

Is the Body Property?

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In his recent essay in these pages, Eric Cohen argues that “the new commerce of the body” challenges us with an unprecedented “moral crisis.” The case for the crisis goes something like this: The great founders of modern capitalism and modern liberalism did not actually intend that the free market’s principles of contract and consent transform every feature of human life. But it is increasingly clear that we may be in the middle of just such a transformation.

What Cohen calls the new spirit of capitalism is really just the triumph of libertarianism, and in America today creeping libertarianism is starting to get pretty creepy. The sophisticated American that David Brooks called the “bourgeois bohemian” seeks to reconcile personal responsibility or prudent self-restraint with the pursuit of personal fulfillment. But our trend toward the reduction of morality to contract and consent has also caused us to regard ourselves—our very bodies and souls (or “moods”)—as materials to be transformed at will, both in the self’s relentless quest for satisfaction and in the pragmatic drive to be useful and pleasing to others.

It turns out, as Cohen explains, that the Sixties radicals did not oppose but actually removed barriers to the commodification of persons: They sought to remove shame, taboos, and other repressive illusions about what we can do with our bodies and minds. Our radicals taught that “I can do my own thing; I don’t have to sell myself to the man.” But the corollary lesson was that nobody can tell me I can’t sell myself to the man. Sophisticated Americans can now be bourgeois bohemians because they have discovered there is no necessary tension between the bourgeois and bohemian spirits in our country. The historical achievement of American bohemians was ultimately to level authoritarian resistance to the spirit of capitalism enveloping all of our lives, allowing commerce to colonize once unimaginable realms—including, perhaps, the buying and selling of body parts from the living.

In a sense, Gilbert Meilaender’s essay on whether human organs are rightly seen as things to be sold is a sequel to Cohen’s broader reflection on the new capitalism. Cohen mentions, in passing, people who might someday “sell their deceased loved one’s organs”; Meilaender considers, in full, the meaning of organ selling, including living vendors who would

liquidate their extra kidney like any other valuable asset. And because of the inherent limit on procuring organs from the truly dead—only a small number of people die in ways that make them potential donors—live kidney sales is where the action is. The supply of living vendors is, for all practical purposes, limitless, especially if we include the most impoverished citizens of the most impoverished nations, who could dramatically improve the material lives of their families by selling a second kidney they don't really need.

There are two reasons for the growing pressure to repeal the prohibition against the buying and selling of kidneys from living donors. The first is human need. The number of people on the waiting list for kidneys is increasing rapidly, much more rapidly than the number of kidneys conceivably available from cadavers or as uncompensated gifts from live donors. People are needlessly suffering on dialysis and dying prematurely because kidneys are not available. The technology to extend and improve the quality of their lives is available, but not the natural material on which the technology depends. Not to use market forces to increase the kidney supply, the argument goes, is inhumane: When it comes to kidneys, “pro-choice” laws are clearly “pro-life.” Like the embryo commerce Cohen describes, the aim is clearly “humanitarian—the pursuit of health, the very good that modern societies most desire.”

The second reason for the anti-prohibitionist pressure concerning the kidney market is the creeping libertarianism that characterizes our society as a whole. As we understand ourselves with ever greater consistency as free individuals and nothing more, it becomes less clear why an individual's kidneys aren't his property to dispose of as he pleases. The fact that this freedom to sell parts of one's own body is unprecedented is not a conclusive argument against its emergence. Justice Kennedy wrote for the Court in *Lawrence v. Texas* that what seem to be necessary and proper restraints on individual liberty to one generation of Americans seem like despotism to the next; our history is the unfolding transformation of liberty into autonomy in one human realm after another. Astute libertarian theorists like Randy Barnett speculate that Kennedy's constitutional analysis points the way to all sorts of new individualistic constitutional rights, including, it would seem, the right to sell one's own body parts.

Remember that the whole argument for property, made by our founding philosopher John Locke, begins with the property each individual has in his or her own body. However the Court may equivocate on details, we

more or less affirm that right to property in one's own body in our constitutional view of a woman's liberty to have an abortion. Why does the individual have the unlimited right to have an abortion—or to destroy what is allegedly a part of her own body for any reason she pleases—and not the right to dispose of a superfluous kidney as she pleases?

Even if my kidney sale is animated by profit, it arguably does me very little harm (the health risks are generally regarded as relatively minimal) and someone else a lot of good. In almost every case, nobody dies, and pro-lifers cannot locate the transplantation transaction with abortion in the so-called “culture of death.” We do draw the line, it is true, at the buying and selling of fetuses, although not so clearly, as Cohen points out, at the buying and selling of embryos. But that's because we think, and even the Supreme Court still concedes, that fetuses share at least some qualities with babies. Commerce in kidneys does not seem to be commerce in human beings. A kidney's moral status, the pro-lifer notices, is incomparably less than an embryo's, and consider how little our law does to protect embryos.

Looking at the matter from another angle, we naturally recoil from the idea that human bodies are natural resources to be mined. And we are rightly revolted by what might well be the resulting redistribution: Healthy kidneys in the healthy bodies of the young would gradually become, via transplantation, failing kidneys in the sick bodies of the old. But arguably that angle is the wrong one under our law: It is up to the individual to choose how to dispose of his or her body, as long as no one's rights are violated. And so as long as the kidney market is properly regulated with health, safety, and genuinely informed choice or consent in mind, we have to let people decide their self-conception for themselves.

It is true that by not letting human beings be considered property, we've made wonderful modern advances toward justice, by making individual rights universal. Turning kidneys and other organs into alienable property might threaten that progress. If I can sell my kidney, why is it that I'm not free to sell my whole body into bondage? But that question, from a Lockean view, gets its force by suppressing a key distinction. The free or autonomous individual “depends” on a body to exercise his freedom, but not on two kidneys. I can surrender a kidney and not alienate any of my inalienable rights; I'm as free to live and pursue happiness as I was before.

In modern America, the most sophisticated people identify themselves and their pursuit of happiness less than ever with the bodies they've been

given by nature. One disturbing feature of all live kidney donation is that it turns a healthy person—the donor—into a sick patient, at least temporarily, and surely the physician should never intentionally do harm to anyone's health. But the cosmetic surgeon also makes healthy people sick, and, unlike the transplant surgeon, with no intention of improving someone else's health. Plastic surgery allows people to choose, to some extent, the body they have imagined over the body they have been given. The small-breasted woman can become amply endowed; a man can, with some mutilation, become a woman. Whatever we think about the morality or even the sanity of these procedures, they are perfectly legal and becoming more common.

“Enhancement” or “transformational” surgery that makes us better than or something other than well involves both commerce and body parts. It is rightly not covered by medical insurance, and the doctors who do it make some of the biggest money in the surgery business. At the same time, people often submit to such surgery for profit: They connect their new appearance—looking younger and better—with personal success. Although it is the individual's choice whether or not to submit to the knife to look prettier, there is sometimes a subtle coercion at work. If people can look better, employers may come to expect it, and those who refuse the available therapy will be at a competitive disadvantage.

The same principle applies to mood brightening: If a pill can reliably put me in a pleasant and productive mood, why can't my dean reasonably press me to make the choice to take it and have my student evaluations shoot through the roof? And this tyrannical subtext even appears in the use of Viagra and similar products: On the HBO show *Big Love*, polygamous wives in the age of postmodern feminism demand equal treatment in every way. Given the limited and preferential character of natural human *eros*, polygamous husbands can be genuine and giving egalitarians only with chemical help.

The old-fashioned polygamy that once flourished in Utah is not, of course, sweeping even Utah today. But our easygoing, libertarian view of divorce coupled with the inexorable laws of nature are imposing similar demands on older men who have welcomed opportunities, in effect, to trade in their first or even second wives for younger and more vigorous models. The more libertarian or purely capitalistic a society becomes, it seems, the more performance-oriented even love becomes. Not only are we the people who invented Viagra and other forms of biochemical sexual

enhancement, we are the people who think we really need them. It's foolish to enter the romantic marketplace with anything less than big love.

When it comes to public policy, health and safety are increasingly the only shared morality we have left. "Safe sex" is the only sexual ethic we acknowledge in common, and we are becoming increasingly puritanical, prohibitionist, and paranoid when it comes to diet, exercise, second-hand smoke, and trans-fatty Oreos. At the same time, we are becoming ever more indifferent to moral objections to the "free market," and the language of contract and consent—the language of the autonomous individual—is increasingly shaping every feature of our lives. As long as it is safe and consensual, we are inclined to let people do pretty much whatever they want.

In this context, moral objections against an organ market on behalf of "human dignity" make less sense to us, and the obvious health and safety benefits of such a market for tens of thousands of Americans seem especially urgent. If the physical risk to the donor is our primary concern, of course, then we should ban both kidney donation and kidney sales: both are equally dangerous. But given how minimal that risk is, the only argument we have left against kidney sales is the possible exploitation of poor, desperate vendors, who sell their bodies because they have nothing else to sell. But even liberals, like bioethicist Robert Veatch, seem increasingly convinced that in a rich society with persistent poverty, the poor might as well increase their worth by selling a kidney—so long as it is safe.

And safety is exactly what a regulated market might offer. If abortion were illegal, many argue, it would not disappear; it would just go underground and become much less safe. Likewise, when it comes to kidneys, the real choice is either a legal, regulated market with the safety of vendors protected by law, or black markets that are much less safe for organ vendors and recipients alike. The horror stories from other countries are real: Poor people desperate for cash make terrible financial deals with organ brokers; the surgery is performed in substandard conditions; the vendor's health is ruined and no one really cares. The organ recipients in such deals sometimes fare little better—getting organs of questionable health, transplanted by doctors with questionable credentials, only to return home with a questionable legal and medical standing. If the alternative is death, however, one understands why the sick take their chances in the black market rather than stay home to perish on the organ waiting list. It is unrealistic to believe, libertarians say, that their moral scruples will characteristically trump their reasonable desire to stay alive.

I recently spent a couple of days at a very affluent retirement community filled with wonderful old men and women of noble achievement. One among them had discovered, quite to his surprise, that he was very near kidney failure, although his health, overall, was not so bad. His response was to search the Web, develop contacts, and enter into negotiation for a kidney with a broker who could find him a live donor abroad. As far as I can tell, nobody in the community had deep moral qualms about what he was doing, and the general view was that he was approaching a terrible personal problem sensibly and forthrightly. (He is too old to find a place on the official donor list, and presumably at his age he does not want to burden any of his loved ones with a request for a donation.)

I realize I am not reporting the results of some scientific study, but only one case of a rich, admirable, and smart American quite willing to engage in illegal, dangerous, and likely exploitive behavior. In the libertarian's view, he is a victim of the outmoded and repressive system that prevents him from achieving his goal safely, legally, and consensually. We can easily imagine a compassionate liberal presidential candidate campaigning on behalf of a policy that makes the buying and selling of kidneys safe, rare, and legal. At the same time, technocratic conservatives like Newt Gingrich desperately want to break the government monopoly on kidney distribution. They see no reason to treat the body any differently than any other commodity, attacking the over-regulation that has created an unnecessary shortage. When it comes to organ sales, and much else, liberal libertarians and conservative libertarians are becoming ever more alike.

Some people are inclined to blame the kidney shortage on bad individual behavior—in particular, the “epidemic” of American obesity, which causes high rates of diabetes and uncontrolled hypertension, which cause high rates of kidney failure, which create an excessive demand for healthy kidneys to replace the ones we’ve destroyed. In response, they preach the gospel of personal responsibility and preventive medicine—a way to ameliorate the kidney shortage by reducing the demand.

Preventive medicine can, in fact, prolong lives and save some people from kidney failure. But in reality, it can't do all that much to address the burgeoning kidney shortage. Millions of Americans have chronic kidney disease, which usually progresses slowly and irreversibly over many, many years. Losing weight and taking blood pressure medications can slow its progress, but not stop it altogether. And even if today's teenagers

embrace the gospel of healthy living, we face an unavoidable multi-decade kidney shortage as the baby-boomers age.

Part of the explanation for the growing rates of kidney failure is that modern medicine keeps individuals alive long enough for their kidneys to fail, rescuing them, at least for a while, from earlier causes of death. This longevity boon also creates a corresponding kidney shortage; our medical successes create new medical miseries, like lives dominated by dialysis, and new medical “crises,” like organ waiting lists. There is a very rough parallel here between kidney failure and Alzheimer’s disease. Fending off other natural agents of death leaves more people to die on dialysis or with dementia, thus ending their lives with particularly tough, chronic, debilitating, expensive, and care-intensive conditions. And finding a definitive remedy for either condition would presumably result in many more people dying of the other: cure kidney disease and Alzheimer’s rates will go up; cure Alzheimer’s disease and rates of kidney failure will go up. Either way, a particularly horrible form of dying seems to win.

For most people, dialysis is better than death, although it often feels like a death sentence. Dialysis is a universal entitlement for Americans under Medicare. It was sold to Congress as a way of bringing lots of hopeless cases back to productive and reasonably high-quality lives. In truth, the overwhelming majority of those on dialysis cannot work, and their lives are more or less consumed by the tasks of suffering and staying alive. There is a profound book to be written on those with the extraordinary virtue that is required to live dignified lives on dialysis. But it may well not be written: Those on dialysis are the most invisible Americans; they don’t have the time or energy to lobby politically or do much creatively to inspire others.

If there is a “crisis” that a kidney market can solve, it is not that people are dying relatively quick and painless deaths from kidney failure. We’re all born to die, and kidney failure is probably one of the better ways to go. The “crisis” is that a growing number of people are stuck dying a slow and painful death on dialysis with less and less hope of transplantation, and surely what has made dialysis bearable for most patients has been that hope. Of course, we can note that our society is “pro-choice” on whether or not to remain on dialysis, and in our more philosophic moments we can speculate on whether it would have been better had dialysis never been invented or never become an entitlement. But we also would not want to fuel the despair of those who would get off dialysis mainly not to be a burden to their loved ones or the taxpayers.

Cohen describes the futuristic embryo market as “a form of cannibalism of the weak by the strong.” By comparison, a market that made kidneys available to dialysis patients might be called cannibalism of the weak (those in desperate enough straits to cash in the extra kidney) for the weak (because the people on dialysis are disproportionately poor, suffering, and African-American). It might produce an America where fewer African-Americans have two kidneys, but where more have at least one that works. The black markets that now exist, by contrast, are clearly the rich, desperate, and devious preying upon the unfortunate and credulous.

The case for kidney markets and against dialysis is made not only in terms of human suffering but also excessive cost. Our budgeteers worry that dialysis—especially combined with Alzheimer’s—will make Medicare unsustainable, and most of our libertarians aren’t really libertarian enough to seek the dismantling of Medicare. A kidney market, they say, would make those with kidney failure less of a burden on the taxpayer. Medicare could pay big bucks for live kidneys—maybe even \$100,000—because individuals with transplanted kidneys are cheaper over the long run than those on dialysis. (Of course, in the age of globalization, there is probably no shortage of individuals who would sell their kidneys for much less; as Nicholas Capaldi blandly observes in his polemic in favor of organ sales: “serious economic studies have shown” that “many third world countries began to climb out of poverty...by supplying something that wealthier economies needed.”)

Ultimately, the effort to extend the spirit of capitalism to commerce in kidneys depends on a very specific stage of scientific progress. Not so long ago, there was neither dialysis nor transplantation. Transplantation—because bodies naturally rebel against alien organs—initially produced sick people who typically didn’t live very long. For a while, the mortality statistics on transplantation and dialysis were similar, and the wait for a kidney wasn’t much more than a year. In recent decades, the length and quality of life after transplantation has been constantly improving, especially for those who are fortunate enough to get a live-donor kidney before having to go on dialysis. The drugs that suppress immune rejection work better and with fewer horrible side effects.

The result, of course, is that the kidney waiting list gets longer, radically diminishing both the likelihood of getting a transplant and the likely benefit of a transplant. The wait is projected to approach a decade fairly soon, and virtually no one can remain transplant-worthy or even alive on

dialysis for that long. Even in the most successful cases, dialysis slowly poisons the very patient it saves. It seems to cause various other serious health problems. And there is no immediate prospect of significant progress in the quality of life on dialysis.

In the future, the need for kidneys might be met through xenotransplantation or regenerative medicine or someday even the development of artificial kidneys, and treatments that arrest or reverse chronic kidney disease might well be developed. But for now, modern science has presented us with a human need that seemingly can only be met by lifting a long-standing taboo on capitalism's reach: My allegedly superfluous kidney has never before been regarded as part of my net worth in dollars. Arthur J. Matas starkly states our moral dilemma: "discussing organ sales simply does not feel right; but letting candidates [on dialysis] die on the waiting list also does not feel right."

Let me be clear that I haven't endorsed the growing push for a market in kidneys from living "vendors," nor have I tried to make the moral and philosophical case against it in any depth. All I've done is show how libertarian premises and humanitarian concerns have made commerce in kidneys seem plausible. For those of us who aim to limit the spirit of biocapitalism in our time, the task ahead is very daunting indeed.

Leon Kass, a prominent opponent of organ sales, saw this problem long ago: "Once the principle of private right and autonomy is taken as the standard, it will prove difficult—if not impossible—to hold the line between donation and sale." For Kass, the possibility of a kidney market shows us "the limits and, hence, the ultimate insufficiency of rights and the liberal principle," but he does not provide a clear program for getting our legislators and courts to acknowledge that our founding principle of rights needs to be checked with some higher or more comprehensive idea of dignity. Even Francis Delmonico and Nancy Scheper-Hughes, who lead the medical and religious establishments in opposition to organ markets, concede that "Arguments against organ sales from live donors are difficult to defend in a secular and free-market-dominated society such as ours, because they cannot be referenced by a traditional Christian morality." To which the Catholic libertarian Capaldi responds: "In a modern liberal society that is religiously 'neutral' and has a market economy, there will and ought to be a market in human organs," and the Church has to face up to that fact and participate in the organ market in a way that respects "Catholic values." The Church, I suspect, will resist that conclusion, but

can our country really rely upon such resistance as the foundation for its secular and liberal public policy? Or can the seemingly indefinite progress of the principle of individual autonomy into every feature of our lives be resisted by an appeal to the truth about natures—that is, by natural law?

It is in this context that Meilaender's argument about the meaning of the body should be judged. Meilaender writes tellingly about how our overemphasis on the pursuit of health threatens to undermine our dignified acceptance of death. Even the imperative of procuring organs from the "newly dead" often transforms the moment of death into a high-tech desolation. And the whole idea that the organ "crisis" must be met with every means at our disposal depends on a "too simple moral position for which saving of lives always has trump." Surely saving lives should not come at the expense of "los[ing] the meaning of the distinctively human lives we want to save."

The idea that selling one's body is a right depends, says Meilaender, on an understanding of bodily ownership that "sever[s] the person from the body." It puts every individual in the imaginary and genuinely alienating position of understanding the "self" as existing apart from the body, as wholly sovereign over the body, as a "spiritual overlord" free to use the body as one pleases. Yet this view is misguided: I delude myself when I think of my allegedly surplus kidney as no different from, say, my land—that is, as part of my net worth, to be disposed of at will. If I think of myself truly as a whole or embodied human being, who is more than the sum of my mental, willful, and physical parts, then my "bodily integrity" continues "to be a very great good," inseparable from my integrity as a living person.

Meilaender argues that selling one's body parts is an undignified commodification of "the unique and irreplaceable person." But this irreplaceable person might generously give a gift of himself—including a gift of his kidney. The great good that is bodily integrity can be trumped, but only in a way that is compatible with the virtuous dignity of the human person.

In the end, Meilaender challenges us with the thought that we ought to rank dignity or moral virtue higher than life and liberty. He defends this truth about our nature against the charge that opposition to organ sales is just an archaic taboo. But in the days ahead, it is not clear if the existing limits on commerce have much ground left to stand on, especially in our health- and autonomy-obsessed time. Leon Kass called his moral

defense of human distinctiveness *Life, Liberty, and the Defense of Dignity*. We Americans cannot help but notice that he deliberately altered the text of our statement of fundamental political principles—the Declaration of Independence. Happiness’s pursuit is replaced by dignity’s defense.

We should all be grateful to those like Gilbert Meilaender and Leon Kass who have devoted themselves to reversing or at least slowing our creeping and sometimes creepy libertarianism by challenging, in the name of human dignity, some basic premises of the modern or “capitalist” idea of liberty. But from kidneys to embryos to everything else, they face an uphill climb. The human need for health and the human longing for liberty challenge relentlessly every moral impediment that stands in their way.

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