The Law and Ethics of Organ Sales

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I. Introduction

Suppose it were demonstrated that hair taken from a healthy New York City resident has life-prolonging properties, and that by waiving a handful of it under a cancer patient’s nose, you could cure him? What should the government do?

One solution would be to require New Yorkers to have their hair cut and given to the state, so that it could be put to the important end of curing cancer. Or the state could make “New York hair” the property of all, so that cancer victims could walk through the city and help themselves. However, there would be a number of objections to these solutions (though relatively few from clip-wielding cancer patients). Some individuals – e.g., fashion models, rock musicians, television news reporters – need their hair in order to make a living. They quite understandably would be reluctant to give up the one asset that might distinguish them from a random applicant for their position.

A less controversial solution would be to encourage New York City residents to donate their hair to the war against cancer. The problem is that New Yorkers, true to their stereotype, would never get around to it. After all, it takes time to get your hair cut, and most New Yorkers are busy.

The tragic outcome of the less controversial solution is easy to see. A relatively small number of New Yorkers would have their heads shaved and the hair donated to fight cancer, while the vast majority would give not a second thought to the problem. All the while, cancer would continue to kill people who could have been saved by a handful of New York hair.

This is pure fantasy, but it is identical in its important respects to the real world problem of providing organs and tissue suitable for transplantation. In fact, in some ways the real world problem is more troubling. The New Yorkers in my hypothetical have a good reason for keeping their hair: it looks good on them. But a large percentage of potential organ providers have absolutely no use for the organ.

The proposed solutions to my hair supply hypothetical, transfer of property and reliance on altruism, are essentially the only two solutions formally adopted in response to the real world “organ supply” problem. Because of the shortcomings of
these solutions, a number of commentators, myself among them, have suggested the allowance of some limited commerce in body parts. This solution can be seen as a compromise between the extremes of transferring property rights and relying entirely on altruism. Property rights are maintained under the market system because anyone who wants the body part of another must gain the consent of the owner. Yet it is likely to be considerably more effective at increasing the supply of body parts than a system, such as the one currently observed in the United States, which relies entirely on the altruism of donors.

In response to the market solutions proposed in recent years, a number of commentators have raised moral objections to the notion of commerce in body parts. For example, two recent articles, one by Leon Kass, and the other by Stephen Munzer, have presented various Kantian arguments against a market in body parts. So far as I am aware, no economist has responded directly to this literature. I intend to do so here.

1 Reliance on altruism is the approach in the United States, see, e.g., Jeffrey M. Prottas, "Obtaining Replacements: The Organizational Framework of Organ Procurement", Journal of Health, Politics, Policy and Law, vol. 8 (1983), pp. 235-239. Transfer of property is observed under "presumed consent" systems, where the state has the right to remove organs from a cadaver unless a family member objects. This is currently the law in Austria, Denmark, and France; see A.J. Matas/J. Arras/J. Muyskens/V. Tellis/F.J. Veith, "A Proposal for Cadaver Organ Procurement: Routine Removal with Right of Informed Refusal", Journal of Health, Politics, Policy and Law, vol. 10, pp. 231-244. There are some approaches that cannot be classified so easily. For example, reports suggest that in China, the state removes and sells the organs of executed prisoners, see Catherine S. Manegold, "Senate Told of Chinese Death-Row Prisoners Shot for Organs for Transplants", New York Times, Friday, May 5, 1995, p. A5.

2 Keith N. Hylton, "The Law and Economics of Organ Procurement", Law & Policy, vol. 12, no. 3 (July 1990), pp. 197-224.


II. A Reassessment of Moral Objections to the Sale of Body Parts

The Kantian critiques of organ selling are not easy to summarize because they consist of several major and minor arguments, not all of them directly traceable to Kant’s comments on the sale of body parts. Moreover, for an economist, the literature is difficult to grasp firmly. Economists are used to working with models, and within a framework in which terms have a settled meaning. Economists who confront the organ shortage problem typically start by thinking of organ provision within a market; they think of supply, demand, and the loss in society’s wealth that results from the undersupply of transplantable organs. It is a serious change of direction to then try to apply the thoughts generated within that framework to the seemingly less organized, less rigorous, arguments of the ethics literature.

However, in spite of the lack of a rigorous framework, the ethical critiques of organ selling seem to center around three major themes. The first and most important is the notion of personhood and dignity, the second is the theme of commodification and incommensurability, and the third is equity. Each of these headings needs to be defined with some care, and I will attempt to do that below. And there are other arguments presented in the ethics literature that cannot easily be placed under any of these headings. For example, some of the ethical arguments have more to do with difficulties in the implementation of a market in body parts than with moral concerns generated by the very attempt to introduce such commerce. I will consider these arguments in a later section.

A. Dignity, Personhood, and Human Flourishing

The Kantian writers have presented several arguments against the sale of body parts, but the one proposition that is central to their criticisms is the claim that such commerce offends the dignity or personhood of the individual, and is inconsistent with “human flourishing.” Perhaps it is best, following Leon Kass, to put it in Kant’s own words. In The Metaphysical Principles of Virtue, Kant states two propositions regarding the sale of body parts.

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7 After submitting this paper to the journal, I came across a response by my former colleague Mark F. Grady, “Politization of Commodities: The Case of Cadaveric Organs,” vol. 20, J. Corporation Law, pp. 51-68 (Fall 1994) (the issue was not available until the Fall of 1995). Grady argues that governmental allocation schemes politicize allocational issues in a way that is damaging to our perceptions of ourselves and our values. While I find Grady’s critique persuasive, he stops short of directly refuting the Kantian writers on their own terms.

8 Human flourishing is a term used by Chadwick, supra fn. 6, and in Radin, “Market Inalienability”, supra fn. 6.

Kant's Proposition 1: To dispose of oneself as a mere means to some end of one's own liking is to degrade the humanity in one's person, which, after all, was entrusted to man to preserve.\textsuperscript{10}

Kant's Proposition 2: To deprive oneself of an integral part or organ (to mutilate oneself), e.g., to give away or sell a tooth so that it can be planted in the jawbone of another person, or to submit oneself to castration in order to gain an easier livelihood as a singer, and so on, belongs to partial self-murder. But this is not the case with the amputation of a dead organ, or one on the verge of mortification and thus harmful to life. Also, it cannot be reckoned a crime against one's own person to cut off something which is, to be sure, a part, but not an organ of the body, e.g., the hair, although selling one's hair for gain is not entirely free from blame.\textsuperscript{11}

Proposition 1 can be taken as a general theorem and the second and elaboration on it. The first can be broken down into two subpropositions, one to the effect that selling a part of oneself degrades the humanity in one's person, and therefore is morally objectionable. It would certainly be objectionable, within Kant's framework, to cut off a part of another person and sell it. An individual is to be treated as within the "kingdom of ends,"\textsuperscript{12} the fundamental aspects of that person are not to be used as a means to some other end. It would seem a contradiction of that order for Kant to approve of an individual cutting off and selling a part of himself for gain.\textsuperscript{13}

The second subproposition is that because the "person" was given to man to preserve, it would be wrong to degrade it, or the physical portion of it, by cutting off and selling body parts.

Proposition 2 sheds additional and much needed light on the components of Proposition 1. We are told in the second that it is all right to cut off body parts that are themselves dead, and thus harmful to life. In addition, there appears to be a sliding scale of seriousness in Kant's view. Cutting off hair is not objectionable. Cutting off hair for the purpose of selling it is troubling, but probably justifiable if the reason is sufficiently important, e.g., curing cancer. But it appears that the cutting off of body parts that are closely connected to one's personhood, such as a kidney, raises ethical problems of a higher order of magnitude.

On the basis of these propositions, Leon Kass concludes that "[m]an contradicts his rational being by treating his body as a mere means."\textsuperscript{14} Stephen Munzer adopts

\begin{itemize}
\item \textsuperscript{10} Id., p. 84.
\item \textsuperscript{11} Id.
\item \textsuperscript{12} Immanuel Kant, Groundwork of the Metaphysic of Morals [1785], translated by H. J. Paton as The Moral Law, London: Hutchinson's University Library, 1948, pp. 95-100.
\item \textsuperscript{13} Kant says so explicitly in a passage covering duties to oneself: "Suppose there were no such duties. Then there would be no duties at all, not even external ones. For I cannot recognize myself as bound to others except insofar as a I bind myself at the same time." Kant, The Metaphysical Principles of Virtue, at 78.
\item \textsuperscript{14} Kass, supra fn. 4, p. 73.
\end{itemize}
a similar point of view but puts more emphasis on the sliding scale; and by stating his criticisms in a weak form, deliberately avoiding bold conclusions,\textsuperscript{15} suggests that the sale of even integral parts may not be morally objectionable under certain conditions.

The range of views expressed by Kass and Munzer is suggestive of the number of different interpretations one defensibly could reach on the basis of Kant’s propositions. Although a wide range of interpretations are possible, the extreme points are easy to define. One extreme is to read Kant as prohibiting the selling of organs, or, more generally, integral body parts, under any conditions. The other extreme – which Munzer, though clearly not embracing, fails to reject altogether – is that selling integral body parts is not morally objectionable as long as the reason for sale is sufficiently important.

The first extreme view, that sales are \textit{per se} objectionable, suggests an outright ban on the sale of integral body parts. The second extreme view, though never clearly embraced by any of the Kantian writers, suggests that certain sales of integral body parts should be permitted. According to this view, the sale of a kidney in order to save the life of another might not be morally objectionable. However, there are many examples that clearly would be morally objectionable; e.g., the sale of teeth in order to improve the appearance of another, the sale of a cornea to improve the vision of a person who could see quite well with eyeglasses, the sale of an Achilles tendon to improve an athlete’s performance. An unfettered market in body parts might easily give rise to a new form of cosmetic surgery, in which the desirable physical traits of one person are purchased and transferred to another. Presumably this sort of commerce would be morally objectionable even to those Kantians who were willing to read Kant’s propositions in a way that permitted some limited commerce in body parts.

In assessing these interpretations of Kant’s propositions, it is important to keep in mind that there are some proposals for commerce in body parts that meet (or seem to meet) the moral objections of some of the Kantian critics. Consider, for example, Lloyd Cohen’s proposal for a futures market in body parts.\textsuperscript{16} Under Cohen’s scheme, the removal of a body part would take place only after death. It would seem unlikely, under this scheme, that a physical transfer would take place where the reason was not of sufficient importance to be morally defensible. Given the alternative of putting an organ into the ground, or burning it, it seems clear that transplanting it to someone who has a need for it is a morally defensible action. Thus, if Wilt the Stilt, a terrifically skilled basketball player plagued with weak Achilles tendons, acquired the tendons of another man, for no other reason than to

\textsuperscript{15} “I do not offer knockdown arguments for bold conclusions. I do contend that it is morally objectionable for persons to sell their body parts if they offend dignity by transferring them for a reason that is not strong enough.” \textit{Munzer, supra} fn. 5, p. 260.

\textsuperscript{16} \textit{Cohen, supra} fn. 3.
make himself a better athlete, it would seem to me to raise no moral concerns if the transfer took place after the death of the tissue provider.

It follows that we may define a weak Kantian position that suggests sharp limits on the cutting off and sale of body parts of living persons, but places relatively few restrictions on the cutting off and sale of the body parts of the dead. The weak Kantian position would presumably also allow certain sales where the harm to the provider is trivial and the benefit to the recipient substantial. Sales of blood, sperm, or bone marrow might fall within this category. Less clear, though probably still morally defensible, is the case of selling skin in order to save a life, or selling a sample of liver tissue containing cells that could be reproduced and used to cure thousands of a deadly diseases.

It also follows that a strong Kantian position would hold that sales of integral body parts are morally objectionable, whether or not the physical transfer takes place after death of the provider. This view permits only the cutting off of certain non-integral body parts, and the sale of such parts only for sufficiently important reasons.

Hence, the first substantial shortcoming of the Kantian critics is a failure on their part to recognize that Kant’s propositions may be reconciled with limited versions of an organ market. It is possible to read Kant, and clearly Munzer has provided such a reading, in a way that permits a certain amount of commerce in organs.

Of course, this interpretation of Kant may be incorrect, so it is worthwhile to consider interpretations that do not permit commerce in integral body parts. The strong Kantian position is one such interpretation. Generally, it is clear that Kant takes a more favorable view toward the cutting off of body parts that are not integral, such as hair, or the cutting off of even integral body parts that may harm the possessor, such as a severely frostbitten finger. Suppose we view Kant as going this far, but no further.

The strong Kantian position runs us into such difficult moral and practical problems, that one has to seriously question whether Kant would claim authorship of this view if he were with us today. Start with the distinction between donation and sale. Kant tells us in the second proposition that to “give away or sell a tooth ... belongs to partial self-murder.” In other words, Kant seems to draw no distinction between the donation and sale of integral body parts. However, Leon Kass explains that there is a difference;

For in a gift of an organ – by its living “owner” – as with any gift, what is given is not merely the physical entity. Like any gift, a donated organ carries with it the donor’s generous good will. It is accompanied, so to speak, by the generosity of soul of the donor. Symbolically, the “aliveness” of the organ requisite for successful transplantation be-speaks also the expansive liveliness of the donor – even, or especially, after his death. Thus, organ removal, the partial alienation-of-self-from-body, turns out to be, in this curious way, a reaffirmation of the self’s embodiment, thanks to the generous act of donation.¹⁷

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The question, of course, is why these things are not also true of an organ that is sold. Isn't the "aliveness" of a sold organ an extension of the "liveliness" of the seller? It would seem that the organ provider transfers some of his "liveliness" to the recipient whether the organ is donated or sold.

And assuming a substantial moral distinction exists between the sale and the donation of integral body parts, how broad is its scope? Suppose, for example, the seller accepts half the price his organ could fetch? Is that to be treated as a sale or a donation? Is it half a "reaffirmation of the self's embodiment," or is it half of an "offense to dignity," or, yet again, is it one hundred percent insult to dignity because the provider tried to sell it but failed to get full price? Consider also, the fact that the National Organ Transplant Act, a federal law which, among other things, prohibits commerce in body parts, does permit compensating organ providers for travel, missed work days, and other expenses connected to organ donation. What is the difference between a donor who receives such limited compensation, and one who receives the same compensation plus ten percent of the market value of the organ? Is one a donor and the other a seller?

More generally, if it is morally permissible to compensate a donor for travel, housing, and lost wages connected to the act of donation, what of a decision to include compensation for forecasted future lost wages attributable to the act of donation? For example, suppose a kidney donor incurs $2000 in travel and housing expenses required by the act of donation, and loses two weeks of time from work. Let his salary be $1000 a week. But suppose it is virtually certain that the loss of one kidney, as a result of donation, will reduce his expected future working years by one half year, and he has ten years before retirement. The total loss in wages is then $2000 (immediate expenses), plus $9,639 (future losses, equal to $25,000 discounted at an interest rate of 10 percent and assuming 50 weeks of work per year). Suppose the recipient pays the organ provider $11,639, which just compensates the provider for the costs of donation. Is this, on moral grounds, to be considered a sale, or a donation?

The difficulty can be stated at an even more general level: If one accepts the principle that it is morally defensible to not require an organ donor to suffer substantial losses in connection with donation, so long as the donor does not make a profit, then it becomes very hard to maintain the moral distinction between organ donors and organ sellers. In the example just discussed, the only difference between an organ provider who received compensation only for out-of-pocket expenses ($2000), and one who received that plus an amount designed to cover future expenses ($11,639), is that the financial loss to the donor is larger in the former than in the latter. But what moral principle requires the state to ensure that organ providers suffer the maximum financial loss as result of their decision to supply an organ?

17 Kass, supra Fn. 4, p. 75.
19 42 U.S.C. § 274e(c)(2).
How, one might ask, can one practically distinguish sales and donations under the framework I have proposed? The distinction is drawn by taking into account the difference between compensating the donor for costs incurred in the act of donation, and requiring the recipient to pay for the full benefits of receiving a new organ. To economists, this is the difference between maximum offer and minimum asking prices. Compensating a donor for the full costs of donation is equivalent to meeting the minimum asking price of an organ seller. Again, unless one holds that a donor must suffer the maximum financial loss, then it is does not seem inappropriate to call an organ provider a "donor" when he is compensated only for the costs of donation.

Trades can occur at prices above the minimum asking level, until the maximum offer price of the buyer is reached. Compensation that exceeds the minimum asking price rewards the organ provider and therefore introduces a profit consideration into the decision to provide an organ.

Thus, if, as is true of all of the Kantian writers, one accepts the premise that donation of body parts is morally defensible while sale generally is not, one may still arrive at the conclusion that some commerce in organs is morally defensible. Commerce is permissible under this framework as long as organ providers are limited to receiving their minimum asking prices.

Indeed, if one reads Kant's propositions carefully, the framework proposed here seems to be implicit in his words. Kant's Proposition 1 speaks of disposing of oneself "as a mere means to some end of one's own liking," and Kant's Proposition 2 refers to "selling one's hair for gain (emphasis added)." It should be clear that compensation for the costs of losing an integral body part, i.e., meeting the minimum asking price, is not equivalent to "selling for gain" or for "one's own liking." For if compensation is limited in this fashion, there is no gain to the organ provider, and it is therefore unlikely that he will, rationally, sell an organ in order to reach a desirable end. A promise to compensate only for the costs of losing a body part does not create the lure of a desirable end relative to the status quo.

A committed opponent to organ sales could respond that this view is overly simplistic. I have ignored the likelihood that organ providers will be uninformed, and unable to accurately assess the expected future costs resulting from the loss of an integral body part.20 One could also argue that they may suffer from time-inconsistent preferences,21 and will act myopically in making the decision to provide an organ in exchange for compensation. But these arguments are closer to the realm

20 Thus, although they may perceive themselves to be better off as a result of selling an organ, they really are not. This argument was introduced as a powerful justification for strict products liability in A. Michael Spence, "Consumer Misperceptions, Product Failure and Producer Liability", Review of Economic Studies, vol. 44 (1977), pp. 561-572.

of administration than that of morality. One could require physicians and others connected with the transplantation network to provide proper information and counseling to all potential organ providers. Alternatively, one could lessen the severity of these problems by adopting a program, such as the one proposed by Lloyd Cohen, in which transfer takes place only after the death of the provider. Informational disparities might still exist under such a program, but at least they would not give rise to the presence of people who have mistakenly compromised their own lives by selling an integral body part.

Thus, unless one demands that organ providers suffer the maximum financial loss in connection with provision, there seems to be no moral case against compensation of organ providers for the costs of provision. Indeed, the moral case for any sort of price regulation in the market for body parts rests on a weak foundation. As a practical matter, it will be difficult to determine whether a provider has been compensated for costs or has received a windfall. The reason is that the costs of organ provision are both objective, and easily measurable, and subjective, or non-measurable.

Generally, the minimum asking price of an organ provider will be the sum of three components: immediate or out-of-pocket expenses ($P_o$), estimated future costs ($P_f$), and a subjective element ($P_s$). Thus, if $P_A$ represents the provider’s minimum asking price,

$$P_A = P_o + P_f + P_s.$$  

The subjective element, $P_s$, will reflect the provider’s valuation of perceived subjective benefits and costs resulting from the act of providing an organ. If the subjective benefits are greater than the subjective costs, $P_s$ will be negative. For example, if the organ is going to the spouse or child of the provider, the subjective element will reflect a substantial perceived benefit, which reduces his minimum asking price. In most cases such as this, the subjective benefit to the provider far exceeds the objective costs (i.e., $-P_s > P_o + P_f$), which explains why donation among family members accounts for the vast majority of organ transplants. However, in some cases the subjective element will reflect a perceived cost rather than a benefit. For example, suppose a family, following the wishes of the provider, donates organs from his cadaver for the purpose of transplantation. Other relatives, who learn of the decision after the fact, are so upset that they refuse to have any further dealings with the family of the donor. To the extent that this is a foreseeable outcome, it is an additional cost to organ providers, which will increase the minimum asking price.

Because of the existence of a subjective component in the minimum asking price, an organ provider who holds out for a price that exceeds the sum of out-of-pocket and estimated-future expenses ($P_o + P_f$) may not be seeking to gain from the transaction. He may be seeking only to be compensated for subjective costs. A
regulator who prohibited compensation for subjective costs would therefore discourage some individuals from providing organs, when they only sought to have their costs covered. Thus, on administrative grounds it may be best to permit transactions in which the price exceeds objective measures of cost.

In any event, the foregoing suggests the question whether to permit compensation for subjective factors – in other words, trades in which the price exceeds the objectively measured costs of the provider – is an administrative rather than moral concern. Put another way, if one accepts the principle, implicit in existing law, that morality does not demand an organ provider to suffer substantial losses in connection with the provision of an organ, then there seems to be no sound moral argument for prohibiting compensation for subjective costs. And if morality does not require prohibition of compensation for subjective costs, then any degree of price regulation would be morally problematic.

To this point I have assumed the ethical wisdom and correctness of Kant’s propositions and argued that they do not clearly rule out all commerce in body parts. Indeed, I doubt that if Kant were with us today, he would look at the long lists of potential organ recipients and hold that is better to let them suffer,\(^{22}\) so that we can more effectively maintain our sense of propriety.

I would now like to reconsider the validity and usefulness of Kant’s propositions; especially Proposition 1, which tells us that (1) selling a part of oneself degrades the humanity in one’s person, and (2) man has a duty to preserve this humanity.

Let us start with the second component: the duty to preserve one’s personhood. As a suggestion on how to run one’s life, this is unobjectionable, but as a rule for crafting legislation, it is quite worrisome.\(^{23}\) How far does the duty to preserve one’s personhood extend? If cutting off and selling a finger violates the duty, then what of other decisions that subject an individual to harm or the risk of harm in exchange for money? For example, a large number of workers hold jobs which expose them to serious risks of harm, such as amputation, or lung cancer from second-hand smoking. In many of these instances, the workers have made a rational decision to accept the risk of harm in exchange for a larger wage than they would receive in a safer alternative.

\(^{22}\) How many are suffering? Consider the kidney recipient registry alone. In 1987, there were eleven thousand on the list in the United States, but if one expands the registry to include dialysis patients who would benefit greatly from a new kidney, the figure exceeds thirty thousand, see Hylton, supra fn. 2, p. 205.

\(^{23}\) I cannot overemphasize the distinction between moral advice and legislative rules. If the Kantian critics of organ sales limited themselves to a discussion of morals, I would find it harder to criticize their writings. In The Metaphysical Principles of Virtue, Kant distinguishes legal and ethical rules, and addresses most of his arguments toward the latter. The Kantian critics of organ sales, however, are writing against a background in which organ sales are illegal, and their arguments defend the existing order.
What is the moral difference between the decision to work in a potentially hazardous environment and to cut off and sell a body part? In both cases one chooses to harm oneself, to compromise or degrade one's personhood, in order to receive a certain sum of money. If there is no important moral difference, does this suggest that Kant's first proposition applies to all choices among alternative jobs? Have we then discovered that it is morally objectionable for an individual to accept a job in a hazardous working environment when he could have minimized the risk to his personhood by accepting welfare payments from the government?

The charge "preserve the humanity in one's person" suggests a much broader prohibition of activity than the mere cutting off and selling of body parts. And yet if we pursue this line of reasoning consistently, we quickly find ourselves regulating decisions that the vast majority of individuals would prefer to be left free to make on their own, in accordance with their preferences.

The fundamental problem with the preservation goal, as a guide for legislators, is that it crosses the line John Stuart Mill drew between directives that aim to prevent one person from harming another, and those that attempt to improve individuals by bringing them up to higher standard. Laws in the former category were quite sensible, indeed necessary, in Mill's view; while laws of the latter were neither necessary nor likely to contribute to welfare. It is more likely that laws of the latter type would become instruments of coercion, at the service of either democratic majorities or self-interested government officials.

Now consider the first component of Kant's proposition, that selling a part of oneself is degrading to one's personhood. As Munzer reminds us, Kant distinguished things that had a price, such as a chair, from things that had "dignity," such as a rational human. Things that have dignity belong in the kingdom of ends; and it is therefore morally objectionable to trade them in the market, for they are to be treated as ends in themselves, not used as a means to some other end. From this reasoning it follows that one degrades the personhood of another individual by selling him into slavery, or by cutting off and selling an integral body part. And one degrades one's own personhood by selling one's whole self, or part of one's self.

The argument strikes an intuitive chord in all of us, but again one must ask how far this principle is to be extended. It was taken to its limit, long ago, by Plato, who told us in The Republic that the virtue of the guardian class should not be compromised by allowing them to take part in the market. Plato's guardians were the leaders of the state, and embodied the desirable virtues of honesty, bravery, and the moral fiber to fight for their principles. These virtues, it is perhaps all too obvious, are compromised by the market. Market participants learn to balance the

costs against the benefits of their actions; some learn that the truth may be too costly to tell at times. Hence, the market, in Plato's ideal world, was a plane of activity that could only be inhabited by those who were unfit to lead.

While it is true that markets often require the compromise of principle, the general notion that there is an inherent conflict between market activity and the development and maintenance of virtue is a proposition that must be rejected firmly and unambiguously. The theory of an inherent conflict, which had a noble birth with Plato, has inflicted enormous misery on mankind over the years. Indeed, if one takes a glance at the remaining states in the world in which this theory remains a fundamental doctrine of government, one finds remarkably little evidence that the desirable virtues are developed and maintained by narrowing the scope of market activity.\(^{26}\)

Property rights and markets are not inconsistent with the development of morals. Kant recognized this; however, the Kantian critics of organ sales, perhaps with the exception of Margaret Jane Radin,\(^ {27}\) seem to be unsure of this proposition. Although Kant seemed to think that property rights existed in order to permit individuals to develop and extend their personalities; a more basic reason is that without such rights, moral development would be impossible.\(^ {28}\) In the absence of property rights, each individual would be compelled to devote a large share, if not all, of his time to defending against the expropriative efforts of others. In such an environment, it is impossible to make long term plans of improving oneself. The general insecurity in one's person and things would encourage an increasingly narrow and short-term view of one's interests. The existence of property rights is a necessary condition for the development and maintenance of virtue, as envisioned by Plato.

What about selling property? The act of selling sometimes requires the compromise of certain ideals; as when a person trying to sell his house decides, against his preferences, to water his lawn so that the grass looks greener. But people sell their property in order to acquire new property for which they have a greater need or

\(^{26}\) Quite the opposite appears to have happened. There are numerous accounts of spectacular corruption and the generally low state of public morals in communist and former communist countries; for one recent account, see Thomas L. Friedman, "Russian Roulette", New York Times, Wednesday, May 3, 1995, at A15.

\(^{27}\) See Radin, "Property and Personhood", supra fn. 6. Radin finds clear moral justifications for protecting the right to exclusive possession in certain items. However, the right to exchange an item on the market is not viewed by her as deserving the same level of legal protection. See Radin, "Market Inalienability", supra fn. 6. This distinction between the moral claims to hold and to sell items is also found in Kant's writings. However, what is novel in the writings of some of the modern Kantians is an aggressive denunciation of the moral appropriateness of market transactions in certain items, and even of economic terminology in general.

desire. The option of taking property to the market gives the owner incentives to preserve and improve the property, i.e., to maximize its productive capacity. In addition, because the option of selling opens the possibility of Pareto improving transactions, men learn to cooperate in order to produce a joint surplus.

Still, one might say that this seems fine for houses, or furniture, but what about body parts? I fail to see why many of the virtues encouraged in markets for real or personal property would not also be encouraged by a limited market in human body parts. The right of exclusive possession has been recognized for quite a long time, so there is nothing controversial in that aspect of property rights in the body. The right to sell would introduce a new feature to the law, and this feature could encourage desirable traits; provided, of course, the market is regulated in an appropriate manner.

Consider, for example, Lloyd Cohen’s futures market proposal. Those who chose to enter into such contracts would have greater incentives to maintain the health of their organs. Where prohibitions against drugs, alcohol, smoking, and prostitution have generally failed to eliminate the injuries associated with such activity, recognizing the market value of body parts would encourage those at risk for engaging in such behavior to give more thought to the hazards. It would be foolish, of course, to think that recognition of value in body parts would lead to the elimination of vices that have been with us since the dawn of intelligence. But it would alter incentives on the margin, in ways that would benefit all. Prostitutes probably would not exit their trade altogether, but they would have a greater incentive to minimize the health risks.

The liability facing potential injurers would also be larger in such a regime, enhancing their incentives to take care in order to avoid injuring others. Physicians, aware of the potential market value of human organs, would have an additional reason, on the margin, to take care in performing invasive procedures.

Of course, as soon as we mention the incentives of individuals to maintain their organs, we see the question on the other side: what kind of person wants to think of himself as a collection of valuable body parts? Framed in this manner, most people would object. But markets do not frame questions in this manner. Just as there are different ways to frame a question, there are individuals who will reach different conclusions if given the choice to participate in a market for organs. For those who find unbearable the very thought of themselves as carrying valuable parts, they need not participate. Their preferences, however, should not govern the decisions of others.

29 Though Leon Kass expresses concern that the Uniform Anatomical Gift Act (UAGA) has distorted the law seriously by recognizing a property in the body, see Kass, supra fn. 4, p. 79. It is sometimes said that the common law recognized no property in the body, save a "quasi-property" recognized in relatives with respect to the body of the deceased. However, it is clear that the common law protects the right of exclusive possession of body parts, so in this sense, it does recognize a limited property in the body.
It should also be noted that we already have active markets in which people are led to think of themselves as having a certain value. Consider, for example, life or disability insurance. A working father who purchases life insurance is very definitely encouraged by participants in that market to think of himself as an earnings stream dedicated to the benefit of his wife and children. As competition expands in the health care industry, people will be led, more and more, to associate their physical condition with a certain price. One could object that these markets encourage people to think of themselves and their bodies as decomposable into valuable assets. However, participants in these markets seem not to be troubled by these concerns. Indeed, markets for life, disability, and health insurance encourage desirable conduct. By pricing risks to health, they ensure that risk levels are communicated through market prices. Employees are therefore led to employment decisions that minimize risk, and employers are encouraged to design worksites in order to minimize the risk of injury to employees. To the extent people are encouraged through risk pricing to avoid imposing risks on others, except in cases where the potential benefits justify the imposition, markets for insurance reinforce incentives created by tort law.

Finally, cooperative behavior in the organ procurement process itself would be encouraged by the introduction of commerce. In the distribution of organs, markets would encourage standardization of procedures among organ procurement agencies, so that procurement networks could work more effectively. In addition, some commentators have suggested that the low rate of organ donation by members of racial minorities may reflect a general distrust of actors within the health care system. This distrust enters into the minimum asking price as a subjective cost. Compensating providers for these costs would increase rates of donation within these groups. As black Americans, for example, learned from experience that the relevant actors could be trusted, the need to compensate for the subjective distrust element would decline to zero over time.

B. Commodification and Incommensurability

The notions of commodification and incommensurability are so closely related that I will deal with them at the same time. While it is possible to distinguish some of the concerns raised under the two headings, the overlap is substantial. Commodification is a problem in the area of organ sales because by permitting this sort of commerce, we suggest to ourselves that body parts should be treated as ordinary commodities, like apples and oranges. One of the reasons for not doing this is that

30 See Hylton, supra fn. 2, p. 207.
the human body is incommensurable with other commodities. I will elaborate on these criticisms.

One can think of the commodification critique as another angle on the degradation argument of the previous section. According to Kant’s first proposition, we degrade our persons by selling body parts in the market. Integral parts of the body, like the body itself, are important aspects of one’s person, and should therefore be treated as within the kingdom of ends.

The incommensurability argument is itself an elaboration of the commodification critique. We start with the premise that certain items cannot be properly accounted for by stating their value in dollar terms. There is too much involved in the “trade” of these items to reduce all of it into a price. It may help to consider a few examples that illustrate the inappropriateness of trading goods of this sort for money.

Suppose, for example, you offer to pay a next-door neighbor $10 to shovel the snow in your yard. The fee may be on the high side for snow-shoveling, but the neighbor will probably be deeply offended by the action. Or suppose, instead of taking a date to dinner, you offer a certain sum of money as a substitute; or to express your gratitude for going to dinner with you, you offer your date a certain sum of money. In each of these transactions the recipient of the offer is likely to be deeply offended. Why?

Some have argued that there are limits to the range of the market, and to economic concepts in general. 32 Some items cannot be priced, it seems. This argument is extended, of course, to bodies, and to body parts. 33 The body itself, according to this view, is an asset that cannot be reduced to a price, like an automobile. Neither should we think that parts of the body can be similarly reduced. Further, by stating prices for bodies and body parts, we give support to a view of ourselves as a collection of parts, which is demeaning.

Let us return to the examples of offensive price offers. Why were they offensive? Because in each case, the offer of payment sends the signal that the offeror sees the transaction as complete, while the sort of exchange envisioned by the other party is of a reciprocal and long-term nature. Consider farmers living next to each other. It is an accepted norm in such communities that they will help each other if, say, one experiences a break-down in his equipment when the crop must be harvested. But the norm is understood as a reciprocal promise that extends indefinitely into the future. In other words, to attempt to use price as a means of effecting such an exchange would be inconsistent with the understanding of the other party. It would suggest to the other party that you do not recognize your

33 See Kass, supra fn. 4; Munzer, supra fn. 5; Radin, “Market Inalienability”, supra fn. 6.
responsibility to comply with the norm. By offering payment you send the signal that you view your duty to your neighbor as closed by the payment of a fee.\textsuperscript{34}

The point is that there are some settings in which the exchange is assumed to be of a reciprocal and possibly long-term nature. That is true of neighbors living next to each other, of friendships, of marriages, and even of certain one-shot transactions. In these settings, market prices have no place because they send the wrong signal, a signal that is inconsistent with the assumptions underlying the transaction or relationship.

But to say that such settings exist does not imply that prices always send a signal of devaluation. Return to the example of the farmers. The fact that a neighbor may help for free does not mean that a farmer should not pay someone else who offers, for a fee, to provide the help that might have been provided by the neighbor. And the fact that it would insult my neighbor if I offered him $10 to shovel my snow does not mean that it would insult a teenager who knocks on my door and offers to shovel the snow for a negotiable fee. The existence of a fee-for-service market for services that are also provided within long-term, reciprocal exchange relationships widens the set of options available to people, which is a benefit. The existence of such a market need not imply a devaluation of the reciprocal relationships, and neither is it a perfect substitute for the reciprocal relationship. For example, the existence of prostitution need not imply a devaluation of marriage. People are intelligent enough to distinguish between the marriage relationship and the typically shorter transaction with a prostitute.

Similarly, the existence of a market in body parts need not imply a devaluation of the body. If this were so, the body would have been devalued long ago by the existence of markets in blood and sperm. Yet in spite of the long existence of a blood market, people generally do not view their blood as a commodity, like orange juice. Moreover, they continue to donate blood, even though they are aware that it can be sold. This suggests that the introduction of commerce in body parts would not lead to a devalued or corrupted view of the body.

If we were all part of one family, there would surely be no need for prices to motivate the supply of certain items, and it would be insulting to members of the group to offer to pay for the supply of goods. But after moving beyond items that can be supplied at relatively low cost, people do not, in general, voluntarily incur

substantial costs in order to supply goods to people outside of their families, free of charge. The price system motivates individuals to supply goods to people who are not family members. No one has suggested that the existence of these incentives has somehow weakened families. I see no reason not to expect the same pattern in the market for body parts.

C. Equity

The third general theme running through the Kantian critiques of organ selling is the claim that it violates basic notions of fairness and equity. Critics point to the potential for inequitable outcomes on the demand side and on the supply side. On the demand side, the organ market violates notions of equity because items as vitally important as human organs would be distributed on the basis of willingness and ability to pay. On the supply side, notions of equity are violated by the phenomenon of poor people selling organs to the rich, a practice which seems uncomfortably close to slavery.

Let us consider the demand side argument first. It is true that organs are vitally important, but so are some other items, such as food and housing. With respect to such items, economic theory suggests that there may be a trade off between equity and efficiency. The efficient allocation of resources is best achieved through the price system. However, there is no guarantee, in theory, that the market allocation will be equitable or fair. In particular, there is nothing in the theory that suggests that a market will not lead to an allocation in which poor families receive inadequate or only low-quality food, while a handful of wealthy adults receive far more food than they can consume.

Concern for the potentially inequitable results of the market has led governments over the years to intervene in markets by setting price ceilings or requiring distribution without charge, on the basis of some measure of need. The various experiments in socialism are important examples of this, but even in the United States there are many jurisdictions in which certain prices are capped, as in the case of rent control. The theory underlying these efforts is that with respect to certain commodities, the price system should not be relied upon as an allocation mechanism because it is important that everyone obtain a fair share. In other words, there are some items that are too important to have their allocation left to the market.

Hayek referred to this theory as the "fatal conceit."35 It is fatal because when put into practice, it often results in misery. It is based on a conceit because economists have long been aware that the equity-efficiency trade off does not require one to forgo the benefits of the price system as an allocation mechanism. The price

system can be maintained while equity concerns are met through a system of lump-sum transfers among households. The conceit implicit in the theory is the notion that an alternative administrative mechanism can be developed, run by government officials, that would work as well as the market without raising troublesome concerns over equity.

In actual experience the equity-efficiency trade off has not been so severe that alternative governmental allocation schemes seem preferable. Consider the paradox of food supply. Perhaps no category of goods has a greater claim to being called a necessity than food. In other words, if, because of equity concerns, there is a set of goods too important to leave their distribution to the market, food should certainly be within that set. However, one finds generally that market economies produce and distribute a greater per capita quantity and quality of food than is produced in socialist systems. In the United States, where except for the government’s attempts to regulate agriculture, the price system largely governs the allocation of food, the cost of food as a percentage of the typical family’s budget is considerably lower than in socialist Cuba. And the quality of food available to a family well below the poverty line in the United States would seem fantastically high to a middle-class Cuban.

Some of the important efficiencies observed in the market for food in the United States probably would be observed in a market for body parts. At present, as many commentators have noted, a significant percentage of transplantable organs are wasted because of incomplete standardization of procedures among participants in the organ supply network in the United States.36 High wastage rates are also a common feature of food supply networks in socialist countries. It is quite possible that the wastage problem observed in the organ supply process in the United States is, like that observed in the food networks of socialist countries, a byproduct of the absence of property rights and enforceable claims on the demand side.37

What about the problem of equity on the demand side; i.e., the possibility that all of the organs for transplantation will end up in the bodies of the rich? If that happened, the best solution would be to subsidize organ purchases by the poor, not to abandon the price system as a method of allocation. However, there are good reasons for believing that this is a problem that would not materialize, as I hope to make clear in an example considered below.

Now let us consider the supply side equity argument. The equity concerns would be raised by the phenomenon of poor people selling their organs to the rich. Is this likely to occur?

To get some sense of the likely participants, let us return and further develop one of our earlier examples. Suppose a kidney provider incurs $2000 in travel and

36 Prottas, supra fn. 31.
housing expenses required by the act of donation, and loses two weeks of time from work, and his salary is $1000 a week. It is virtually certain that the loss of one kidney, as a result of donation, will reduce his expected future working years by one half year, resulting in a loss of $9,639 in present value terms. Suppose these are all of the costs connected to the donation, so full compensation of the provider requires payment of $11,639.

Is it possible that a less well-off individual might purchase the kidney? Consider the interests of the potential recipient. Suppose he has, in expectation, five years left to work (given the illness), and finds that his work life can be extended, in expectation, by five years as a result of a kidney transplant. How much would this potential recipient be willing to pay for a new kidney? He should be willing to pay up to an amount equal to the present value of the increase in his lifetime earnings. Suppose he, like the provider, works fifty weeks a year, and the interest rate is ten percent. If \( X \) is his weekly wage, the present value of the increase in earnings is

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50X[(1/1.10)^6 + (1/1.10)^7 + (1/1.10)^8 + (1/1.10)^9 + (1/1.10)^{10}] ,
\]

which is also the maximum offer price of the recipient. Equating this with $11,639, we find that if the potential recipient makes a salary in excess of $99 a week, he will be willing to offer a price in excess of the full compensation fee to the organ provider. Recall that the organ provider’s salary is $1000 a week.

I have just described a transaction in which a relatively poor individual buys an organ from one who is considerably wealthier. Was this just a numerical slight of hand? No. The features of this example are quite general as descriptions of a transaction for a body part. The general features suggesting the possibility of transactions similar to the one in my example are: (1) the gain in the organ recipient’s working years is larger than the loss in the organ provider’s work years, and (2) the interest rate is positive. The latter factor, though unimportant in my example, is important generally because the gain to the organ recipient ordinarily will be immediate, while the loss to the provider will be experienced in the distant future.

The general lesson of this example is something that is observed in markets all of the time. Willingness to pay is a function of wealth, but it is also a function of interest, need, and the size of the benefit to the buyer. For these reasons, there is likely to be a substantial percentage of transfers in which relatively poor individuals are acquiring organs, sometimes from wealthier providers.

Whether in fact the pattern that results raises fairness concerns is, in the end, an empirical matter. The pattern will depend on the composition of organ recipient registries and the type of body part that is being transferred. The composition of the kidney recipient registry in the United States does not suggest that an organ market would result in transfers from the poor to the rich: black Americans, a relatively poor group, make up roughly thirty percent of the registry.\(^38\)

\(^{38}\) Prutnas, supra fn. 31, p. 293.
A tissue such as bone marrow, which can be extracted relatively easily, may develop into a market which resembles the current market for blood. In the blood market, the rich generally donate, and some of the poor sell. Indeed, few of the rich would sell their blood for fear of the reputational damage that might result if it were known that they were selling blood, a sure sign of financial distress. The same sort of bifurcation might eventually be observed in a market for bone marrow.

Finally, suppose the resulting pattern is in fact one in which relatively poor people sell body parts to the rich. Is this a problem? If so, what distinguishes it from the fact that relatively poor individuals often accept dirty or hazardous work that the rich generally avoid? Surely the distinction cannot be based on the degree of risk incurred: many lines of work present risks more serious than those incurred by an individual who donates a kidney. I suspect that “the problem” in the eyes of the Kantian critics is not that the sellers in organ market would not be as wealthy as the buyers, but that the sellers may be seriously compromising the quality of their lives. But this problem can be avoided by adopting a system, such as the Cohen proposal, in which physical transfers take place only after the death of the organ provider.

D. Some Notes on Implementation

In spite of my efforts to counter the arguments of the Kantian critics, I do not believe that an unfettered market in body parts would be a good idea. Indeed, some of the problems identified by the Kantians are important and need to be taken into account in any market-oriented organ supply system. The general thrust of my argument is that the serious problems are largely on an administrative level. In short, the ethical case against any commerce whatsoever in body parts is weak. The important problems are of a utilitarian, administrative nature, and concern the optimal design of a market-based system. Since I have discussed many of these problems elsewhere, I will deal with only four of them briefly here.

One question that must be addressed is who can claim property in body parts. It is an obvious concern because one undesirable result of a system in which body parts have value in the market is the incentive given to unscrupulous characters to kill and dismember people in order sell their parts. Alternatively, will a creditor,

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39 For example, Leon Kass, discussing the equity problem, notes that as he “read[s] about the young healthy Indian men and women selling their kidneys to wealthy Saudis and Kuwaitis, I can only deplore the socioeconomic system that reduces people to such a level of desperation.” Kass, supra fn. 4, p. 76. However, the sale of kidneys by the young and healthy can be prohibited without banning any sort of commerce in organs.

40 One is reminded of the scene in a Monty Python movie in which organ traders show up on a man’s doorstep. After explaining their purpose, they force their way into his house and restrain him as they remove a kidney with a chain saw. As one might imagine, there are real life stories that are not much milder. The most famous is the story of Burke and Hare, a team
under such a system, claim ownership of the bodies of his debtors? Will the guardian of a mentally retarded teenager sell parts of his body? Although there are a number of ways to avoid these outcomes, one easy solution would be to prohibit all such vicarious sales. Only the possessor should be permitted to claim property in his body parts while alive. Where the possessor has not entered into a contract to sell body parts, the common law “quasi-property” rule granting the right to possession of the cadaver to the next of kin for burial purposes should remain the law.

A second problem, often considered a serious ethical concern, but actually belonging in the administrative category is the problem of “coercion.” Writers who refer to this are usually discussing the problem of deals in which the seller realizes, after agreeing to sell the body part, that is was a mistake. Either the compensation turns out to be inadequate, or he misunderstood the down-side risks, or he simply failed to realize what was best for his long-term interests at the time he entered into the agreement. Should people be held to these bargains? Absolutely not. The common law has shown a deep respect for bodily integrity; no court would enforce a contract requiring a party to cut off and transfer an integral part of his body.41

The problem is a little more complicated where the seller is dead. The common law rule grants the family quasi-property in the body of the deceased, for the purpose of arranging burial. Here the question arises whether the wishes of the family members are to be respected if they refuse to hand over the body. The case for changing the common law rule, which grants the right to the family, is not entirely clear. For if the common law rule were kept intact, the parties involved in a sales transaction would know that they would have to get approval from close relatives in order to have an enforceable claim to the body parts of the seller. This may be a desirable rule because it would in effect require the seller to discuss the matter with his family before entering into a sales agreement. The family would prefer the advance notice, and the seller would benefit from hearing their views. Indeed, the “coercion” potential – i.e., the problem of mistaken deals – might be eliminated altogether through these early discussions among family members.

A third frequently discussed issue is that of quality deterioration. The fear is that in a market-oriented system, there would be a dramatic increase in the percentage of diseased organs and tissue offered for transplantation. The problem is observed, of course, in the blood market. The answer is that there are a number of market mechanisms for controlling the problem of quality deterioration. For example, under a system in which sellers contract to provide body parts after death, organ procurement firms could screen for the quality of organs initially and monitor quality through the term of the contract. Through the development of stable registries of

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suppliers, a practice observed in the blood market, quality deterioration could be largely avoided. In addition to this, organ providers will have incentives, under a market system, to develop reputations for quality and to provide warranties.

Finally, a fourth problem is market structure, and it is closely related to the quality deterioration issue. At present organ procurement agencies in the United States are local monopolies, are required to be so in order to receive federal support. Clearly the United States government would have to reverse this policy if a market-based procurement system were ever developed. Quality in the provision of goods is enhanced by competition, and there is little reason to think that organ supply is different in this respect.

III. Conclusion

It is easy for an economist or philosopher who approaches this subject to march quickly into an abstract discussion of the limits of the market, but we are dealing with a simple policy issue, the answer to which would dramatically effect the quality of the lives of thousands on organ donor recipient registries. Should body parts be sold? Or, alternatively, should body part providers be compensated for their costs? The ethical case against sales for gain is difficult to make, or to accept, and I find the case against full compensation entirely wanting. The serious grounds for objecting to a limited market in body parts are not on a moral level, but almost entirely on the level of administration.

Zusammenfassung

Es gibt Autoren, die gegen den Handel mit Körperteilen moralische Einwände anführen. Der Beitrag untersucht diese Einwände im Hinblick auf die wirtschaftlichen Beweggründe sowohl von Organenempfängern als auch von Organspendern. Im Lichte der dabei angestellten Überlegungen verlieren die Einwände erheblich an Gewicht.