

Creating A Legal Market In Kidneys: Recognition of Ownership of the Body and Its Parts and A Proposal For A Legal Kidney Market

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I. INTRODUCTION

Central to libertarian ethos lies the well-embedded mantra, 'The body is mine, and mine alone'. Under the auspices of libertarianism, the core principles accentuating the right to self-ownership clash with the long-standing provisions in law against the recognition of a proprietary interest in one's body. The critical disparity between supply and demand in organ transplantation and its ramified loss of life has been documented worldwide.¹ In a world where three people die each day in anticipation for a kidney in Britain, and eighteen people in the US,² the need for kidneys is urgent. The traditional 'no property' approach in English law to the human body, including biomaterials leading to the denial of a commercial kidney market (ss 32 and 33 Human Tissue Act 2004), has fuelled this shortage. Inevitably, 'a global black market in human organs and a booming transplant tourism industry has materialised'.³

Controversy highlights the live debate regarding the valuable consideration for the exchange of a kidney. Advocacy for such a commercial market in kidneys has resulted in fundamental concerns with apprehension of opening up a Pandora's Box of ethical dilemmas. The underlying issue concerns the ownership of the body and its parts — vital for discussion because ownership is a prerequisite for economic transactions.⁴ Therefore, to deal successfully with

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¹ Alireza Bagheri, 'Compensated Kidney Donation: An Ethical Review of the Iranian Model' (2006) 16(3) Kennedy Institute of Ethics Journal 269.

² 'Organ Donation: Statements And Stances' (*Organ Donation*, March 2010)

<http://www.organdonation.nhs.uk/newsroom/statements_and_stances/> accessed 20 January 2014.

³ Steve P Calandrillo, 'Cash For Kidneys? Utilising Incentives To End America's Organ Shortage' (2004) 13 George Mason Law Review 69, 87.

⁴ Barbro Björkman and Sven Ove Hansson, 'Bodily Rights and Property Rights' (2006) 32 Journal of Medical Ethics 209.

commerce and remuneration, we must clarify the extent to which the body and its parts can be recognised as property.⁵ This Article provides a theoretical and legal analysis through the lens of libertarianism, arguing for self-ownership. Those hostile to self-ownership and a kidney market argue that it commodifies the body, challenging one's moral integrity. A market raises fears of predicaments such as exploitation of the poor, who, in times of destitution, will be attracted to making a quick buck via the system, making them slaves to the rich by providing them an abundant supply of kidneys. This Article however demonstrates that the body is already commodified, highlighting the contradictory nature of the law, and that injustice and inequality underlie any system and will be inevitably impossible to combat completely. A limited property right further thwarts fears of individuals selling their lives; this Article asserts that only biological material that does not harm anyone should be allowed to be sold, just like blood, sperm and hair which are regenerative and whose sale have been permitted in the past.

The analytical framework on ownership of the body lends itself to philosophical and legal theorists who subscribe to the 'body as property' view. The various kidney transplantation systems highlighted in this paper – UK, Spain and Iran – further demonstrate conflicting perceptions of the body. With Iran being the only country in which kidney sales are permitted, it provides a concrete legal framework from which the West can learn.

Section 2 explores philosophical perspectives on the individual's relationship with the body, and what constitutes property, and whether the body is congruent with these well-founded elements. The capricious nature of the law will be illustrated via case law. The law's progressive recognition of self-ownership will serve as the foundation of arguing for a compensated, regulated kidney market.

Section 3 analyses the fears held by those against commodifying the kidney. It draws from contemporary examples – prostitution, commercial surrogacy and the kidney exchange programme – highlighting the contradicting reasoning justifying the denial of such a market. Utilitarianism and Kantian ethics are further used to support such a market.

Section 4 looks at the body in three global spectrums. It compares the Iranian model with the current opt-in/out systems in Spain and the UK. Iran exemplifies the approach we should be taking.

⁵ *ibid.*

II. SELF-OWNERSHIP

*Over himself, over his own body and mind, the individual is sovereign.*⁶

At the epitome of libertarianism lies self ownership: the belief that every individual owns himself and has the right to do what he wishes with his body provided, no harm is caused. However, the law prohibits the way the body is used, for example, by prohibiting kidney sales. This is highly debated, for the ability to donate one's own kidney arguably postulates prior ownership of it. It is this paradox that haunts contemporary bioethics and law. This Section explores these contentious issues through philosophical and legal theory and attempts to illustrate that we own our bodies; thus, interference by the state is a violation on our rights, and selling our kidney should be permitted.

2.1 Theories on Property Rights and the Body

The 'body as property' is often rejected on the grounds that its acceptance might lead to morally objectionable practices.⁷ Historically, however, people as property was comfortably accepted. For example, in Roman and Anglo-Saxon law, and later by statute and common law fiction and equity, a debtor could be personally attached to force payment of the debt.⁸ Similarly, a wife was equated to chattel of her husband (*Hopkins v Blanco*).⁹ In the 17th century, people could be slaves, chattel owned by their masters (*Gregson v Gilbert*).¹⁰ Two hundred years of legal slavery exhibits the inherent collision of the market with human freedom. For most anti-slavery advocates, self-ownership constituted the 'taproot of freedom'¹¹ and the 'defining sin of slavery was its denial of a property in the self'.¹² Liberal notions were evident even in that era, where Sir William Blackstone commented, '[T]he spirit of liberty is so deeply ingrained in our constitution' that the instant a slave 'lands in England, [he] becomes a freeman; that is, the law will protect him in the enjoyment of his person, his liberty and his property'.¹³ For libertarians, acceptance of self-ownership is a

⁶ John Stuart Mill, *On Liberty* (J.W. Parker and Son 1859).

⁷ Muireann Quigley, 'Property Rights in the Human Body: Applying Honoré' (2007) 33(11) *Journal of Medical Ethics* 631.

⁸ Mark Pawlowski, 'Property in Body Parts and Products of the Human Body' (2009) 30(1) *Liverpool Law Review* 35.

⁹ *Hopkins v. Blanco*, 457 Pa. 90, 320 A.2d 139 (1974).

¹⁰ *Gregson v Gilbert* [1783] 99 ER 629.

¹¹ Peter Halewood, 'On Commodification and Self-Ownership' (2008) 20 *Yale Journal of Law and Humanities* 131, 133.

¹² *ibid.*

¹³ 'Right of Revolution' (*The Founders' Constitution*, 1765)

<<http://www.press-pubs.uchicago.edu/founders/documents/v1ch3s3.html>> accessed 14 December 2013.

necessity; otherwise, the argument that slavery is evil would have no validity. One cannot base the evilness of slavery on the mere fact that 'slaveholders often treat their slaves badly, since a kind-hearted slaveholder would still be a slaveholder, and thus morally blameworthy, for that'.¹⁴ Rather, the reason slavery is immoral is because it constitutes stealing – 'the stealing of a person from himself'.¹⁵ Murray Rothbard takes this view and argues that 'a man can alienate his labour service, but he cannot sell the capitalised future value of that service'.¹⁶ This is because an individual cannot sell himself into slavery and have this sale enforced as this would result in him surrendering his future will over his person. Thus, a man 'cannot transfer himself, even if he wished, into another man's permanent capital good'.¹⁷ This somewhat removes the contradictory nature of Locke's labour theory in which he argues that every man owns his labour, yet still agrees there can be slavery (but not the selling into). Rothbard argued that voluntary slavery is contradictory itself, for when an individual submits himself to the subservience of his master voluntarily, he is not yet a slave since his submission is voluntary; but if he later changes his mind 'and the master enforce[s] his slavery by violence, the slavery would not then be voluntary'.¹⁸

Libertarian philosophy traces its conceptual ancestry to 17th century philosopher John Locke, who, in justifying private ownership of 'unowned "things"' (ie things in nature), argued that 'every Man has a Property in his own Person' and thus, 'no Body has any Right to but Himself'.¹⁹ Therefore, we have property in our actions, which in turn gives us a property right in what we 'mix' our labour with. Alan Ryan argues that this property is a natural relationship in that it suffices to establish a claim of natural right in the absence of government and a system of positive law, and in the absence of any agreement by other persons to acknowledge our rights over what we thus establish a property right in.²⁰ Much uncertainty lies in Locke's theory and the different interpretations of his 'metaphor' can be discussed in three parts.

Firstly, much debate surrounds the meaning of 'every man hath property in his own person'.²¹ Some have interpreted it literally, meaning we have property in

¹⁴ Edward Feser, 'Robert Nozick (1938-2002)' (*Internet-Encyclopedia of Philosophy*) <<http://www.iep.utm.edu/nozick>> accessed 18 December 2013.

¹⁵ *ibid.*

¹⁶ Murray Rothbard, *The Ethics of Liberty* (New York University Press 1998).

¹⁷ *ibid.*

¹⁸ *ibid.*

¹⁹ John Locke, *Two Treatise on Government* (London 1821).

²⁰ Alan Ryan, 'Self Ownership, Autonomy, and Property Rights' (1994) 11(2) *Social Philosophy and Policy* 241.

²¹ Locke (n 19).

our bodies, hence, we own ourselves. However, Anne Philips, amongst other critics, argues that Locke was not implying property in the body and did not intend an absolute right to do whatever one wished with one's body and its parts.²² Likewise, Ryan argues ownership of ourselves does not amount to full liberal ownership. Instead, he posits that having property of ourselves is akin to what an English-man would recognise as a repairing lease; that is, a leasehold interest that grants rights of occupancy and enjoyment as extensive as those that the freehold owner would have and allows one to sell the unexpired portion of one's lease, but imposes simultaneously the requirement to maintain the property and hand it back in as good condition as it was received. This argument must be perceived carefully for at death, we do not hand our bodies back, nor are they given to someone else to use, so the requirement of it being in as good condition as it was first received is unfounded. When we die our bodies and organs will never be as they were at the beginning. Rather, it is that more elusive entity, 'our person that we have an indefinite care for, and our bodies are to be used properly in its service'.²³ Locke in some form also viewed the body as a leasehold, stating that 'men being all the workmanship of one omnipotent and infinitely wise Maker – all the servants of one sovereign Master, sent into the world by his Order, and about his business – they are his, not one another's pleasure'.²⁴ Thus, for Locke, we have a limited property right in our body, for we cannot commit suicide, undermining the absolute nature of property rights. However, this fails if a person does not believe in an 'omnipotent and infinitely wise maker'. The justification is perhaps a little outdated considering society's secularisation.

Nevertheless, possession greatly occupies the law and therefore, even if we accept that we only have a leasehold interest in our body, as long as we are in possession of it, it is still possible to own it. In fact, with leaseholds, we still have the power to sublet it, and you cannot give or let something you do not own (*nemo dat*), even if it is temporary. Perhaps this discussion requires an analysis of the body and soul distinction. If it is your soul that occupies the body (hence, possession), then, accepting we own ourselves, when the soul leaves the body upon death, the body then becomes no property. In George Bernard Shaw's play *Man and Superman*, he tried to portray exactly this. For him, we own our souls and this is what occupies the body. According to him, our bodies drag us down in that 'hunger, and cold, and thirst, age, decay and disease, death above all, makes [people] slaves of reality'.²⁵ He further asserts

²² Anne Philips, 'It's My Body And I'll Do What I Like With It: Bodies as Objects and Property' (2011) 39(6) *Political Theory* 724.

²³ GW Smith (ed), *Liberalism: Rights, Property and Markets* (Routledge 2002) 225.

²⁴ Locke (n 19).

²⁵ George Bernard Shaw, *Man and Superman* (United Holdings Group 1931).

that 'thrice a day a meal must be eaten and digested', which is congruent with the discussion below on labouring oneself – in other words, we are constantly labouring our body, for without it, we simply die. He further argues that when our souls enter heaven, we 'escape the tyranny of the flesh'²⁶ because we are bodiless. This could justify the current position in law because, upon death, your body is deemed '*nullius in bonis*';²⁷ hence, a representation of your soul leaving your body, but signifying that it was yours before, *unlike* the position in law.

Secondly, even if Locke did not imply literal interpretation, we must analyse what he postulated as the 'mixing labour' theory. He argues, 'The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state of nature [and] ... hath mixed his labour with ... thereby makes it his property'.²⁸ There are two potential ways to apply this theory to the body. Firstly, it applies to things in their state of nature. In *Association for Molecular Pathology v Myriad Genetics, Inc.*²⁹ the United States Supreme Court held that genes cannot be patented because they are naturally occurring. Therefore, our bodies could potentially be naturally occurring since they are made up of these genes. If Locke is correct, by necessity we must own ourselves, for otherwise anyone who did any work on us would come to have a property interest in us. For example, would a tattoo artist who tattoos your arm become the owner of your arm as a result of mixing his labour with it? According to Locke, but disputed by Nozick, this could subsequently lead to the ownership of your whole body.³⁰ According to Locke, others cannot own you for you own your labour. Therefore, self-ownership is essential to avoid enslavement.

Alternatively, if we are naturally occurring, one can argue that an individual labours his own body through the maintenance of it. For example, eating well, exercising and even stimulating the mind via education adds value to the body. Without such maintenance and self-preservation one would starve and wither away. Therefore, one could say that mixing one's labour with a naturally occurring phenomenon, the body, amounts to appropriation, inducing ownership of it and allowing one to bear the fruits of one's labour. As Locke stated, 'His labour hath taken it out of the hands of nature, where it was common, and belonged equally to all her children, and hath thereby

²⁶ *ibid.*

²⁷ *Hayne's Case* [1614] 77 ER 1389.

²⁸ Locke (n 19).

²⁹ *Association for Molecular Pathology v. Myriad Genetics, Inc.*, 132 S.Ct. 1794 (2012).

³⁰ Jeremy Waldron, *God, Locke, and Equality: Christian Foundations in Locke's Political Thought* (CUP 2002).

appropriated it to himself'.³¹ Therefore, even if at one point our bodies were regarded as being in common, through our labour we become the owners of our bodies. Harris, agreeing with Locke, argued that 'starting with the premise of self-ownership, ownership of the fruits of my labour follow automatically. My body is the tree; my actions are the branches; and the product of my labouring activities is the fruit'.³²

Rothbard regards self-ownership as being the only viable solution. He recognises only two refutable alternatives: (a) communal ownership – 'no person is a full self-owner of their body and each person has an equal part of the ownership of everyone's body'³³ or (b) class rule ownership – 'one person or group of persons are entitled to own not only themselves but all the remainder of society'.³⁴ He rejects (a) for it is 'physically impossible for everyone to keep continual tabs on everyone else, and thereby to exercise his equal share of partial ownership over every other man'.³⁵ Even if it were not impossible, it is 'absurd to hold that no man is entitled to own himself, and yet to hold that each of these men is entitled to own a part of all other men'.³⁶ He adds that a society systematised on this principle perishes because it interferes with people's freedom to act and ability to survive; and thus, it is not desirable because people refuse to live in a society where they are not 'free to take any action whatsoever without prior approval by everyone else in society'.³⁷

Rothbard further rejects (b) because it is not a universal ethical rule that pertains to all humans as it demands that those owned are 'subhuman beings who do not have a right to participate as full humans in the rights of self-ownership enjoyed by'³⁸ their owners. One criticism is that he fails to consider bodies as 'no property'. He touches on it later arguing, '[S]ince ownership signifies a range of control, this would mean that no one would be able to do anything, and the human race would quickly vanish'.³⁹ However, Rothbard has confused ownership and control because while 'ownership implies control,

³¹ Locke (n 19).

³² JW Harris, 'Who Owns My Body' (1996) 16(1) Oxford Journal of Legal Studies 55.

³³ 'A Critique of Rothbard's Arguments For The Natural Right to Self-Ownership' (*Anarchopac*, 2013)

<<http://www.anarchopac.wordpress.com/2013/12/08/a-critique-of-rothbards-arguments-for-the-natural-right-to-self-ownership>> accessed 4 December 2013.

³⁴ *ibid.*

³⁵ *ibid.*

³⁶ *ibid.*

³⁷ *ibid.*

³⁸ *ibid.*

³⁹ *ibid.*

control does not necessarily imply ownership'.⁴⁰ Thus, Anarchopac argues that individuals may not own themselves but nonetheless control themselves,⁴¹ which is sufficient for survival. This, however, could be challenged on the basis that control can change from one's hands to the hands of an enemy. What happens when one falls under someone else's control? For example, prisoners at Guantanamo Bay are under the control of the United States government, with no control over the interference with their bodies. Many of the prisoners have not been charged with a crime, and during their time they are tortured via violent procedures of force-feeding and sleep deprivation. Once something and someone is in possession, control of that something or someone will become inevitable. In fact, one can even argue that some of the abhorrent ordeals these individuals face are akin to the ordeals of slaves.

Furthermore, possession and control falls under Honoré's eleven incidents of ownership. He identifies these as being the 'liberal concept of full individual ownership'.⁴² These are constitutive of, but not compulsory to ownership.⁴³ These include, inter alia, the right to possess, use and manage the body; the right to earn income from the body; and transmissibility. We already know that we possess, use and manage our bodies; we can put our bodies to work and get paid for our labour; and through our ability to donate blood and organs, we know that we can also transfer aspects of our body. This is similar to the 'bundle of rights approach' first advocated by Hohfeld: '[T]he right to exclude, the right to transfer and the right to possess and use'. As Elinor Ostrom notes, 'None of these rights is strictly necessary ... Even if one or more sticks [incidents] are missing, someone may still be said to "own" property'.⁴⁴ However, Driesen argues that if too many sticks are missing from the bundles, then ownership becomes 'an unhelpful – indeed, a misleading – concept'.⁴⁵ The primary bundles are present in relation to the body, thus, being indicative of self-ownership. Gray recognises that the right to exclude lies at the epitome of property and argues that '[property] is not about enjoyment of access but about control over access', further supporting self-ownership.⁴⁶

⁴⁰ *ibid.*

⁴¹ *ibid.*

⁴² Carl Wellman, *Rights and Duties: Property Rights and Duties of Redistribution*, vol 6 (Taylor & Francis 2002).

⁴³ Jesse Wall, 'The Legal Status of Body Parts: A Framework' (2011) 31(4) *Oxford Journal of Legal Studies* 783.

⁴⁴ Larry Lohmann, *Carbon Trading: A Critical Conversation on Climate Change Privatisation and Power* (Mediaprint 2006).

⁴⁵ David M Driesen, 'What's Property Got To Do With It' (2003) 30 *Ecology Law Quarterly* 1003 (reviewing Daniel Cole, *Pollution & Property: Comparing Ownership Institutions for Environmental Protection* (CUP 2002)).

⁴⁶ Kevin Gray, 'Property in Thin Air' (1991) 50(2) *Cambridge Law Journal* 252.

Moreover, Nozick argued that our rights stem from the fact that we are all self-owning individuals. His use of 'self-ownership' is deduced as meaning that we hold the same rights of 'use, abuse, loan, sale, rent, and in the end destruction, over our own bodies' in the same way we attribute these rights over other 'things' we think of as being property. He demonstrates this using the analogy of ten pounds withdrawn from a cash machine and argues that one can do whatever one wishes with it – whether he spends it, gives it away or burns it – the same applies to the body. Thus, everyone deserves to have this right respected and one falls foul of injustice if this is violated.⁴⁷ However, Nozick views government redistribution of tax as being akin to theft and also fails to recognise people as self-owners: 'Taxation of earning from labour is on par with forced labour ... [T]aking the earnings of n hours labour is like taking n hours from the person; it is like forcing the person to work n hours for another's purpose'.⁴⁸ This is akin to Locke's labour theory, for essentially, the money one should receive for his labour is going to someone else. Vallentyne, agreeing, adds that from 'the cardinal principle that each person is the legitimate owner of his own powers'⁴⁹ it necessarily follows that redistribution taxation is tantamount to theft. Both these views maintain that we have self-ownership, for otherwise redistribution taxation would not be regarded as being wrong.

Contrary to Nozick, Cohen argues that we do not in fact own ourselves. He uses 'eyes' to demonstrate this: suppose the state were to hold a lottery every time someone went blind, and if your national insurance number came up and you still had your sight, it would take one of your eyes and give it to the blind person.⁵⁰ Many people would view this as unjust. Nozick argues that this would occur in a Rawlsian state in order to benefit the least well off, whereas Cohen denies that the state could justly do this because of Rawls' first principle of autonomy, as this would be a 'gross unwarrantable interference in your life by the state'.⁵¹ But he argues that this injustice does not result from self-ownership. Instead, he argues, taking his first example, imagine a world where everyone is born without sight and the state has the patent on mechanical eyes which, if implanted shortly after birth, work into adulthood even if they are not in the body of the person they were first transplanted into.⁵² At death the state takes them back, refurbishes them and reuses them. They remain the state's

⁴⁷ Helen McCabe, 'John Rawls & Justice' (*Philosophy Now*, 2014)

<http://philosophynow.org/issues/92/John_Rawls_and_Justice> accessed 15 February 2014.

⁴⁸ Robert Nozick, *Anarchy State and Utopia* (Basic Books 1974).

⁴⁹ Barbara H Fried, 'Left-Libertarianism: A Review Essay' (2004) 32 *Philosophy & Public Affairs* 66.

⁵⁰ McCabe (n 47).

⁵¹ *ibid.*

⁵² *ibid.*

property but the state lets people borrow them for free over their lifetimes. Now imagine both eyes break for someone, the state has a lottery and your number comes up; so the state retrieves one of their eyes from you and give it to the person with broken eyes. You might think this is also unjust – but, Cohen argues, if you do think this is unjust, then this shows it is not self-ownership at work (as the state retains the eye), but that people have a right to bodily integrity: '[T]he suggestion arises that our resistance to a lottery for natural eyes shows not belief in self-ownership but hostility to severe interference in someone's life'.⁵³

David Gordon argues that a defender of self-ownership could likewise acknowledge the wrongfulness of the removal of someone's eyes in Cohen's scenario. All he needs to maintain his proposition is that you own your eyes and this 'adds to the moral badness of making you enter the eye lottery', and questions, what is wrong with that?⁵⁴ He asserts that bodily integrity and self-ownership 'supplement each other, rather than compete for allegiance as Cohen appears to think'.⁵⁵ Furthermore, Cohen's scenario disregards consent because the lottery would undoubtedly be involuntary and hence, a violation against all the people included in it. In addition, his model does not make sense in application to the body for this would assume that the government owned our bodies, or that a person could be separated from their bodies in the same way they could with their eyes.

At the core of people's rejection of our body as property lies the perception that others will be able to own us. However, such critics fail to realise that the assertion of self-ownership will only allow *the individual* to view *his* body as property and no other person can own it. As Hyde argues, 'If my body is property, it may neutralise others' domination of it ...'⁵⁶ The lack of self-ownership in the law has left scientists and researchers with the ability to remove bodily materials from others, patent it and make windfall profits from this. Therefore, it is not the recognition of self-ownership that will result in other people's domination of your body, but rather the non-recognition of it. As a result, self-ownership is a necessity and will only enhance one's autonomy.

Advocates of self-ownership argue that the same applies to body parts. Boulter argues that if society regards an individual's body as their property, it is only

⁵³ *ibid.*

⁵⁴ David Gordon, 'A Reluctant Marxist' (*The Mises Review*, 1998)

<http://mises.org/misesreview_detail.aspx?control=106> accessed 16 January 2014.

⁵⁵ *ibid.*

⁵⁶ Alan Hyde, *Bodies of Law* (Princeton University Press 1997) 56.

logical that property rights are acknowledged in excised body parts.⁵⁷ Campbell further argues that self-ownership stipulates that individuals ought to be able to alienate their separated biological material. Therefore, if one owns their body parts, sale should not be prohibited for one should be able to do as one wishes with one's own property.⁵⁸ However, others disagree. The plethora of arguments for and against demonstrates a lack of consensus on self-ownership and ownership of body parts. Even the law is clouded on this matter. Therefore, it may be helpful to look at utilitarianism and Kantian ethics, which provide an ideal way of thinking about property in the kidney.

2.1.1 Utilitarianism

Based on the maxim, '[T]he greatest happiness for the greatest number that is the measure of right and wrong',⁵⁹ utilitarianism is one of the greatest defences for a kidney market. Happiness was characterised as pleasure over pain. In order to satisfy this, Bentham created a hedonistic calculator in which to weigh pleasure versus pain. The criteria was categorised by 'intensity, duration, certainty, proximity, productiveness, purity and extent'.⁶⁰ The creation of a kidney market would bring the greatest happiness to both parties where the donor is compensated and the recipient receives a life-saving kidney – 'both parties would receive a benefit from the fulfilment of their end of the bargain'.⁶¹ The pain experienced, which is realistically experienced by both parties, would be far less than the benefit gained. Though some believe this will allow the killing of a person to harvest organs to save the lives of many, Bentham argued that the law would 'define inviolable rights, such as the fundamental right to life, which would protect the well-being of individuals'.⁶²

Alternatively, J.S. Mill, who was strongly against state paternalism, argued that power can only be legitimately exercised over an individual 'against his will to prevent harm to others'.⁶³ Therefore, to achieve the highest form of good, people should be allowed to decide for themselves what to do, including what to do with their bodies. Only an individual knows his own body, and the state has a duty to respect one's liberty. Therefore, on this basis, the sale of an organ is not 'injurious to others and therefore ... the state has no interest in governing

⁵⁷ Wall (n 43).

⁵⁸ *ibid.*

⁵⁹ Jeremy Bentham, *Fragment on Government* (CUP 1988).

⁶⁰ *ibid.*

⁶¹ Heather Hausleben, 'Property Rights in Organs – An Argument for Commodification of the Body' [2013] Law School Student Scholarship Paper 350.

⁶² *ibid.*

⁶³ Mill (n 6).

this type of choice for people'.⁶⁴

Concurring, Cohen argued that legalising a kidney market would not only promote the 'welfare and "good" of those involved' by saving the recipient's life, who would perhaps have died waiting under the current system, but it would also give the 'vendor' a 'chance for financial enrichment' whilst helping someone in need.⁶⁵ Therefore, the greatest good, or as Aristotle would say, *eudemonia*, is achieved when a kidney market is legalised as more people would benefit. Rather, denying compensation to the donor would go against utilitarian principles because there is a striking opportunity to maximise the 'greatest happiness for the greatest number of people' but is simply being deprived.

2.1.2 Kantian Argument

Philosopher Immanuel Kant emphasised that individual freedom is the only innate right and prohibits coercion by others.⁶⁶ He condemned 'assaults on the freedom and property of others' and declared freedom as 'a human being's quality of being *his own master*'.⁶⁷ As Taylor argues, the understanding of 'being one's own master' combined with 'emphasis on non-interference with the freedom of others, seems tantalizingly close to the concept of self-ownership'.⁶⁸ Thus, it is surprising that Kant rejected self-ownership. In fact, his reasoning for this is because it is inconsistent with his second formulation of the categorical imperative, that rational beings must 'so act that you use humanity ... always at the same time as an end, never merely as a means'.⁶⁹ Thus, for Kant, self-ownership licenses suicide, voluntary servitude, organ sales, self-mutilation and prostitution,⁷⁰ which all violate the second formulation. More specifically, the removal of an organ 'constitutes partial self-murder to the same degree as suicide'.⁷¹ However, Heather Hausleben argues that his term 'self-murder' implies that the individual is harmed. But based on the nature of the organs, 'the body can remain a functioning whole and therefore is not "murdered" in

⁶⁴ *ibid.*

⁶⁵ McCabe (n 47).

⁶⁶ Marcus Verhaegh, 'The A Priori of Ownership: Kant on Property' (*Ludwig von Mises Institute*, 2004) <<http://mises.org/daily/1605/The-A-Priori-of-Ownership-Kant-on-Property>> accessed 16 November 2013.

⁶⁷ Immanuel Kant, *Groundwork of the Metaphysics of Morals* (CUP 1785) 38.

⁶⁸ Robert S Taylor, 'A Kantian Defense on Self Ownership' (2004) 12(1) *The Journal of Political Philosophy* 66.

⁶⁹ Wall (n 43).

⁷⁰ *ibid.*

⁷¹ Kant (n 67).

any manner'.⁷² She considers that though it may be immoral to cause such harm for no purpose, 'the donation of an organ takes from one living body that can do without the organ to give to another body that will die without the benefit of that organ'.⁷³ Therefore, there is an overall benefit and, if the donor is compensated, the benefit is experienced by both parties.

For Kant, 'things' either have a price or a dignity; things with a price are replaceable, but those above a price instead have dignity. Thus, for Kant, the removal of a kidney is 'inappropriately ascribing a price to a person's body, which should have a dignity rather than a price'.⁷⁴ However, Hausleben argues that it should not matter that we treat a single organ 'as a unit with a "price" ... when the uniqueness of the individual as a whole is respected and preserved'.⁷⁵ Furthermore, a market in kidneys could eliminate the waiting lists and prevent people from resorting to the black market. Such a market 'advantages the health and integrity of persons as ends in themselves'.⁷⁶ Surely, not giving compensation is using someone merely as a means. Hausleben argues the market should exist 'free from intrusion as a place for consensual interaction'.⁷⁷ She adds that there is no need for a shared moral outlook and therefore, because morality is irrelevant, a commercial organ market would be allowed without 'an analysis of moral underpinnings of the business deal' provided that both parties have consented.⁷⁸

2.2 Current Law

The common law fails to establish consistent principles regulating ownership interests in the body. It questions whether the body is the property of the person seeking to control it.⁷⁹ Generally there is no property; however, that is subject to one fundamental exception that forms the underlying 'conceptual discrepancy'⁸⁰ that arguably subverts the legal framework on which the traditional principles have been founded.

⁷² Hausleben (n 61).

⁷³ *ibid.*

⁷⁴ *ibid.*

⁷⁵ *ibid.*

⁷⁶ Mark J Cherry, *Kidney for Sale: Human Organs, Transplantation and the Market: When Altruism Isn't Enough: The Case for Compensating Kidney Donors* (Georgetown University Press 2005) 89.

⁷⁷ Hausleben (n 61).

⁷⁸ *ibid.*

⁷⁹ Alexandra George, 'Property in the Human Body & Its Parts: Reflections on Self-Determination in Liberal Society' [2001] EUI Working Paper LAW No.2001/8, Italy 18.

⁸⁰ *ibid.*

2.2.1 Cadavers

The common law reluctance in recognising property rights in the body dates back to *Hayne's Case*.⁸¹ William Haynes was 'indicted for the larceny of four winding sheets used in the burial of three men and a woman'.⁸² The question was 'in whom should the property be laid in the indictment'.⁸³ It was held that the property of the sheets remained in the owners, 'in him who had property therein, when the dead body was wrapped therewith; for the dead body is not capable of it ...'.⁸⁴ Sir Edward Coke refers to the case in stating that a cadaver was '*nullius in bonis*'⁸⁵ – in other words, the legal ownership of no one – and belonged to the ecclesiastical jurisdiction. However, Matthews argues that the phrase, 'the dead body is not capable of it [ie property]', here means not that the dead body is not capable of being property, but that it is not capable of owning property.⁸⁶ Therefore, Coke's statement, Matthews argues, refers to either objects belonging to no one because they are sacred to God, 'such as are churchyards ...', or 'some things which in their natural state are no one's property',⁸⁷ such as freemen, and thus, neither of his citations can properly be said to refer to dead bodies.⁸⁸ Furthermore, that the body belongs to the Church's cognisance is not a justified reason for denying property rights in corpses, for, even as Coke admits, '[C]hurch fabric and monuments ... are protected by the common law'.⁸⁹ This would not prevent a corpse from being buried in unconsecrated ground or remaining unburied. The case of *R v Sharpe*⁹⁰ demonstrated that despite Coke's statement, corpses did not belong exclusively to the ecclesiastical jurisdiction and that civil courts would intervene to prevent the exhumation of bodies for dissection or for reburial according to different rites.⁹¹ Lastly, if they are capable of belonging, does this not make them property?

Despite the arguments above, the no-property rule is firmly embodied in English law. Founded on dubious *obiter dicta*, the general scholastic consensus

⁸¹ *Hayne's Case* (n 27).

⁸² *ibid.*

⁸³ *ibid.*

⁸⁴ *ibid.*

⁸⁵ Paul Matthews 'Whose Body? People as Property' (1983) 36 *Current Legal Problems* 193.

⁸⁶ *ibid.*

⁸⁷ *ibid.*

⁸⁸ *ibid.*

⁸⁹ *ibid.*

⁹⁰ *R v Sharpe* [2001] 1 SCR 45.

⁹¹ George (n 79).

is that the 'rule is now ripe' for revaluation in light of modern technologies'.⁹² Price states that these obiter remarks are 'ghosts of the past'⁹³ and thus, no longer have standing. In contrast, most American states favour a more flexible right of 'quasi-property' in the deceased's body in favour of the surviving spouse or next of kin for the purposes of burial.⁹⁴ The person who possesses the right is not the owner of the body but holds it 'on trust' for family. Such right entitles an action for damages for unlawful interference with the body before and after burial. To the degree that the next of kin has 'legally recognised rights of custody, control and disposition'⁹⁵ – essentials of ownership – it is clear this quasi-right is akin to property in the corpse. The next of kin or surviving spouse retains an ongoing right to have the body remain undisturbed in the grave.⁹⁶ Historically, damages for emotional distress suffered by the next of kin were awarded for the treatment of their relatives' corpse. In doing so, the courts opened up, if only a fraction, the doors to the commercialisation of body parts.⁹⁷ Though the claim was not a property right, it was not dissimilar in substance. Nonetheless, in *State v Powell*,⁹⁸ the Supreme Court of Florida examined US case law, holding that 'the next of kin has no property right but merely a limited right to possess the body for burial purposes'.⁹⁹ Thus, their right was encompassed by tort law instead of the 'ancient and discredited quasi-fiction'.¹⁰⁰

2.2.2 Property in Body Parts

The law's exception to the no-property rule is based on the Lockean principle that the application of skill, modifying the part to some extent, gives rise to a property interest. Interestingly, the only person who cannot come to own any aspect of their body has been the person themselves.

The first exception to the no-property rule in the UK can be found in *R v Kelly*.¹⁰¹ Here, the defendants were prosecuted for the theft of body parts from

⁹² Pawlowski (n 8).

⁹³ TW Price, 'Legal Rights and Duties in Regard to Dead Bodies, Post-Mortems and Dissections' (1951) 68 South African Law Journal 403.

⁹⁴ Pawlowski (n 8).

⁹⁵ *ibid.*

⁹⁶ Rosalind Atherton, 'En Ventre Sa Frigidaire: Posthumous Children in the Succession Context' (2006) 19(2) Journal of the Society of Legal Scholars 139; *Meek v State* [1933] 185 NE 899.

⁹⁷ George (n 77).

⁹⁸ *State v. Powell*, 497 So. 2d 1188 (Fla. 1986).

⁹⁹ *ibid.*

¹⁰⁰ *Carney v. Knollwood Cemetery Association*, 514 N.E.2d 430, 435 (Ohio Ct. App. 1986) (Jackson, J).

¹⁰¹ *R v Kelly* [1999] 2 WLR 384.

the Royal College of Surgeons. They had obtained a number of body parts to cast mould for sculptures, consisting of 'three human heads, part of a brain, six arms, ... ten legs or feet and part of three human torsos'.¹⁰² They were not returned and some were found in a field near the defendant's home. The defendants argued that 1) the body parts could not be considered property for the purposes of the Theft Act 1968; and 2) the Royal College was not in lawful possession of the body parts. It was, however, held that 'parts of a corpse *are* capable of being property within s.4 of the Theft Act, if they have acquired different attributes by virtue of the application of skill, such as dissection or preservation techniques, or for exhibition or teaching purposes'.¹⁰³ The Court, implicitly applying Locke, held that the specimen in question would have been subject to 'many hours, sometimes weeks of skilled work'¹⁰⁴ and therefore, acquired different attributes. In reaching this conclusion, the Court relied on the Australian judgment of *Doodeward v Spence*,¹⁰⁵ a case concerning the preservation of a pair of stillborn conjoined twins. Here the Court stated that where the human body or parts of it in lawful possession 'acquire[s] some attributes differentiating it from a mere corpse awaiting burial' via application of skill, it could be considered property.

Third party possession entitlements were also litigated in *Dobson v North Tyneside Health Authority*.¹⁰⁶ However, the Court of Appeal was unwilling to recognise a property interest in the brain, because the 'minimal work and skill that was applied to the biological material (preservation) was insufficient for the application of skill exception'.¹⁰⁷ Interestingly, Rose LJ submitted that the common law is not still on the matter of 'no property' or even its application of skill exception. His Lordship argued that on some future occasion, the courts might hold that human body parts are capable of being property, 'even without the acquisition of different attributes, if they have a use or significance beyond their mere existence';¹⁰⁸ for example, if they are 'intended for use in an organ transplant operation, [or] for the extraction of DNA ...'¹⁰⁹ Therefore, arguably, the kidney intended to be used in a transplant could be considered property; and because this can be so even without the application of skill changing its nature, one could argue that it is one's property and it remains so when it is taken out.

¹⁰² *ibid.*

¹⁰³ *ibid.*

¹⁰⁴ *ibid.*

¹⁰⁵ *Doodeward v Spence* [1908] 6 CLR.

¹⁰⁶ *Dobson v North Tyneside Health Authority* [1996] EWCA Civ 1301.

¹⁰⁷ *ibid.*; Wall (n 43).

¹⁰⁸ *Dobson* (n 106).

¹⁰⁹ *ibid.*

Extending the common law of the dead to the realms of the living, in other words, applying Locke to live bodies creates further contradiction. These are most evident in the following patent cases demonstrating the Courts' unjustified denial of self-ownership due to commodifying the body, yet allowing such commodification through permitting other ownership.

Although patent legislation typically prohibits the patenting of humans, it has permitted property rights through patents in living things 'whose "creation" embody a degree of human skill or effort'.¹¹⁰ In *Diamond v Chakrabarty*,¹¹¹ the US Supreme Court allowed the first patent over an invention consisting of living matter. Arguably, patent law 'proffers a surreptitious method of awarding property rights over aspects of human bodies or their parts'.¹¹² The Court focused on the 'polymerase chain reaction', the process by which genes are replicated after DNA is extracted from the individual. *Doodeward*¹¹³ was applied, satisfying that researchers and scientists exercised enough 'skill and effort' over the isolated gene to acquire some form of property right. Such reasoning was further applied in *Moore v Regents of University of California*,¹¹⁴ where the California Supreme Court affirmed *Diamond*,¹¹⁵ recognising that those involved in applying skill and effort to Moore's body were entitled to the property that resulted from their exertions. Moore was prohibited from owning his own body, yet others 'could own derivatives from body parts that they had appropriated from him'.¹¹⁶

Moore suffered from hairy cell leukaemia, a rare form of cancer. His treatment involved the removal of his spleen, along with follow up treatments over seven years. A T-cell line was patented in the process and, though the 'Mo cell line' was a great commercial and medical success, Moore was unaware his spleen had been used this way. Once he attained knowledge of this process, including the profits that the expropriators derived as a result of their extraction, he sued for conversion of his spleen. The California Court of Appeal recognised the existence of property rights within the body and declared that the possessor had an absolute right of dominion over his body; thus, held that Moore owned his body and its parts. However, the California Supreme Court reversed this verdict, but failed to determine conclusively whether Moore possessed property interests in his body. Its reluctance to recognise such a right stemmed

¹¹⁰ George (n 79) 26.

¹¹¹ *Diamond v. Chakrabarty*, 447 U.S. 303 (1980).

¹¹² George (n 79).

¹¹³ *Doodeward* (n 105).

¹¹⁴ *Moore v. Regents of University of California*, 51 Cal. 3d 120 (1990).

¹¹⁵ *Diamond* (n 111).

¹¹⁶ George (n 79).

from fears of opening a market trade in body parts and ‘chilling’ scientific research using human biological materials. By allowing researchers to profit from such derivatives of Moore’s body, the law set the precedent for the commodification of body parts. Furthermore, they implicitly used Locke to deny that which he actually advocated for: self-ownership. Patent law sees the personification of the Lockean exception by granting ‘monopoly ownership of creations’ to pharmaceutical companies.¹¹⁷ One could also posit that without Moore’s genes, the doctor would not have been able to find such a cure, and thus, would not have profited. It therefore seems inequitable that Moore was not permitted to share in the profits. Significantly, Moore had to give consent for his gene to be extracted in the first place, which is indicative of the right to exclude. Justice Mosk, in his dissent, argued that to deny a property right in our own body violates the ‘profound ethical imperative to respect the human body as the physical and temporal expression of the unique human persona’.¹¹⁸

However, the majority held differently, perceiving the situation as being one in which the doctor, by exerting his labour on Moore’s cell line, transformed the body part from non-property into property. The outcome contradicts the policy reflected in patent law and collides with liberal principles of autonomy: ‘[T]he court’s decision denied bodily property to the inhabitant of the body while simultaneously allowing other people to derive property rights in that body’.¹¹⁹ Justice Mosk rightly argued that Moore had a ‘... right to do with his own tissue whatever the defendants [including his doctor and the University] did with it: ie he could have contracted with researchers and pharmaceutical companies to develop and exploit the vast commercial potential of his tissue and its products’.¹²⁰ Though the Supreme Court agreed, it held that everyone has genetic information coded for the manufacture of the types of cells Moore had in his spleen; thus, the particular nature of Moore’s spleen was ‘no more unique to Moore than the number of vertebrae in the spine or the chemical formula of haemoglobin’.¹²¹ They emphasised that it was the doctors who made something out of the cells, not Moore, and therefore, when the cells were removed from him, ‘Moore becomes a “naturally occurring raw material”, whose “unoriginal” genetic material is transformed into something unique and valuable by the “inventive effort”, “ingenuity”, and “artistry” of his doctors’.¹²²

Ironically, the Courts denied the self-interest due to the fear of commodifying

¹¹⁷ *ibid.*

¹¹⁸ Moore (n 114).

¹¹⁹ George (n 79).

¹²⁰ Moore (n 114) (Mosk J, dissenting).

¹²¹ *ibid.*

¹²² Halewood (n 11).

the body, yet the cell was commodified via commercial exploitation. Thus, as Peter Halewood rightly asserts, '[W]hat undid Moore in the case was not an excess of commodification but a dearth of it'.¹²³ Had Moore had the opportunity to exercise self-ownership in the form of property rights 'with a capacity to exercise rights of inclusion and exclusion, his autonomy would have been strongly augmented not diminished'.¹²⁴ As a result, the decision had a perverse effect of depriving Moore the right to self-determination and autonomy 'that self-ownership symbolised in the earlier period of degradation of people's bodies under chattel slavery'.¹²⁵ This case demonstrates a more communal approach to the body, for the majority wanted to promote medical research beneficial to the whole community. To allow Moore a share in the valuable commodity produced when doctors mixed their labour with the cell would supposedly lower the incentive to carry out medical research on human tissue.

Moore highlights the inherent difficulties of using Locke's theory as the foundation of our reasoning. The Court failed to provide a reasonable explanation for not recognising Moore's property interest in his body or his body parts. Such a property right would incentivise people to participate and help science move forward. Furthermore, it seems absurd that one would allow someone else to have some sort of proprietary right over his or her bodily material. If property rights are justified via the application of skill and effort, then as discussed, should one not be entitled to own one's own body through the investment of time, effort and skill? But how much skill and effort is required to modify something? Or as George questions, must one operate or perform surgery on oneself in order to satisfy the criteria of skill and effort?¹²⁶ What if a 'thing' has not been altered from the state it was naturally in? For example, in *Dobson*, the brain was merely preserved in paraffin and had not been altered. What if a doctor takes out someone's kidney and merely preserves it until he transplants it into someone else? Effectively, the nature of the kidney has not changed, much in the same way the brain was not regarded as having been altered by its preservation, and even then it had been removed from the original source.

The case of *Myriad Genetics*¹²⁷ denied pharmaceutical companies the ability to patent genes. Myriad patented its discovery of the location and sequence of BRCA1 and BRCA2 genes, mutations of which significantly increase risk of

¹²³ *ibid.*

¹²⁴ *ibid.*

¹²⁵ *ibid.*

¹²⁶ George (n 79).

¹²⁷ *Myriad Genetics* (n 29).

breast and ovarian cancer. The primary issue was that the location and order of the nucleotides existed in nature before Myriad found them and thus, no invention or modification occurred; Myriad simply isolated them. Therefore, the Court held that the isolated genomic DNA themselves were 'unpatentable products of nature' because Myriad did not 'alter any of the genetic information encoded in the ... genes' nor did they possess 'markedly different characteristics from any found in nature'.¹²⁸ However, applying Locke once more, the Courts permitted the patenting of complementary DNA, which removes the non-coding region, creating a new molecule declared not found in nature.¹²⁹ Similarly, our kidneys are naturally occurring. Therefore, doctors who remove our kidneys and simply transplant them into another body do not change the nature of the kidney itself, but merely isolate it from the original body and place it into another. Furthermore, we personally can change the nature of our kidneys, making them our own. For example, Medical Director Leslie Spry¹³⁰ points out that using pain killers for a long period of time can harm the kidney tissue and structures; smoking can reduce the kidney's ability to function properly; and consuming high sodium foods, which increases blood pressure, can lead to the failure of our kidneys. These are ways in which we change the nature of our kidneys via the induction of labour into our bodies. Just as we can damage our kidneys, we can also ensure they remain healthy; therefore, mixing our labour changes the nature of our kidneys to the extent that we own them. Donna Rawlinson Maclean made this argument when she filed for a patent named 'myself', submitting, 'It has taken [thirty] years of hard labour for me to discover and invent myself, and now I wish to protect myself from unauthorised exploitation ...'¹³¹

Perhaps the law is moving towards the recognition of a property right within the body. In *Yearworth v North Bristol NHS Trust*,¹³² six cancer patients produced samples of semen, prior to their chemotherapy treatment, that were to be frozen and stored for possible future use. Unfortunately, the hospital

¹²⁸ *ibid.*

¹²⁹ Jake Sherkow 'A Closer Look at the Supreme Court's Decision on Gene Patenting' (*Stanford Medicine*, 2013)

<<http://www.scopeblog.stanford.edu/2013/06/13/a-closer-look-at-supreme-courts-decision-on-gene-patenting>> accessed 5 October 2013.

¹³⁰ Leslie Spry, '5 Surprising Ways You Could Be Damaging Your Kidneys' (*HuffPost Healthy Living*, 2014) <http://www.huffingtonpost.com/leslie-spry-md-facp/national-kidney-month_b_2949750.html> accessed March 18 2014.

¹³¹ Lori B Andrews, 'The Gene Patenting Dilemma: Balancing Commercial Incentives with Health Needs' (2002) 2 *Houston Journal of Health Law & Policy* 65.

¹³² *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37.

inadequately stored the semen, which subsequently thawed and expired. The men claimed under personal injury, negligence and bailment and succeeded in the latter two actions. The Court of Appeal referred to *Moore* – ie that conversion did not lie for body parts excised from the body of a ‘consenting living patient by a physician who then proceeded to use the cells for a potentially lucrative research purpose that had not been disclosed to the patient’.¹³³ However, the Court perceived it would have no trouble declaring that the preserved sperm had been subjected to work and skill, changing its character, and thus, were inclined to apply *Doodeward*.¹³⁴ But, it deemed the ‘skill exception’ ‘not entirely logical’ and thus, did not want the common law on the matter founded upon it.¹³⁵ Furthermore, because it was devised as an exception to a principle of exceptional character, it held that ‘such ancestry does not commend it as a solid foundation’.¹³⁶ Instead, it wanted to develop a broader basis for decisions in this context. It held that the men had ownership of the sperm, which they produced. They alone generated it from their bodies, with the sole object that it might be used for their benefit. Their ‘negative control over it was absolute’ and they had the power to order its destruction at any point. Thus, although the hospital had a duty to store it, it had no rights in respect of it. The Court ensured their decision was limited to cases involving ‘products of living human bodies intended for use by the person whose bodies had produced them’,¹³⁷ recognising bailment. As Mr. Stallworthy, acting on behalf of the NHS, submitted, bailment is a doctrine confined to personal property that requires the Court to find that human tissue constitutes a chattel susceptible of being property that can be owned; bailment can only exist where the bailor retains some ultimate or reversionary possessory right.¹³⁸ It appears that the Court has done just this. However, one could argue that this ‘used for their benefit’ requirement applies to kidneys. Even if one is satisfied that the kidney is not owned prior to being removed out of the body, once removed, the *sale* of the kidney would be for the person’s benefit and for the benefit of another, just as the sperm was to be used later for the person’s benefit, thus justifying ownership of it. The case also asserted that ‘parliament must either update the concept of ownership in this connection or ... make further provision which if without updating it would remedy any perceived injustices in other ways’.¹³⁹

¹³³ Cynthia Hawes, ‘Tortious Interference with Goods in New Zealand: The Law of Conversion Detinue, and Trespass’ (University of Canterbury 2010).

¹³⁴ *Doodeward* (n 105).

¹³⁵ *ibid.*

¹³⁶ Shawn H Harmon, ‘Yearworth v North-Bristol NHS Trust: A Property/Medical Case of Uncertain Significance?’ (2010) 13(4) *Medicine, Health Care & Philosophy* 343.

¹³⁷ Cynthia Hawes, ‘Property Interests in Body Parts: Yearworth v North Bristol NHS Trust’ (2010) 73(1) *Modern Law Review* 130.

¹³⁸ *Yearworth* (n 132).

¹³⁹ *ibid.*

Counsel for the trust argued that the provisions of the HFE Act 1990 successfully precluded claims based on property, arguing that ‘the men ... could only have requested the unit to use their sperm in a particular way’.¹⁴⁰ However, the Court of Appeal argued that although the claimants could not direct the use of their sperm, such limitations on their usage did not negate their ownership of their sperm. The Courts enforced that the units holding such licences ‘pursuant of the 1990 Act are required to use stored gametes and embryos only for the purposes set out in Schedule 3 and for which consent has been obtained’.¹⁴¹ This was confirmed in *Evans v Amicus Healthcare Ltd*,¹⁴² which permits individuals to withdraw their consent at any time. The Court viewed the ability to withdraw as being powerful confirmation of their ownership, taking a stringent view of the consent provisions of the Act: ‘The fact that the control granted under the Act is a negative rather than positive control does not dissuade their Lordships in this matter’.¹⁴³ Furthermore, the Court pointed to a number of statutes that limit one’s ability to use property without eliminating one’s ownership and also to consent provisions that preserved the men’s ability to control how their sperm was to be used, and therefore upheld ownership.

In reaching its conclusion, the Court referred to *Hecht v Superior Court of Los Angeles County*.¹⁴⁴ Here, a woman’s deceased partner deposited sperm for use at a later date. The Court held the sperm was capable of being property and thus ‘capable of being subject to the provisions of the deceased’s will’.¹⁴⁵ As the Lord Chief Justice rightly pointed out, ‘[I]t is logically difficult to see how the self-same sample of sperm (or indeed any tissue sample) could be considered to be property once the source of that sample has died if it was not already capable of being property before their death’.¹⁴⁶ Therefore, as Quigley notes, ‘*Hecht* cannot simply be taken to be the recognition of a proprietary interest that begins after death’.¹⁴⁷ Essentially, the sperm must have been property at the time the will was written. In discussing bailment, their Lordships drew on *Washington University v Catalonia*,¹⁴⁸ reinforcing their stance on property in human tissue. Fundamentally, the case questioned whether individuals who had donated tissue to the university had ‘continuing rights in relation to it as bailors’.¹⁴⁹ Clarke LCJ considered that the donated tissue implied that it ‘was property

¹⁴⁰ *ibid.*

¹⁴¹ Muireann Quigley, ‘Property: The Future of Human Tissue?’ (2009) 17(3) *Med Law Review* 457.

¹⁴² *Evans v Amicus Healthcare Ltd* [2004] EWCA Civ 727.

¹⁴³ Quigley (n 141).

¹⁴⁴ *Hecht v. Superior Court of Los Angeles County*, 16 Cal. App. 4th 836 (1993).

¹⁴⁵ *ibid.*

¹⁴⁶ Quigley (n 141) 461.

¹⁴⁷ *ibid* 463.

¹⁴⁸ *Washington University v. Catalonia*, 490 F.3d 667 (8th Cir. 2007).

¹⁴⁹ *ibid.*

capable of passing from the donors to the donee'.¹⁵⁰ This challenges those who deny ownership yet want individuals to be allowed to determine the fate of their organs and tissues. This is significant, Quigley asserts, because it demonstrates that the Court does not essentially associate proprietary considerations to commercial ones and that individuals can *donate* because they own the organ and tissue to begin with.¹⁵¹

McBride and Bagshaw argue that the development in the law after *Yearworth* was inevitable given the growing secularisation of society and the concomitant popularity of the idea that people 'own themselves'¹⁵² and should be allowed to do what they like with their bodies.¹⁵³ Others argue that the recognition of self-ownership is the highest form of allowing a person to regard their bodies as being sacred thus upholding integrity. Harmon rightly argues that the law has not appreciated the essentiality of the human body: 'As a nexus of human value on the one hand, and the vessel of instrumentalisation on the other, it has been a source of both respect and confusion'.¹⁵⁴ A source of respect for the body and its integrity, yet confused through the law's resistance of the 'ultimate expression of value and identity – self-ownership'.¹⁵⁵ Property rights in separated biological material simply 'represents a natural extension of the right to bodily integrity'.¹⁵⁶

III. IT'S MY KIDNEY, I CAN DO WHAT I WANT

This Section seeks to negate fears of commodifying the body through the recognition of self-ownership by using contemporary examples where law and society permit the commodification of the body. It seeks to analyse the issue of consent, as well as utilitarianism and Kantian ethics, to promote a regulated kidney market.

3.1 Commodification

Commodification has been defined as the 'production of a good or service for a

¹⁵⁰ *ibid.*

¹⁵¹ Quigley (n 141).

¹⁵² Nick McBride, 'Yearworth v North Bristol NHS Trust [2009] EWCA Civ 37' (*McBridesGuides*, 2013) <<http://mcbridesguides.files.wordpress.com/2013/09/yearworth-v-north-bristol-nhs-trust.pdf>> accessed 18 December 2013.

¹⁵³ *ibid.*

¹⁵⁴ Harmon (n 136).

¹⁵⁵ *ibid.*

¹⁵⁶ Rohan Hardcastle, *Law and the Human Body: Property Rights, Ownership and Control* (1st edn, Hart Publishing 2009) 147.

profit'.¹⁵⁷ It has been argued that sale of kidneys would result in the commodification of the body and its parts, and such fears have greatly impeded the development of a kidney market. However, these fears are highly hypocritical. Calandrillo argues that society endorses the view that commerce in human parts is immoral and contravenes human dignity. However, this justification conflicts with other 'practices that we feel no such qualms about permitting'.¹⁵⁸ For example, the reality of a thriving black market makes it difficult to reconcile the view that organs and tissues should not be traded. Sperm and ova banks flourish as Americans seek to remedy infertility, charging customers thousands of dollars for their services.¹⁵⁹ In *United States v Garber*,¹⁶⁰ a woman was given \$200 per week along with \$2,5000 in cash, 1,000 shares of stock and use of a car in exchange for regular extractions of her blood containing a rare antibody. Arguments have been made that these are regenerative cells and therefore, it is acceptable. However, sales have not simply been limited to such cells and tissue. One hundred and fifty dollars was given to a graduate student at the University of Pennsylvania for ten grams of 'non-regenerative thigh muscle'.¹⁶¹ This commercial trade in tissues demonstrates many of the 'indicia of tangible property'.¹⁶² However, Harre argues that disposal of body material should be permitted provided it does not threaten the individual's integrity. This integrity remains intact even with the removal of hair, blood and one kidney.¹⁶³ Andrews argues that there is no reason to prohibit the sale of all body parts and that only a prohibition is justified for sale of non-generative body parts where its donation or sale entails the death of the donor.¹⁶⁴ Some extremists, such as Harris, question why we should not be allowed to sell our heart. He posits that if this is what he wills to do and fully knows what he is doing, then he should not be prevented from doing so.¹⁶⁵ The contention here signals the dangers of a slippery slope: acceptance of the commodification of a kidney will lead to the argument that because I can sell my kidney, I can sell any organ or body part. However, it is significant to note

¹⁵⁷ Gordon Laxer and Dennis Soron, 'Thematic Introduction: Decommodification, Democracy and the Battle for the Commons' in Gordon Laxer and Dennis Soron (eds), *Not For Sale: Decommodifying Public Life* (Broadview Press 2006) 17.

¹⁵⁸ Steve P Calandrillo, 'Cash For Kidneys? Utilising Incentives To End America's Organ Shortage' (2004) 13 *George Mason Law Review* 69, 97.

¹⁵⁹ Calandrillo (n 3).

¹⁶⁰ *United States v. Garber*, 607 F. 2d 92 (5th Cir. 1979).

¹⁶¹ *ibid.*

¹⁶² Roy Hardiman, 'Toward the Right of Commerciality' (1986) 34 *UCLA Law Review* 207, 221.

¹⁶³ HAT Have, Stuart F Spicker and Jos VM Velie, *Ownership of the Human Body: Philosophical Considerations on the Use of the Human Body and its Parts in Healthcare* (Kluwer Academic Publishers 1998).

¹⁶⁴ *ibid.*

¹⁶⁵ *ibid.*

that this Article simply promotes the implementation of a legal regime strictly for kidneys (ie limited property right), like that of Iran. It is not indicative of a market in human body parts per se because death should never be the end result of the vendor.

Others fear that commodifying body parts might result in practices where people are compelled to sell body parts to pay outstanding debts. Thus, the phrase 'it cost me an arm and a leg' would be too real to invoke laughter.¹⁶⁶ The advantage of a regulated market, however, means the removal of a kidney is controlled by this system. Titmuss argues that a society where people are willing to donate blood to help strangers is better than one in which people only sell blood for money. Permitting a market in blood 'promotes self-interest at the expense of altruistic motives'.¹⁶⁷ However, such thinking cannot be applied to a kidney market, because, as Philips points out, Titmuss is only sympathetic to such a notion because the work of donating blood or semen is relatively undemanding in comparison to a kidney.¹⁶⁸

3.1.1 Distributive Justice

The main concern with accepting a kidney market is the exploitation of the poor – in other words, it would have a 'perverse distributive impact'. It is argued that if such a market were to be legal, a disproportionate number of poor people would be the majority vendors. Studies show that poverty is the driving force behind black markets. For example, the Journal of the American Medical Association conducted a study verifying that 96% of black market kidney sellers in India sold a kidney to escape financial hardship.¹⁶⁹ Adversely, many reported continued debt six years later, now accompanied by deteriorated health. Subsequently, it would primarily be the wealthy who could afford to buy such organs. However, this does not need to be the case. Charles Erin and John Harris argue that it is unfair that in a system of organ donation, everyone is paid but the donor. They argue, 'Only the unfortunate and heroic donor is supposed to put up with the insult of no reward, to add to the injury of the operation'.¹⁷⁰ Thus, they suggest that an ethical market would include an organ purchaser, an organisation like the NHS, which would distribute organs according to 'medical priority'. Direct sales and purchases

¹⁶⁶ DB Resnik, 'The Commodification of Human Reproductive Materials' (1998) 24(6) *Journal of Medical Ethics* 388.

¹⁶⁷ Anne Philips, *Our Bodies, Whose Property?* (Princeton University Press 2013).

¹⁶⁸ *ibid.*

¹⁶⁹ Calandrillo (n 3).

¹⁷⁰ Charles A Erin and John Harris, 'An Ethical Market in Human Organs' (2003) 29 *Journal of Medical Ethics* 137, 138.

would not be permitted, and thus no exploitation of low-income countries and 'no buying in ... India to sell in Harley Street' would exist.¹⁷¹ The organs would go through a screening process and strict controls, and penalties would be implemented to prevent abuse.¹⁷² This would be similar to the hybrid Iranian kidney model, a free market with individuals selling to the government, which acts as the intermediary.¹⁷³ Calandrillo agrees with this, arguing that a 'government provision of funding for organ purchases based on income or wealth levels of potential buyers' will alleviate such fears of exploitation and unfair advantages for the poor.¹⁷⁴ Such a system is highly beneficial as it prevents holdouts from donors who, if direct sales were permitted, would perhaps auction off their kidney at unrealistic prices. In Iran, vendors receive money from the government and additional compensation from the recipient. For this reason, as Doctor Delmonico points out, the government is not the final arbiter of payments. Rather, market forces 'determine the under the table price ... Thus, the Iranian system is, not surprisingly, far from regulated'.¹⁷⁵ This Article advocates a fixed price without under the table offers, as it would be inequitable if various vendors received more than others based on their luck in recipient. To ensure this, the system must ensure anonymity; in Iran, parties know each other prior to the sale, which makes it easier for them to enter into private contractual transactions.

Even if only the privileged could buy organs, denying a person the right to purchase an organ to save his life or someone else's life should not be subject to a vote or others' ethical hang-ups.¹⁷⁶ Littau argues, 'If I want to remove a kidney and sell it to a willing buyer for \$30,000 ... I ought to have that right'.¹⁷⁷ Lord Plant of Highfield similarly argues that it is an exercise of choice and autonomy: if 'you find it distasteful it has got absolutely nothing to do with you because you have your values and I have mine'.¹⁷⁸ No one stops you from

¹⁷¹ *ibid.*

¹⁷² *ibid.*

¹⁷³ Marcia Clark and William Travis Clark, 'Selling Your Organs: Should it be Legal? Do You Own Yourself?' (*Forbes Magazine*, 2013) <<http://www.forbes.com/sites/marciac Clark/2013/06/13/selling-your-organs-should-it-be-legal-do-you-own-yourself>> accessed 9 January 2014.

¹⁷⁴ Calandrillo (n 3).

¹⁷⁵ Anne Griffin, 'Iranian Organ Donation: Kidneys on Demand' (2007) 334 *British Medical Journal* 502.

¹⁷⁶ Stephen Littau, 'Free Market Organs: The Case for Capitalism in the Organ Transplant System' (*United Liberty*, 2013) <<http://www.unitedliberty.org/articles/13852-free-market-organs>> accessed 8 December 2013.

¹⁷⁷ *ibid.*

¹⁷⁸ Lord Plant, 'Selling Yourself Short: The Body, Property and Markets' (*Museum of London*, 2013) <<http://www.gresham.ac.uk/lectures-and-events/selling-yourself-short-the-body-property-and-markets>> accessed 10 December 2013.

donating blood, but 'I just want to sell mine, and to prevent me ... is an infringement of my rights, my right of ownership over my body'.¹⁷⁹ The body belongs to the individual; thus, he is the decider of how its parts are to be exchanged.

Without such a system, we expose individuals to the exploitation by middlemen who have 'dramatically marked up' transplantation costs to retain the surplus. A libertarian would argue that if a person values '\$50,000 more than she values her kidney so that she can fund education or provide food for her family why does society have the right to tell her she's wrong?'¹⁸⁰ Therefore, given an ultimatum between starving children and living with one kidney to continue providing for them, 'isn't the poor person (and even society) better off than she was previously?'¹⁸¹ Despite equal access, the poor will inevitably be the majority of vendors.¹⁸² Notwithstanding its illegalisation, it is the poor who sell their kidney on the black market, therefore, is it not more favourable to regulate it, ensuring safe procedures and follow ups? A legal market would provide a safe transaction for both the vendor and the buyer, ensuring that healthy kidneys are given in exchange for compensation promised.

Another hypocritical aspect of our system today is our value in saving life. If we believed that money should never be exchanged for life, why do we unhesitatingly accept the billing of medical services?¹⁸³ A patient in need of antibiotics 'is no less relieved of her obligations to pay than if she were visiting the grocery store'.¹⁸⁴ Calandrillo argues that there is no reason why such transactions should not be funded by a universal state health care system, allowing everyone access. He argues that 'if healthcare is indeed a fundamental right, requiring that people pay for life-saving medicines or operations is not morally different than making them pay for life-saving human organs'.¹⁸⁵ To avoid the rich being the only buyers, the government should aid the poor through suitable payment programmes (eg instalments).

This concern of exploiting the poor is pretentious for it is the poor and uneducated who are allowed and 'even encouraged' to 'fill the ranks of dangerous professions and military service' but are prevented from taking the

¹⁷⁹ *ibid.*

¹⁸⁰ *ibid.*

¹⁸¹ *ibid.*

¹⁸² Calandrillo (n 3).

¹⁸³ *ibid.*

¹⁸⁴ *ibid.*

¹⁸⁵ *ibid.*

measured risk of selling an organ.¹⁸⁶ In America, the top five most dangerous jobs include agriculture, fishing, forestry and construction jobs.¹⁸⁷ As Dean L'Hospital argues, not one of these jobs has the 'immediate, life-saving impact of an organ transaction' yet are deemed as 'honourable professions' whilst selling your kidney 'is considered shameful and/or taboo'.¹⁸⁸ It is hypocritical of the law to assert that it cares about the well-being of the poor, when it allows individuals to be exploited every day through dangerous occupations. However, we allow this to continue because we know that it is the right of every individual to assume the risk of a dangerous job if they deem the reward worthwhile¹⁸⁹ in the same way we would expect it to be the right of the individual to choose whether to take on the risk of donating a kidney.

Libertarians will not agree that the poor are exploited because the 'possession of resources has absolutely nothing to do with freedom'.¹⁹⁰ As Sir Keith Joseph stated, '[P]overty is not unfreedom; the lack of resources is not a restriction on liberty'.¹⁹¹ Thus, Lord Plant argues that buying the kidney of a poor person is not exploitative, but 'a perfectly legitimate form of freedom of exchange'.¹⁹² Furthermore, the risk of death is widely accepted when the kidney is altruistically donated. So why does this acceptance change with the introduction of profit motives? 'What had historically been deemed "minimal risks" suddenly escalated into intolerable dangers when profit became an obvious motive!'¹⁹³ This paternalistic attitude prevents the patient from exercising his or her right of self-determination and is illogical because people risk their lives everyday for profit, for example, with stunt doubling.

3.1.2 Consent

Based on notions of autonomy and bodily integrity, Justice Benjamin Cardozo stated, 'Every human being of adult years and sound mind has a right to determine what shall be done with his own body'.¹⁹⁴ The doctrine of informed consent draws on the 'body as property' view, declaring that competent

¹⁸⁶ Dean L'Hospital, 'The Medium of Exchange Paradigm: A Fresh Look at Compensated Live Organ Donation' (2008) 2 Human Rights and Globalisation Law Review 1.

¹⁸⁷ *ibid.*

¹⁸⁸ *ibid.*

¹⁸⁹ Clark and Clark (n 173).

¹⁹⁰ *ibid.*

¹⁹¹ Lord Plant (n 178).

¹⁹² *ibid.*

¹⁹³ Arthur L Caplan, 'Blood, Sweat, Tears and Profits: The Ethics of the Sale and Use of Patient Derived Material in Biomedicine' (1985) 33 Clinical Research 448.

¹⁹⁴ *Shloendorff v. Society of New York Hospital*, 11 N.Y. 125, 105 N.E. 92 (1914).

individuals have a right to exclusive control over their bodies.¹⁹⁵ This is confirmed through the laws of trespass against the person that requires proof of consent to relieve a person of criminal liability.

Rape in its earliest version was regarded as a property crime.¹⁹⁶ Since women were seen as chattel, it was a crime against the person whose property had been damaged in the rape – usually the husband or father was compensated for the wrongdoing. Today, the question of the woman's consent is central to the crime. This is a historical demonstration that the body is not anyone else's but your own, and it is not acceptable for people to do with it that which you have not agreed to.

Opponents to a market in kidneys argue that commercial incentives negate the poor's consent. Furthermore, arguments propose the poor to be too uneducated to understand the inherent risks, which precludes informed consent.¹⁹⁷ As is known, duress and necessity in criminal law preclude voluntary action. Therefore, Taylor submits that poverty drives people to make choices to make ends meet, ergo, organ markets compel sale by those in financial need.¹⁹⁸ Despite this, people may still 'autonomously choose to sell an organ since they are still directing their own actions within their impoverished economic circumstances'.¹⁹⁹ Thus, autonomy is not necessarily impaired, even if the sale was out of desperation. Taylor argues that control is an intentionally characterised concept: '[A] person can only cede control to another intentional agent'.²⁰⁰ However, economic forces are not intentional agents; thus, it is not possible to cede control to them. Therefore, coercion by poverty or other economic factors cannot happen. Consequently, this argument fails to counter the argument that autonomy supersedes economic coercion when individuals choose to sell their kidney.²⁰¹

¹⁹⁵ Roger F. Friedman, 'It's My Body and I'll Die If I Want to: A Property-Based Argument in Support of Assisted Suicide' (1995) 12(1) *Journal of Contemporary Health Law and Policy* 183, 207.

¹⁹⁶ Anne Phillips, 'Your Body, Whose Property?' (*The Body Sphere*, 2013)

<<http://www.abc.net.au/radionational/programs/bodysphere/your-body2c-whose-property3f/4931122#transcript>> accessed 18 January 2014.

¹⁹⁷ J Radcliffe-Richards et al, 'The Case for Allowing Kidney Sales' (*The Lancet*, 1998)

<http://ac.els-cdn.com/S0140673697082111/1-s2.0-S0140673697082111-main.pdf?_tid=e658f6f8-470e-11e3-add3-0000aacb360&acdnat=1383761687_23109363ca8d75573301eeb2323a77d4>

accessed 9 February 2014.

¹⁹⁸ Paul M Hughes, 'Constraint, Consent, and Well-Being in Human Kidney Sales' (2009) 34 *Journal of Medicine and Philosophy* 606.

¹⁹⁹ *ibid.*

²⁰⁰ *ibid.*

²⁰¹ James Stacey Taylor, *Stakes And Kidneys: Why Markets in Human Body Parts are Morally Imperative* (Ashgate Press 2005).

For Wilkinson, financial incentives *can* unduly influence the poor because the poor find them difficult to resist.²⁰² Although it is important to consider the free will and ethics of economic temptation to the financially desperate, consent to sell is fundamental to the decision, not whether it was voluntary.²⁰³ Therefore, commercial kidney markets are morally permissible because when individuals choose to sell they do so autonomously and are not being exploited; and even if they were being exploited, their consent trumps exploitative concerns. It would be morally wrong to deny such a market when we are aware that most sellers live in poverty, since 'the chance to receive a few thousand dollars to escape the slums in exchange for taking on an added risk to their health is rational and well worth it'.²⁰⁴ All labour can be seen as commodifying the body. The following specifically demonstrates the reality of commodification.

3.2 Prostitution

Prostitution exemplifies body commodification. Whilst prostitution is illegal in some countries, it is legal in others, demonstrating societies' hypocrisy in permitting the commodification of the body while stigmatising organ sales for fear of exactly that. It has, however, been contested that with prostitution, what is sold is not a body, or a self, but a 'service'.²⁰⁵ Others, including Carol Pateman, argue that sexuality is one of the most intimate aspects of the self. It is integral to it and cannot be separated from the self; therefore, a prostitute who sells her sexuality is also selling her 'self'.²⁰⁶ It is argued that because it is the use of the woman's body that is sold, and sexuality and the self are unified, it is classified as selling the self. On a similar note, Julian Savulescu argues that if we are allowed to sell our labour, why not sell the means to that labour?²⁰⁷ We have free market activity wherein we publicise sex through open advertising on billboards and TV. According to Radin, prostitution should be decriminalised in places where it is prohibited, 'so as to protect poor women from the degradation and danger of the black market'.²⁰⁸ However, sexual services such as 'brokerage (pimping), recruitment and ... advertising should be prohibited' because these initiate someone else's ownership via control.²⁰⁹ Whilst this is similar to a kidney market, it is important to note that one is simply

²⁰² Hughes (n 198).

²⁰³ *ibid.*

²⁰⁴ Calandrillo (n 3).

²⁰⁵ Marjolein Van Der Veen, 'Rethinking Commodification and Prostitution: An Effort at Peacemaking in the Battles over Prostitution' (2001) 13(2) *Rethinking Marxism* 30.

²⁰⁶ *ibid.*

²⁰⁷ Phillips (n 196).

²⁰⁸ Margaret Jane Radin, 'Market Inalienability' (1987) 100 *Harvard Law Review* 1849.

²⁰⁹ *ibid.*

commodifying a part of oneself, not the whole body. Commodification of the kidney does not mean commodification of the body in the same way that commodification of blood does not mean commodification of the body. To say a kidney market leads to commodification is to be blind to the numerous ways society is commodifying the person already.

3.3 Commercial Surrogacy

Another example of commodification is surrogacy. There are two forms: traditional, where the surrogate is the child's biological mother, and gestational surrogacy, where the mother is unrelated. Gestational surrogacy usually involves a commercial transaction. Titmuss argues that few would agree that women have a moral or civic duty to undergo 'the intrusive medical procedure involved in the donation of eggs, or the physically and emotionally draining pregnancy of a surrogate mother' just in the same way we would not 'think people in general had a duty to provide spare kidneys to complete strangers'.²¹⁰ And thus, he questions, 'When the acts themselves are regarded as so much beyond the call of duty, is it appropriate nonetheless to refuse compensation?'²¹¹ It is difficult to imagine that in such a situation, people would not want to show their gratitude by some form of compensation, not necessarily money, but some value. Titmuss argues, 'If surrogacy arrangements of any kind are permitted, it seems exploitative not to recognise the work involved and offer some reward'.²¹² Radin argues that a surrogate is paid for the same reasons that an ordinary adoption is commissioned: 'to conceive, carry and deliver a baby'.²¹³ However, some view surrogacy as analogous to prostitution because what is being sold is not the baby, but the use of the woman's body, thus commodifying her. This view seems reasonable because if the surrogate decides she wants to keep the baby, no contract can be enforced in court that she must go through with giving up the baby – thus, one does not contract for the baby, but for gestational services.

3.4 Kidney Exchange Programme

The final illustration of commodification is the Kidney Exchange Programme. This programme is designed to aid those whose partners want to donate a kidney but unfortunately do not match in blood type. As a result, they can match with a couple in a similar situation and the two healthy spouses or partners can exchange the kidneys for transplant in their sick spouses or

²¹⁰ Phillips (n 196).

²¹¹ *ibid.*

²¹² *ibid.*

²¹³ Radin (n 208).

partners. This is deemed a 'money-less market'. But looking closely, is this really what it is? Valuable consideration can be money or, alternatively, something capable of being computed in financial terms. Historically, a peppercorn was enough to constitute valuable consideration and therefore, money is not mandatory. Therefore, is this programme not simply another mechanism of compensation without actual money being handed over, but rather money's worth? If this kind of program is permitted, compensation in the form of actual money should also be permitted. It is just a substitution of one for the other.

IV. PRIVATE VS COMMUNAL JURISDICTIONS

4.1 Iranian Kidney Model

An old sign in Tehran reads 'Association of Kidney Patients'. It is one of twenty-three such 'Dialysis and Transplant Patient Association' clinics found across Iran, the only nation with legal kidney sales.²¹⁴ In 1998 Iran created a compensated, living-unrelated kidney transplant programme, which has proven to be highly beneficial, allowing on average 1,400 Iranians per year to leave '\$3,000 richer, and 120-160 grams lighter'.²¹⁵ The promise of \$1,200 from the Iranian government, which also subsidises surgery and recovery costs, including an additional negotiable gift from the recipient of the organ donation, has been sufficient to convince individuals to part with their organ.

Whilst Iran is not always the most forward-thinking country, we should take a page out of their legal system. Iran's kidney market demonstrates a limited ownership of one's body view. The lethargic supply of kidneys skyrocketed when a legal market was created. Kidneys from living-unrelated donors now constitute around 80% of the supply.²¹⁶ The market is regulated through a process where potential donors and recipients are subjected to a number of psychological and clinical evaluations. Once deemed competent, participants are referred to government officials who then set up payments. This process acts as an efficient filtering mechanism, ensuring that all participants are Iranian citizens between the ages of twenty and thirty-five, thus safeguarding the citizens by creating a 'regional transplant hub', preventing the country from being regarded as a 'haven for international organ traders'.²¹⁷ Screening processes protect recipients from HIV and hepatitis B and ensure that

²¹⁴ L'Hospital (n 186).

²¹⁵ *ibid.*

²¹⁶ *ibid.*

²¹⁷ Sarah-Louise Johnson, 'Making Beans Out of Kidneys: An Argument Against Kidney Sale' (MA dissertation, University of Birmingham).

individuals are psychologically prepared. Black markets do not cater to such health checks; doctors are barely qualified to carry out the operation; donors rarely receive the full money they are promised; and transplants are not always successful, leaving both donor and recipient with grave difficulties later on. Black markets thrive because it is easy to mask diseases of desperate poor people; therefore, the regulation of such a market will be safer for society as a whole.

Broker price mark-ups are no longer an issue for compensated donors and recipients, and transplant surgeries are no longer carried out by 'marginally qualified surgeons in substandard facilities'.²¹⁸ Further, living-unrelated kidneys provide better medical outcomes than cadaveric kidneys.²¹⁹ It seems that despite placing a price on the kidney, Iranians still value human life equally as before the legal market was created. Contrary to market critics' predictions, the poor have not been picked clean of organs, commoditised or taken advantage of in the legal market; instead, these problems have plagued other nations that prohibit organ sales and that fail to control black markets. For example, a study by Ghods demonstrated that the rich and poor were transplanted almost equally. The study consisted of 500 kidney recipients: 50.4% were poor, 36.2% were middle class and 13.4% were wealthy.²²⁰ Whilst some people may be exploited, it is their decision to consent to the procedure as adults aware of the risks. As Leonardo De Castro points out, '... [T]he possible disadvantages of compensated organ donation are not greater than the possible benefits and these can be minimised through the implementation of safeguards'.²²¹ Furthermore, compensation for a kidney is only temporary and does not constitute long-standing improvements to socio-economic status. However, even a small sum could dictate life over death.

The success of the Iranian Kidney Model lends itself to a number of factors. Firstly, the rationale for the 2000 Organ Transplant Act was based on Iran's desire for society to bear responsibility and show appreciation to organ donors. The country saw the deprivation of a 'rightful claim to be compensated' as morally wrong, especially because everyone in the exchange is compensated, except for the donor.²²² Secondly, such a system ties in well with the significant

²¹⁸ Dean L'Hospital, 'The Medium of Exchange Paradigm: A Fresh Look at Compensated Live Organ Donation' (2008) 2 Human Rights and Globalisation Law Review 21.

²¹⁹ Ahad J Ghods and Shekoufeh Savaj, 'Iranian Model of Paid and Regulated Living Unrelated Kidney Donation' (2006) 1(6) Clinical Journal of the American Society of Nephrology 1136.

²²⁰ *ibid.*

²²¹ LD de Castro, 'Commodification and Exploitation: Arguments in Favour of Compensated Organ Donation' (2003) 29 Journal of Medical Ethics 142.

²²² Bagheri (n 1).

value of saving life in Islam. It could be argued that Iranian donors are not paid for their kidney, but merely rewarded for their altruistic donation. However, this is debatable because the altruistic gesture might not exist but for the payment in the first place. Robert Veatch has called 'rewarded gifting' a blatant corruption of the language and argues that the transfer of money is not a 'reward' but a payment.²²³ However, he believes that rewarded gifting is more justified where a non-monetary reward such as 'bonus points' are provided by the programme. On the other hand, Bagheri states that compensation of donors is not the same as purchasing a good with a price tag on it; instead, it is recognition, appreciation and reimbursement for someone who has come forward to donate an organ, taken time from work, travelled, and forgone earnings.²²⁴ He argues that such compensation is no different than paying the doctors for their services. However, difficulties may arise in determining where to create a boundary between 'compensation' and 'persuasive incentives' that pressure people into donating organs.²²⁵ Furthermore, he adds that it should be left to the individual whether to accept the compensation or to waive it, but he fails to explore why a donor has this option. Libertarians would argue that he can do so because he is free to choose and he is free to sell his kidney; therefore, the argument reverts to 'the kidney is "mine", and therefore I can do what I want with it', even if I commodify myself.

4.2 Opt-In and Opt-Out Systems

The Iranian model can be compared to systems in both Spain and the UK. Unlike in Iran, where there is a limited ownership right, such that only Iranians may sell their own kidneys, the UK and Spain have a system of opting in and out. The UK uses the opt-in system, which is voluntary and altruistic. According to this system, a person must give explicit informed consent before his death, confirming that he wants to donate his organs. In contrast, in the opt-out system, everyone is a potential donor unless a person registers to opt out of donation prior to death. Countries with this system generally have a higher success rate, though not significant enough to eradicate the long waiting list. Wales granted Royal Assent to The Human Transplantation Act in 2013. The Act introduces a soft opt-out system where on the death of an individual who has not opted out, his or her family is contacted, and if they want to opt-out on behalf of the deceased then they may do so. In contrast, in hard opt-out systems, where an individual has failed to opt out, the family is not contacted and his organs will be taken out for donation. A hard opt-out system

²²³ *ibid.*

²²⁴ *ibid.*

²²⁵ *ibid.*

introduced in England would open challenges under the European Convention on Human Rights.²²⁶

Stephen Littau states that the distinctions between the opt-in and the opt-out systems are important because of the presumption of ownership. He argues that if citizens have an option of opting in, this shows self-ownership; to suggest that an individual has to opt out shows citizens' bodies are property of the government.²²⁷ Thus, it could be regarded that countries using the opt-out system, such as Spain and France, are running on a system of collective ownership. This system has been criticised for its similarities with conscription, where tissues and organs can be removed posthumously for transplantation, irrespective of any consent.²²⁸ Under such a system, human bodies are treated as public property either indefinitely, or for a limited period of time, before what remains is released for burial.²²⁹ However, the 'presumed consent' system is somewhat misleading, because family members can refute the choice of an individual who has chosen not to opt out and the deceased cannot do anything to ensure that his donation is carried out. This could violate his freedom of choice.

America presumes consent only where hospital staff and police are unable to trace any possible family members. However, in 1999, police made a mistake when using a deceased John Doe's fingerprints to trace his relatives.²³⁰ After confirming that no relatives could be found, his heart, liver, pancreas, intestines, kidneys and remaining lung were removed.²³¹ Four days later, it was discovered that he was Arthur Forge Jr. of Fort Worth. Police were unable to explain why their analysis was unsuccessful.²³² It has been argued that the 'presumed consent organ donation law might scare people [into believing] that the state could be body snatchers'.²³³ The future may be faced with such problems that violate individual rights. Unfortunately, such systems lack transparency for those in control usually cause the mistakes.

²²⁶ Simon Bramhall, 'Presumed Consent for Organ Donation: A Case Against' (2011) 93 Annual Royal College Surgeon England 270.

²²⁷ Littau (n 176).

²²⁸ J Kaushik, 'Organ Transplant and Presumed Consent: Towards an "Opting Out" System' (2009) 6(3) Indian Journal of Medical Ethics 149.

²²⁹ *ibid.*

²³⁰ Maryellen Liddy, 'The "New Body Snatchers": Analyzing the Effect of Presumed Consent Organ Donation Laws on Privacy, Autonomy and Liberty' (2000) 28(3) Fordham Urban Law Review 815.

²³¹ *ibid.*

²³² *ibid* 816.

²³³ *ibid.*

Doctors in the UK are now encouraging people on waiting lists to accept surgery using illegally trafficked kidneys at a government-controlled hospital in Sri Lanka. The organs were said to be on sale for tens of thousands of pounds, with promises of surgery at a Colombian hospital.²³⁴ This is transplant tourism, defined by The United Network for Organ Sharing as ‘the purchase of a transplant organ abroad that includes access to an organ while bypassing laws, rules or processes of any or all countries involved’.²³⁵ It is easy for the West to travel to the South where the black markets are obtrusive and where such markets are not deterred. For example, in India, kidney sales were banned in 1994, but to circumvent the law, donors are simply asked to sign an affidavit stating they were not paid. How can we deny a legally regulated kidney market when we know that a black market in kidneys is thriving?

The opt-in system is fairer in that it provides individuals the opportunity to ‘empower their anti-donation preference’,²³⁶ but the opt-out system is perhaps worse than a regulated kidney market for it goes against the foundations of one’s autonomy and integrity, which is exactly the reason courts fear a compensated market in kidneys. As Dorry L. Segey states, ‘[O]pt-out is not ... the magic answer we have been looking for’.²³⁷ He adds, ‘[W]ith opt-out the perception becomes, “we will take your organs unless you take the time to fill out a form”. That’s a dangerous perception to have. We only want to use donated organs from people who intended to donate’.²³⁸

V. CONCLUSION

Despite the discrepancies that inundate this evocative debate, this Article has attempted to reconcile the differing attitudes towards the body, arguing for the implementation of a legal, compensated kidney market. The law’s paternal

²³⁴ Miranda Prynne, ‘Britons Being Sold Illegal Kidneys for Surgery in Sri Lanka’ (*The Telegraph*, 2013)

<<http://www.telegraph.co.uk/news/worldnews/asia/srilanka/10442714/Britons-being-sold-illegal-kidneys-for-surgery-in-Sri-Lanka.html>> accessed 4 January 2014.

²³⁵ DA Budiani-Saberi and FL Delmonico, ‘Organ Trafficking and Transplant Tourism: A Commentary on the Global Realities’ (2008) 8 *American Journal of Transportation* 925.

²³⁶ Jennifer Dolling, ‘Opting In to an Opt Out System: Presumed Consent as a Valid Policy Choice For Ontario’s Cadaveric Organ Shortage’ (*University of Toronto*, 2009)

<http://tspace.library.utoronto.ca/bitstream/1807/18276/1/Dolling_Jennifer_M_200911_LLM_the_sis.pdf> accessed 10 March 2014.

²³⁷ ‘Presumed Consent Not Answer to Solving Organ Shortage in US Researchers Say’ (*John Hopkins Medicine*, 2011)

<http://www.hopkinsmedicine.org/news/media/releases/presumed_consent_not_answer_to_solving_organ_shortage_in_us_researchers_say> accessed 10 March 2014.

²³⁸ *ibid.*

reluctance in recognising property in oneself stems from fears of commodifying the body and the unsettling notion that such acceptance would simply exploit the poor. However, irony subsumes this fear for our society is guilty of these exploitative accusations regardless of a market in kidneys. Whilst paternalism deems such a market an affront on human dignity, it is not the acceptance of payment that violates human dignity but rather its prohibition that is pernicious to an individual's autonomy.

In a world with thriving markets in blood, ova and sperm, biological material is at the epitome of commodification generating large economic gains. Therefore, extending the market to include 'non-vital solid organs such as kidneys', which can be removed safely, is not such a stretch.²³⁹ Where altruism has failed, financial compensation has succeeded. In Iran the vibrant legal market demonstrated its benefits and destroyed the illegal market for organs that flourished prior to 1998. With correct safeguards intact such a market will protect individuals from abusive black markets. This debate is obscured by morality and, whilst subjectivity is inevitable, we must not let it blur the glaring legal needs. Thus, utilitarianism, despite its ability to create injustices in certain scenarios, offers an ideal solution in this case. As Kohler correctly states, property is a social construct – nothing more than a normative set of relationships that might be attached to whatever subject matter society deems necessary or beneficial to make the subject of property.²⁴⁰ As waiting lists expand, a limited property right in the body becomes mandatory. Advancements in biotechnology will most likely see a future in which engineered kidneys can be transplanted. However, until then, both the poor and sick fight for survival. We are merely digging their graves by denying them this right.

²³⁹ Denis Cummings, 'Should it be Legal to Sell Organs?' (*Finding Dulcinea*, 2009) <<http://www.findingdulcinea.com/news/health/2009/july/should-it-be-legal-to-sell-organs.html>> accessed 14 December 2013.

²⁴⁰ Alison Clarke and Paul Kohler, *Property Law Commentary and Materials* (CUP 2005).

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