in health care. In cases where such economic interests are present, however, the physician should inform the patient in a way that does not interfere with the patient's medical treatment. Or, if the sole purpose of the intervention is economic in nature and the patient is healthy, a governmentalist approach might be adopted. If the patient dies, then the relatives should be informed of the commercial interests, but only in a way that does not interfere with their mourning, which would depend on the particular circumstances. Prudence and care should always be observed in such practices.

These issues are even more unclear when it comes to gene-epidemiological research biobanking, because here the economic value of one biological sample is infinitesimal, while the biobank as a whole may have great economic potential, as in the case of the deCode biobank in Iceland. Here as elsewhere, it is important to distinguish between research that pursues profit, and research to improve health. If the biobank is turned into a commercial endeavour, donors should be informed, and broader visions of participation should be pursued. Indeed, Björkman and Hansson acknowledge the non-trivial nature of specifying information about future uses to prospective donors in biobanking. Conversely, the right to withdraw one's sample and information from a biobank is perhaps a more trivial one, however impractical and expensive in practice. If everyone who had a right

to something claimed their right, then most social institutions would probably collapse. It is worth reflecting upon why they do not.

CONCLUDING REMARKS

The problem of ownership of the human body and its part are connected to the legal distinction between "thing" and "person" that dates back to Roman law. According to this legal tradition, a thing can be owned, but a person cannot. Indeed, Björkman and Hansson's analytical framework presupposes that human biological material is a thing, or at least in legal or philosophical terms can be treated as such: but, is biological material really a thing? DNA, cells, tissue and human embryos may not be persons, but does this mean that they are things? Roman law lacks a third category to address these issues. Perhaps then, they are better understood as no-things? While it might be fruitful to pursue an intermediate third category, the route we have followed in this paper has been a different one. By focusing on practices rather than things, we have tried to contextualise "the complex issues of commerce and remuneration" in relation to human practices in medicine, health care, and research.

Our underlying premise is that human biological material is intrinsic to human life, not only when they are parts of the living human body, but also in terms of how they are involved in human practices. Having "harvested" cells from an aborted fetus, a scientist may have a conceptual and technical interest in the genetic signals involved in embryonic stem cell differentiation. A pregnant woman, on the other hand, may want to exert control over her own body and social life by requesting an abortion. Although both individuals are faced with a painstaking problem, we are talking about entirely different perspectives and ways of relating to the fetus. The meaning and truths of the former situation, that of the scientist, cannot be reduced to the meaning and truths of the latter situation, that of the pregnant woman, and vice versa. Introducing prospective economic interests in the cells and tissues of her fetus, may have unforeseen and adverse effects on the woman's situation and the meaning of the moral dilemma she is facing.

We would like to invite Björkman and Hansson to pursue these matters

further. Though we have deep felt doubts about the fruitfulness of their analysis of bodily rights, we do not doubt their capacity to develop both creative and provocative thoughts. We thank them for having stimulated ours. Oscar Wilde once said that a cynic was a person who knew the prize of everything, but the value of nothing. Though, even if we were to know the value of everything, then perhaps will would still not know the value of no things.

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Authors' affiliations

J R Karlsen, J H Solbakk, Section for Medical Ethics, Department of General Practice and Community Medicine, Faculty of Medicine, University of Oslo, Norway
P L de Faria, National School of Public Health and Faculty of Law, New University of Lisbon, Portugal

Correspondence to: Jan Reinert Karlsen, Section for Medical Ethics, Department of General Practice and Community Medicine, University of Oslo, Frederik Holsts Hus, Ullevål terrace, PO Box 1130 Blindern, NO-0318 Oslo, Norway; j.r.karlsen@medisin.uio.no

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