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Sometimes Merely as a Means: Why Kantian Philosophy Requires the Legalization of Kidney Sales

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SOMETIMES MERELY AS A MEANS: WHY KANTIAN PHILOSOPHY REQUIRES THE LEGALIZATION OF KIDNEY SALES

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Running Head: Kant Requires the Legalization of Kidney Sales

Several commentators have tried to ground legal prohibitions of kidney sales in some form of Kant's moral arguments against such sales. This paper reconsiders this approach to justifying laws and policies in light of Kant's approach to law in his political philosophy. The author argues that Kant's political philosophy requires that kidney sales be legally permitted, although contracts for such sales must remain unenforceable. The author further argues that Kant's approach to laws, such as those governing kidney distribution, was formed in part by considering and rejecting an assumption frequently employed in the bioethics literature, namely, that legal duties can be grounded directly in moral duties. The author explains some of Kant's reasons for rejecting this assumption, and concludes that arguments pertaining to the legality of kidney sales developed on the basis of Kant's moral philosophy should no longer be considered tenable.

Keywords: organ markets, Kant's political philosophy, health policy, kidney transplant, contract law

The moral and legal permissibility of selling kidneys has been heavily disputed in the contemporary bioethics literature. Most jurisdictions prohibit such sales, including the European Union and the United States. Currently, the only existing exception to this rule is Iran, which legalized compensation for kidney donation in 1988 (Ghods and Savaj 2006). Whether such sales should be legally permitted raises a host of complex issues, and the question has provoked several book-length works and dozens of articles.

Among the more frequently cited arguments regarding the permissibility of a market in organs are arguments originating in Kant's moral philosophy. Kant's moral philosophy seems particularly relevant to the permissibility of such markets, in part because Kant categorically denied the moral permissibility of selling any part of the human body.

To show that such sales are *immoral,* however, is not yet to show that they should be *illegal*. Most people will readily concede that, in principle, not all immoral actions should also be illegal. But in this paper I will argue, not only that Kant's moral arguments are not demonstrative in showing that such sales should be illegal; but that Kantian philosophy cannot support legal prohibitions of organ sales at all, and

further, that Kant's political philosophy requires the legal permissibility of kidney sales,[1] even if such sales are deeply immoral.

The paper will proceed in three major parts. First, I will briefly explain the main features of Kant's moral philosophy that led him, and many contemporary writers after him, to argue that selling organs is immoral. Contemporary writers have generally thought that this argument by itself could, if successful, either fully or partially justify legal prohibitions against selling kidneys. Second, I will argue that Kant's political philosophy not only does not justify these legal prohibitions but requires laws prohibiting sales to be understood as violating what Kant calls "innate right." A careful consideration of Kant's major principles and several key texts, however, suggests that while kidney sales must be permitted, contracts for these sales cannot be enforced. In the third section I consider whether it is tenable to continue treating the question of the legality of organ markets on the basis of Kant's *moral* rather than *political* philosophy. I argue that Kant effectively shows why his moral philosophy cannot be used to justify laws or policies in the ways that his contemporary interpreters have imagined, and consequently, that normative justifications of legal prohibitions grounded in Kantian moral philosophy should be considered untenable.

I. KANTIAN MORAL ARGUMENTS FOR PROHIBITING KIDNEY SALES

There is little doubt that Kant himself thought that it is morally impermissible to sell human body parts. Kant claims that one may not maim, dismember, or otherwise permanently alter one's own body for any purpose other than to save one's own life. A person is not permitted to sell a limb or even a finger (Kant

[1] In this essay, I use "legal permissibility" and "legalization" to indicate the specific legal features I explicitly defend in this essay, and not others that people sometimes associate with these terms. The argument here is most obviously directed against criminalization of kidney sales, but it is not merely an argument for decriminalization, because I also give arguments relevant to whether kidney sales should be officially discouraged or disincentivized by the state, and because I also discuss the implications of Kant's political philosophy for understanding when consent for organ sales has been obtained, and whether contracts for kidney sales are legally enforceable. It is particularly important to note that, unlike several recent authors, by arguing for the "legalization" of a market I do not suppose that the state should take positive steps towards establishing such a market on the grounds that it would save lives or have other beneficial consequences.

1980, 124). A man cannot have himself castrated to make it possible to earn a living as a singer. Selling or even giving away a tooth is a way of "partially murdering oneself" (Kant 1996b, 6:423).[2]

Commentators have picked up on two major strains of argument for these views. First, in his pre-critical lectures, Kant offers an argument against organ sales, explaining that a person cannot be both property and a person (Kant 1980, 165). To claim that someone is both is "self-contradictory." Because a person cannot be his own property, he is not "at his own disposal." Consequently, he cannot sell any part of his body.

We might call this argument a metaphysical one, because it seems to depend on the idea that it is a metaphysical mistake to think of a person as property. Various commentators have followed Kant here (Harré 1987, Cohen 1999). The difficulty with the metaphysical argument, taken alone, is that while it may indeed be a metaphysical mistake or even a contradiction to *claim* that a person is both a person and property, it is not clear why it is morally wrong to act on that basis. Kant needs a further argument to show that treating a person as property or a thing is not just a metaphysical mistake, but also a moral one.

Kant of course later worked out just such a principle, the categorical imperative (especially as summarized in the formula of humanity and the idea of human dignity). The second argument Kant provides against organ sales is more easily tied to his moral arguments, and occurs in the *Doctrine of Virtue.* In that work, Kant says that to "maim" oneself or "deprive oneself of an integral organ" (such as a "tooth") is to commit "partial suicide" (Kant 1996b, 6:423). Organ selling is wrong, evidently, for the same reasons that suicide is wrong. Since Kant argues (both in this passage and elsewhere) that suicide violates the categorical imperative, it seems natural to assume that Kant thinks organ sales violate the categorical imperative in the same way that suicide does. Because this second argument relies explicitly on Kant's moral principles as described in the various formulations of the categorical imperative, we can refer to this second argument as the *moral* argument against organ selling.

Commentators have generally sought to explain the moral argument either in terms of the formula of humanity (the second formulation of the categorical imperative) or the idea of human dignity (which Kant describes in his discussion of the third formulation of the categorical imperative). They have reached

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[2] All references to Kant's works use the Prussian Academy pagination, except for those from Kant's *Lectures on Ethics* (1980).

various conclusions about whether and to what extent this moral argument succeeds. Some have argued that Kant's argument, or something closely related to it, successfully shows why kidney sales, but not donations, are impermissible (Chadwick 1989, Kass 1993, Cohen 1999, Stempsey 2000, Cohen 2002, Kass 2002, 185, Morelli 2004, Heubel and Biller-Andorno 2005). Others have argued that any arguments Kant makes against sales also apply to donations, because the arguments are against cutting out and using one's organs *per se*, not just selling them. Some take this to be a reason to forbid both sales and donations, or at least some sales and donations (Powers 1999); while others take this to be a compelling reason for rejecting or re-examining Kantian arguments applied to organ markets (Gerrand 1999, Gill and Sade 2002, Cherry 2005, 135, Taylor 2005, 151, Cherry 2009). Some conclude that organ sales might be permissible, on a Kantian view, under some circumstances but not others (Munzer 1993, Munzer 1994, Green 2001, Kerstein 2009b, Kerstein 2009a, Alpinar-Şencan 2015). And others conclude that Kant fails altogether to ground the impermissibility of organ sales in the categorical imperative (Engelhardt 1996, 351, Bole III 1999).(Taylor 2005, 151)

It is important to note that nearly all authors either say, or seem to assume, that their analyses of Kant's moral or metaphysical arguments have direct applicability to the laws that should govern organ distribution. While one author explicitly notes that he does not intend his conclusions to ground legal prohibitions (Munzer 1994), others extend their conclusions about the morality of organ sales directly to the legal question about how the distribution of kidneys ought to operate (Chadwick 1989, Cohen 2002, Morelli 2004, Kerstein 2009b), or suggest that a Kantian moral analysis could or should, in principle, directly shape laws and policies (Green 2001, Shell 2009). Other authors motivate their arguments by pointing to the importance of the moral duties discussed by Kant for shaping laws and policies (Kass 1993, Kass 2002, Kerstein 2009a). Even critics of legal prohibitions have enlisted Kant's moral arguments as support for laws permitting some kinds of organ exchanges or sales (Wilkinson 2004, Taylor 2007). Kant's moral principles correctly understood, they argue, undermine rather than support legal prohibitions. And finally, even those who have argued that Kant's arguments fail generally seem to assume that *if* Kant's moral arguments had succeeded, then those arguments would have implications for laws and policies (Bole III 1999, Engelhardt Jr. 1999, Taylor 2005).

This general assumption, that metaphysics or moral philosophy should or could directly shape the laws governing the distribution of kidneys, is perhaps most remarkable because it is an assumption that Kant seems not to have shared.[3] Kant himself distinguished sharply between political philosophy and moral philosophy, and did not think that either metaphysical or moral arguments should directly determine the content of laws and policies.[4]

II. KANTIAN POLITICAL PHILOSOPHY AND KIDNEY SALES

A. Principles of Right

Kant assumes, in both his moral and political philosophy, that persons possess "free choice." Free choice is the capacity possessed by human beings for acting in ways that are not determined by sensibility, and in this way it is the opposite of "animal choice" (Kant 1996a, 6:213). Persons are distinguished from animals, in Kantian metaphysics, by the fact that their choices are not necessarily determined by laws of nature. Their choices can also be determined by laws of "pure reason."

However, Kant did not think that laws and policies can force persons to determine their choices in accordance with the laws of pure reason, or the moral law. (In fact, attempting to do so would be conceptually incoherent and would amount, in Kant's words, to a "contradiction"—I shall have more to say about this towards the end of this essay). Instead, laws and policies create the conditions necessary for the possibility of exercising free choice, in the sense that they help determine what belongs to each, which is a necessary precursor to talking about whether someone acts in accordance with the moral law.

While the law is not directly concerned with enforcing or ensuring "free choice" itself, it is concerned with what Kant calls "freedom in the external use of choice" (1996a, 6:214) (or what he refers

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[3] This is not to say that metaphysics and moral philosophy do not shape Kant's political philosophy—his political philosophy is, after all, found in the *Metaphysics of Morals.* Rather, Kant's political philosophy is a sophisticated account of the metaphysics of political authority that does not share the assumption of recent commentators, that state power should be used to directly enforce moral duties or metaphysical truths. For an account of the importance that a "minimal metaphysics" plays in Kant's political philosophy, see Flikschuh (2000).

[4] I will explain some features of this division in this article. The relationship between the two is, however, a complicated topic that has generated a large literature. See especially Guyer (1998, 2002), Wood (1997), Pogge (1998), Ripstein (2009, Appendix), Willaschek (Willaschek 2009), and Seel (2009).

to later as simply the "free use" of choice). This external freedom is concerned with, roughly, the actions that we commit (as opposed to the ends we adopt, for example). However, laws and policies are not concerned with *all* the actions we commit: instead, they are concerned with our actions only insofar as these affect other persons. So, Kant says that the concept of right is concerned, "first, only with the external and indeed practical relation of one person to another, insofar as their actions, as deeds, can have direct (or indirect) influence on each other" (1996a, 6:230). The concept of right, then, on which all laws and policies should be based, is entirely "relational," where "relational" refers to relationships with *other people*—not our relationships to ourselves, or to the moral law.

Kant's general strategy in his political philosophy—expressed most fully in his *Doctrine of Right*—will seem familiar to readers of the *Groundwork*. The work as a whole is built on several carefully delineated (and closely related) fundamental principles. Kant calls the most fundamental of these the universal principle of right: "so act externally that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law" (Kant 1996a, 6:231).

This universal principle of right describes the way in which my actions may or may not permissibly affect others. It prescribes, as the most basic political norm, the duty not to interfere with the freedom of others, when their freedom is specified according to a universal law. If the free use of my choice conflicts with someone else's freedom, then that use of free choice is impermissible or non-rightful.

Conversely, if my use of free choice *can* coexist with everyone else's freedom, then my use of free choice is right. This can be seen a little more clearly when viewed in light of what Kant calls "innate right." According to Kant,

> Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity. (Kant 1996a, 6:237)

Innate right, then, is simply the right that corresponds to the duty contained in the universal principle of right: if everyone has a duty to act in ways that can coexist with my freedom, then I have a right to be free of others acting in ways that cannot coexist with my freedom (provided, in each case, that our freedom is considered in the same way, under a universal law). I have a right to use my freedom however I wish as long as it does not interfere with their freedom. And they have no right to curb or otherwise interfere with

my freedom, unless my freedom interferes with theirs, as described under a universal law. Kant spells out this implication explicitly: innate right means that I am "authorized" to do whatever I want to others, as long as it does not violate their rights or "diminish what is theirs" (Kant 1996a, 6:238).

Because each is entitled to exactly the same kind of freedom, i.e. freedom that is compatible with the freedom of others in accordance with a universal law, persons are fundamentally equal under law. Each person has total authority to direct him or herself however he or she wishes, provided it does not conflict with the rights of others. One contemporary commentator has described this variously as the quality of being "independent" (Ripstein 2009, 14 ff) or "one's own master" (Ripstein 2009, Ch. 2): we are equal in the sense that we each have a right to order our own affairs and to use what is ours, provided our use does not conflict with the freedom of others.[5]

Because right is concerned primarily with securing this kind of independence for each, Kant says that right is concerned with the formal conditions of outer freedom, rather than the matter of freedom (Kant 1996b, 6:380). This formal/material distinction means, essentially, that right secures a formal domain for each person in which he or she can act without direct interference from the choices of others. Laws are not concerned, consequently, with the matter (or "ends") of the choices that persons make within their domain of freedom. The matter of any individual's actions—i.e., the ends towards which the actions are aimed—are, by definition, set by the individual him or herself, and not the state or other agents.

B. Principles of Right and Kidney Sales

1. Innate right and kidney sales

The domain over which each person may exercise choice begins with that person's body. Persons are free with respect to their own bodies primarily because for Kant, persons just *are* their bodies. Bodies are the extension of persons in space and time. Innate right specifies that each person has a right to freedom. So,

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[5] At least two commentators have offered somewhat different interpretations of what Kant means by "freedom" in the *Doctrine of Right*. See Flikschuh (2000, Ch. 3) and Finnis (1987). However, the interpretation offered here is the traditional one. It shares crucial aspects with accounts offered in Ripstein (2009, Ch. 2) and Gregor (1963, Ch. 3), for example.

if each human body is a person, then each human body also has a right to freedom (see Ripstein 2009, 40).

Freedom for an embodied person means freedom from physical interference by others, unless the consent of the embodied person is obtained first. So Kant uses the example of touching another's body without consent as an example of what it would mean to violate a person's "innate right." Such touching directly affects what is "internally mine" (1996a, 6:248).

Touching without consent is not wrong, then, because it violates property rights. A person does not have a property right in her body. Asserting otherwise would be a metaphysical error, because persons and property are distinct (as discussed earlier). In this way, Kant's account stands in sharp contrast with other accounts of persons' relationships to their bodies, such as Locke's. Rather, touching without consent is wrong because it violates a person's most fundamental domain of freedom, her person itself.

Because a person's domain of freedom begins with the body, persons have formal rights to do what they wish with their bodies, provided that their choices do not infringe on the freedoms of others. They may act, with respect to their own bodies, on whatever ends they wish. This right is grounded, again, in the fact that others have no right to interfere with an individual's body: the body is the source and the primary domain of any person's innate right to freedom.[6] This implies that one is authorized to remove a kidney or other organ and dispose of these as one wishes, and that (correspondingly) others do not have a right to interfere with this. It is a person's innate right in his or her body that grounds a right to sell organs.

Kant's political principles, incidentally, illustrate why Kant-inspired arguments against organ sales in the bioethics literature have not succeeded in making a truly *Kantian* case against the legal

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[6] Kant seems to presume that rights over one's body are relatively straightforward, because he relies on the idea that a person has a right to her own body but does not give any further explanation about what this means. It seems unlikely Kant could hold such a simple view in an era where human bodies are often partially composed of transplanted tissues and medical devices. One author suggests that rights in the body ought to be understood as partially contingent on the determinations of the united will (Flikschuh 2010). This seems plausible, but even if Kant were to allow some flexibility in determining what counts as a person's body, I don't think it would greatly affect the findings of the present paper. While it may be the case that any plausible Kantian view should allow for some flexibility in determining what, exactly, counts as an individual's body, in many cases what counts as an individual's body/person will be relatively clear, in our day just as it was in Kant's. In this paper, I assume that a kidney is a part of the person in whom it is currently implanted. So, once it is transplanted into a new person, it becomes a part of that person. This seems to roughly accord with the way organs are treated in the present legal context. Touching a kidney transplant recipient without consent gives rise to one suit of battery, not two, even if the recipient's body houses a kidney from a living donor.

permissibility of such sales. These arguments have, by and large, made reference to the formula of humanity, which specifies the ends on which a person must act, i.e. the *matter* of a person's choice.[7] But for Kant, laws are not concerned with the matter of a person's choice, but rather with the formal conditions of outer freedom. For a Kantian argument against the legal permissibility of organ sales to succeed, it would have to show that such sales violate the freedom of others, where freedom is considered in its formal, not material sense.

2. Prohibitions rooted in "duties of rightful honor"

One major commentator provides an argument from Kant's political philosophy that might be thought to lend support to prohibitions against kidney sales. Arthur Ripstein interprets Kant's remarks about "duties of rightful honor" (elsewhere referred to by Kant as "internal duties" of right (1996a, 6:237) and "duties from the right of humanity in our own person" (1996a, 6:236)) to mean that there are limits on what one may be legally permitted to do to oneself. So, according to Ripstein, a person may not "alienate himself" (2009, 68) or do anything that involves destruction of a person's "purposiveness." Ripstein finds in this sufficient Kantian grounds for prohibiting euthanasia (so 'consent is no defense against a charge of murder'). Although Ripstein does not address kidney sales, the argument could plausibly be extended to give a Kantian defense of prohibitions against kidney sales as well, since such sales could be interpreted as partial self-alienation and destruction of a person's "purposiveness."

It seems unlikely that Kant meant to suggest that duties of rightful honor support the criminalization or prohibition of consensual actions such as euthanasia or kidney sales for two main reasons. First is the fact that Kant categorically excludes the whole class of self-regarding duties from legal enforcement. This exclusion is attested to, first, by Kant's comments about the structure of the *Metaphysics of Morals*. The *Metaphysics of Morals* is divided into two major sections, the *Doctrine of Right* and the *Doctrine of Virtue*. In the preface to the *Doctrine of Virtue*, Kant explains the division by saying that duties of virtue are "duties for which there is no external lawgiving" (Kant 1996b, 6:410) indicating that such duties cannot be enforced, in contrast with duties of right. Because perfect duties to

[7] The formula of humanity: "So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means" (Kant 1996c, 4:429).

oneself—such as the duty not to commit suicide or partial suicide by selling one's organs—are described in the *Doctrine of Virtue* (only), it follows that Kant understands these as duties that cannot be enforced. Further attesting to the idea that Kant excludes self-regarding actions from legal prohibition is Kant's comment that a person can "never do wrong in what he decides upon in regards to himself" (1996a, 6:313). If a person cannot do wrong with respect to him- or herself, then, duties of rightful honor or internal duties of right cannot refer to enforceable duties that one owes to oneself (Byrd and Hruschka 2010, 63).[8] Additionally, although Kant mentions duties following from the "right of humanity in our own person" in several places in the *Doctrine of Right,* which right he associates with duties of rightful honor, he never suggests that these duties may be legislatively enforced, with the possible exception of bestiality which he mentions in an isolated comment (Kant 1996a, 6:363).

A second reason for thinking that Kant did not intend to criminalize violations of duties of rightful honor is the fact that, while it may seem difficult to accept that individuals are legally authorized to sell organs or otherwise violate the "right of humanity" in their own selves (given Kant's strongly stated positions on this right in his various moral writings), it is even more difficult to see the grounds on which Kant's political philosophy could justify the right of a third party to coercively prevent a person from violating this right against herself. It is true that third parties are generally authorized to coercively prevent someone from threatening or violating the rights of some innocent person—indeed, were this not possible then state authority would in principle be unjustifiable. So, one might think that it would in principle be permissible for a third party to stop someone from violating her *own* right, i.e. the right of humanity in her own person. However, persons always have the authority to waive their rights by consenting to others' proposals, as according to the traditional principle, *volenti non fit iniuria* (1996a, 6:313). In cases where consent is present, no interference or coercion is appropriate or even permissible. Kant further bolsters this point elsewhere by arguing that although persons are generally authorized to coerce those who violate their rights, they are not required to do so (Kant 1996d, 8:129). In cases where one violates one's own rights, one consents and thus implicitly waives any right one would otherwise

[8] I will not develop an account of what Kant means by "internal duties of right" or "rightful honor" here. For one plausible explanation, see Byrd and Hruschka (2010, 63).

have to coerce the wrongdoer (i.e., oneself), and there would be no authorization for third parties to interfere.

C. Principles of Right and Kidney Purchases

One might object at this point that even if persons have a right to do what they want with their kidneys, it has not yet been shown that there is a corresponding right to buy kidneys. Even if "sales" were technically licit, the state could perhaps impose restrictions on the purchase of kidneys. This is the approach of the Swedish government towards prostitution, for example: selling sexual services is not illegal, but buying them is. Such restrictions aim at eliminating a market for the item in question, even while (nominally) protecting persons' rights to do what they want with their bodies.

The objection is plausible, particularly because Kant drew a systematic division between innate right, which implies a right to one's own body, and what he calls "acquired right," that is our rights to things external to ourselves, such as property, contracts, and money. Kant also thought that acquired right is subject to the state's ratification. The state, acting as the embodiment of the united will, can conclusively settle who owns some piece of property or can determine that some property or good belongs to all in common. It is for this reason that possession of any piece of property is only "provisional" until what belongs to each is conclusively established in a civil condition (1996a, 6:264-6). Similarly, the state can decide when private resources become public resources through taxation (1996a, 6:326). So, it might be thought that if the state can go so far as to garnish some part of an individual's income through taxation, for example, then the state could also put limitations on how individuals use their income.

Although it is true that the state has authority to determine what is "laid down as right" (1996a, 6:306), it does so in a way that is meant to reaffirm or make conclusive what could be determined as right on other grounds (namely, the principles of right discussed earlier). "Public right" is a system of laws that needs to be "promulgated" by the state in order to bring about a rightful condition (1996a, 6:311). Kant treats issues such as the police power, taxation, and welfare under this heading. These laws, however, do not result in any genuinely new powers for the state: rather, public right "contains no further or other duties of human beings among themselves than can be conceived in [private right]" (1996a, 6:306).

Consequently, powers that seem new (such as the power of taxation) are conceived of as subsidiary to the overall purpose of the state to preserve itself (1996a, 6:326), which is in turn necessary for securing the requirements of private right. So, although the state has the authority to determine that a portion of my income must be returned to the state for the purpose of preserving the state, it does not at any point acquire the authority to tell me what I may do with that which remains in my possession. Indeed, the only reason the state has the authority to tax in the first place is so that it can protect external freedom, i.e. the freedom of individuals to use what is theirs according to their own plans and purposes.

The only exception to this rule is that the state may restrict our use of that which belongs to us by right in order to protect the equal freedom of others. So the state may not be able, as a general rule, to tell me what I can do with my wood or my matches. But it may put limits on my ability to start a fire that poses a hazard or a nuisance to others. In the case of organs, however, it is not clear how my purchase of a kidney from a consenting other affects what belongs to third parties by right.

The reason the state cannot prohibit purchases is similar, then, to the reason it cannot prohibit sales. There is simply no motivation in any of Kant's major political principles for the restriction of either sales or purchases, unless those sales or purchases violate the freedom of non-consenting third parties.

D. Kidney Exchanges and Unenforceable Contracts

If persons have rights to buy and sell kidneys, it will seem obvious that exchanging money for kidneys cannot be prohibited. Be this as it may, because they involve body parts—which, as already noted, are metaphysically distinct from property—such exchanges create some legal complexities that are not encountered in more typical exchanges, such as those involving the exchange of property for money, for example. Most particularly, such exchanges present problems when conducted under contracts. In what follows, we will examine contracts in more detail. I will argue that Kant's political philosophy, while not supporting the prohibition of kidney sales, also cannot support enforcing contracts for kidney sales.

Kant understands consensual exchanges to be rightful because they are constituted by a *united choice* (Kant 1996a, 6:271). A united choice is simply a choice made by two or more persons to collectively alter their respective rights. The rightfulness of a united choice is easily explained by reference to Kant's principles of right, the universal principle of right and innate right. If one person

agrees to transfer something to someone else, she has the right to do this, provided the other chooses to accept it; and vice versa. Because the transaction affects only the rights of the parties to the exchange, and both have rights to make any choice compatible with the freedom of everyone, the exchange is rightful.

The usual means by which a united choice operates in an exchange is through a contract. Contracts are a major area of emphasis in Kant's political philosophy (See Ripstein 2009, Ch. 5); but for the purposes of the present discussion, it is most important to note that contracts are a special case of a united choice, because they are able to create duties in the contractors to perform some specific action at some future date. As Kant says, contracts entitle one person to "an active obligation on the freedom and the means of the other" (1996a, 6:274). And, because the resulting obligation is a legal one, it can be enforced.

In the case of a contract for kidneys, a person would hypothetically create an enforceable legal duty to partially disembody himself, by promising to sell his kidney to someone else, and an enforceable legal right, in the other party, to him doing so. But the creation of any such duties or rights is impossible, because they violate innate right.

To see why this is, we must discuss innate right in more detail. An innate right—i.e., the right to freedom insofar as it can coexist with the freedom of others—entails a right to cut off a body part, as I have argued. This was explained as being a result of the fact that the domain over which a person has rights must necessarily begin with the body, which is the physical extension of a person in time and space. Describing innate right as a right to freedom that can coexist with the freedom of others implies that one has a right to one's body, since such a right is presumably compatible with the freedom of everyone.[9]

Innate right has implications for the body, but the definition of innate right itself does not mention the body but rather the right to "freedom." A right to freedom is somewhat different from other kinds of rights we might think of, such as a right to a car or a couch. The freedom I now possess is not "mine" by virtue of the fact that I can exclude you from having it. We speak colloquially of someone "losing their freedom," of course, but the fact that I lost my freedom does not imply that someone else may have found or otherwise acquired it.

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[9] There are limitations to this compatibility, of course. See note 6 above.

Instead, saying that a person has an innate right to freedom is just to say that a person has an innate right to a particular status: namely, a right to the status of legal person. And a legal person is just someone capable of having rights and duties, i.e. it is someone capable of the external use of choice. A person's right to freedom is not a right to any particular thing, then (beyond, perhaps, her body, as suggested above). It is rather a right to exercise rights, and to be treated by others as one who can have rights and duties with respect to them. It includes a right to do those things that are the prerogative of all legal persons: a right to affect the rights and duties of others by doing the various things that have implications for their rights and duties, such as acquiring and alienating, or entering into consensual relationships with them. In this sense, it is like a Hohfeldian power: the right to freedom is the power, within a set of rules, to alter one's own rights and/or the rights of others, by acquiring, alienating, consenting, etc.[10]

The special nature of innate right distinguishes it in two important ways from other kinds of rights. First, one cannot alter or relinquish one's innate right by an act of will, or by united choice with other consenting persons. Unlike other rights, which can be acquired, altered, or relinquished by will, innate right does not depend—either for its creation or continued possession—on an act of will, but rather on something innate to persons, namely, their *humanity* (1996a, 6:237). Consequently, the only way to alter or relinquish an innate right is to negate the condition on which the right depends, namely, by altering or relinquishing one's humanity itself. As just stated, innate right is a status or a power: possession of this right is what makes it possible for one's will to effectively alter other kinds of rights and duties. As the power that makes it possible for one to alter rights and duties in general, innate right itself is not subject to modification or relinquishment in the same way as are those other rights and duties.

For related reasons, second, one also cannot create rights or duties in a contract that involve the alteration or relinquishment of innate right. Because one cannot, by consent, alter or relinquish innate right, the successful creation of a duty to alter or relinquish innate right would necessarily conflict with innate right. Rights and duties are, for Kant, non-conflicting (1996a, 6:224), and so such conflicting duties are conceptually impossible. But regardless of whether we agree with Kant on the conceptual

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[10] A power is one of four Hohfeldian incidents—the others being claim, privilege, and immunity. See Wenar (2010).

impossibility of conflicting rights and duties, the more fundamental point here is similar to the one above. Innate right is antecedent to, and independent of, any rights or duties we might create by an act of will. It is, in fact, the only reason why our acts of will have legal status in the first place. It is consequently impossible to create a right or duty that conflicts with innate right, since such a right or duty, if it succeeded in binding, would undermine the very condition that made it binding. It is not that such conflicting duties should be actively discouraged or prohibited: rather, they simply fail to displace innate right, and so are never successfully created. Supporting this understanding is a comment Kant makes about the possibility of a conflict between innate right and acquired right. Kant concludes that in this situation innate right takes precedence, as the right to freedom is the basis for other rights (6:238).

The upshot of this is that contracts that conflict with innate right fail to create an enforceable duty and so cannot be enforced. The failure to create the relevant legal duty means that any attempt at enforcement of such putative contracts would violate an individual's innate right, and consequently that such enforcement would be wrong.

An example of a putative duty that violates innate right would be the duty contained in a contract for suicide. A person who contracts to commit suicide attempts to create a legally enforceable duty requiring him to kill himself. But killing oneself directly undermines one's own innate right, by taking away the condition of innate right (one's humanity). To be enforced, the contract relies on the agent's innate right, i.e. his power to create legally enforceable duties by exercising his will. But the content of the contract requires the negation of this power. Enforcement of such a duty by the other party to the contract would require that the other be capable of obtaining a right to another's non-existence, or to his or her relinquishment of innate right. But individuals do not have the authority to create such duties or rights.

If persons cannot create duties or rights conflicting with innate right, then they also cannot create duties or rights requiring dismemberment, such as in a contract for the removal and sale of an organ such as a kidney. In this case, it will seem less clear to some readers why dismemberment, particularly loss of a kidney, conflicts with an individual's innate right in the same way that suicide does. "Innate right" belongs to persons by virtue of their "humanity" alone; but by "humanity," Kant means "rational nature." Because renal function adequate for maintaining higher brain functions usually only requires one

functioning kidney, it has seemed to some commentators that rational nature can survive unscathed following the removal of a kidney (Munzer 1994, Gill and Sade 2002)—in contrast to suicide, which obviously destroys all faculties, rational and otherwise.

However, for Kant the human body does not play a merely instrumental role in its support of rationality. Rather, human bodies gain their distinctive significance because they are the extension of the rational nature in time and space. The body, along with the self, "constitutes" the person (Kant 1997, 27:387).[11] Consequently, as mentioned earlier, for Kant a person *is* his or her body. So it is not possible to divide human bodies up into parts that are "essential" or "real" persons, because they support rational capacities, and those that are extraneous to persons (Powers 1999, Alpinar-Şencan 2015). Instead, the body as a whole is the person. It is worth pointing out that Kant's assumption here corresponds with a widely-held intuition. Both common language and law treat bodies *as* persons. To touch my hand is to touch me, and not merely to touch something that is attached to me.

Consequently, to dismember a person is to take some physical thing that has status as a legal person, endowed with innate right by virtue of its humanity—in this case, a kidney—and make it into a mere *thing,* i.e. something that cannot have rights or duties. In this way, dismemberment relinquishes the innate right of a part of a person. Since the creation of a duty that conflicts with innate right is impossible, the creation of a duty to dismember myself must also be.

To say I cannot create a duty to dismember myself is not equivalent to saying that it is criminal for me to dismember myself or even to sell a part of myself to another. As already discussed, severing parts of one's body may be morally wrong, but it cannot be prohibited on the grounds that it violates a duty to oneself: right is concerned only with making the choice of one compatible with the rights of others. Insofar as my action does not violate the rights of others, it is not the proper target of legal prohibition. Promises—even written contracts—for the sale of organs also cannot be prohibited, for the same reason. Although the contract must fail to create a legal duty in me to dismember myself, or to create a legal right in the other to my dismemberment, the contract itself does not wrong anyone. The

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[11] Although this quotation is from student notes from Kant's lectures, it evinces the position Kant would later take in his political philosophy and indeed all his moral writings. The quotations at the beginning of Section I show, for example, that Kant believed that even the little finger and testicles are partially constitutive of persons, not mere things attached to persons, and must be treated as such.

contract simply fails to endow me with a duty of self-dismemberment, or the other with a right to my dismemberment.

The impossibility of creating such duties or rights suggests that Kant's position requires that contracts for the sale of organs be considered unenforceable.[12] Persons could still *write* contracts for the sale of organs; such "contracts" would likely serve as evidence of consent for the transaction. But the contracts themselves could not be enforced because they did not actually succeed in creating new legal duties or rights. If either party changed their mind prior to the transaction, the other could not force specific performance or even compensation for breach of contract.

E. Further Textual Evidence

Beyond the overall argument that can be made from Kant's principles, there are several further textual reasons that bolster this interpretation of Kant's position as allowing sales but refusing to enforce contracts. On at least two other occasions in his political philosophy, Kant considered the implications of contracts that would theoretically create duties in conflict with a person's innate right.

First, Kant considers the legality of a contract in which one person is sold to another (Kant 1996a, 6:283), i.e. chattel slavery. Slavery is immoral under any plausible reading of Kant's moral philosophy, yet Kant does not attack the sale on those grounds. Instead, Kant argues that a person cannot make such a sale, because it would mean completely renouncing his "freedom." By completely renouncing his freedom, he would cease to be a person, and consequently could not be bound by the legal duty to keep the terms of the contract. The contract is consequently "null and void."

The passage is illustrative in several ways. First, the major problem with such contracts is not that they are immoral. Kant does not even consider here, for example, whether someone could act as, or think

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[12] In current legal practice, an unenforceable contract differs from a void contract. A void contract is treated by courts as if it never existed; it is of no legal effect. A variety of things may render contracts void, such as one or the other party contracting under duress. An exchange that occurs under a "void" contract can be considered criminal, because the contract does not successfully demonstrate the existence of consent. In contrast, "unenforceable" contracts are those that courts take as evidence of consent to some exchange, but cannot be enforced for some reason. In the UK, for example, contracts for prostitution are unenforceable. Prostitution is not a crime, and a contract for prostitution can demonstrate that consent was present (and consequently differentiates the interaction from both rape and theft on behalf of the john and prostitute, respectively). But such contracts cannot be enforced if either party wishes to back out of them. Kant seems to have taken a similar position on prostitution, as will be discussed later.

of him or herself as, a slave or the property of another. Rather, the problem with such contracts is instead that they fail to create the relevant legal duty. Second, the reason these contracts fail to create the relevant legal duty is that in such contracts, the seller would have to completely renounce his freedom—i.e., would have to renounce the one thing to which every person has an innate right. By completely renouncing freedom, the seller would cease to be a legal person, and so could have neither rights nor duties.[13] Third, since such contracts do fail to create the relevant legal duty, the conclusion is not that such contracts should be criminalized or prohibited, but rather that they are "null and void," and so cannot be enforced at all.[14]

On another occasion, Kant considered contracts for sexual services. In Kant's view, such contracts treat persons as objects, and so less than a person endowed with innate rights. Again, however, it is not the moral duties of the seller or buyer that are legally relevant, but rather the prospect of enforcing such contracts. Says Kant,

> . . . neither concubinage nor hiring a person for enjoyment on one occasion . . . is a contract that could hold in right. As for the latter, everyone will admit that a person who has concluded such a contract could not rightfully be held to the fulfillment of her promise if she regrets it. So with regard to the former, a contract to be a concubine . . . also comes to nothing; for this would be a contract to let and hire . . . a member for another's use, in which, because of the inseparable unity of members in a person, she would be surrendering herself as a thing to the other's choice. Accordingly, either party can cancel the contract with

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[13] Thank you to an anonymous reviewer for pointing out that Kant's argument here is superficially similar to Mill's in the fifth chapter of *On Liberty* (1956, 125). The differences between the two are instructive, however. For Mill, we "allow" people to dispose of themselves, because this is the way in which their "good" is "best provided for." Selling oneself into slavery, however, permanently relinquishes all future freedom, and so "defeats" the very "justification of allowing" persons liberty to make choices in the first place. For Mill, then, slavery contracts cannot be enforced because they ultimately undermine a person's good by permanently undermining their liberty to make decisions concerning themselves. For Kant, the problems are entirely conceptual: a successful contract for slavery would make the slave a mere object, rather than a legal person, and a contract cannot obtain between two parties unless both are legal persons.

[14] Here, the term Kant uses is "void," rather than "unenforceable." In current legal parlance, a "void" contract is one that is of no legal effect at all (see note 13). If such a contract is of no legal effect at all, it cannot even function to document consent. Consequently, actions that occur under it might be considered criminal since consent is not present.

It is not clear to the present author whether the distinction between "unenforceable" and "void" would have meant a similar thing to Kant as it does now. If so, then perhaps this serves as evidence that Kant would have thought, not only that contracts for slavery couldn't be enforced, but that slavery itself should be understood as criminal (even though he does not say this). But this is a matter of speculation, and, in any case, the point wouldn't determine whether contracts for kidneys should be understood as "void," like contracts for slavery, or merely "unenforceable." It is possible that Kant would still understand contracts for kidneys as unenforceable, as this is the approach he takes to at least one other exchange that violates innate right (contracts for prostitution, which I will discuss momentarily). Here I merely note that if Kant was familiar with something like the contemporary distinction between void and unenforceable, it would raise the further question, to which category should organ sales belong?

> the other as soon as it pleases without the other having grounds for complaining about any infringement of its rights. (Kant 1996a, 6:278–9)

So Kant does not claim that such contracts can be forbidden. Instead, he argues that contracts requiring persons to sell their sexual services simply cannot be enforced: the legal consequence of the objectification is that "either party can cancel the contract with the other as soon as it pleases."

In each of these cases—a contract for a kidney, a contract for self-enslavement, and a contract for prostitution or concubinage—the enforceability of the contract requires the successful creation of a legal duty in the seller and a legal right in the buyer that directly conflict with innate right, i.e. a person's right to be considered a legal person, and consequently to hold rights and duties with respect to others. Because such conflicting rights and duties are impossible, the result, in contracts for kidneys as in the latter two examples, should be that the contracts are simply unenforceable, rather than that they should be the target of legal prohibitions.

III. WHY KANT'S MORAL PHILOSOPHY CANNOT JUSTIFY PROHIBITIONS OF SALES

One might concede that Kant's political philosophy does seem to require these conclusions about organ sales and contracts, but object on the grounds that one can hold Kant's moral philosophy and still reject his political philosophy or actual political positions.

While there is of course some truth to this—it would be a stretch to argue that the entire *Doctrine of Right* could be derived directly from Kant's moral philosophy—Kant himself understood important facets of his political philosophy to be necessitated by features inherent in his moral philosophy. Most important is Kant's insistence that law and ethics must proceed according to different principles, because ethics is essentially a matter of one's ends, and laws cannot determine the ends for which a person acts.

Kant consistently emphasizes, in his moral philosophy, that the morality of an action is not found in the external features of that action, but rather in the maxims adopted by the agent performing the action, and ultimately in the ends for which an agent acts. The first formulation of the categorical imperative describes morality in terms of maxims. Maxims have ends: they are often analyzed as having two parts, namely the action about to be performed, and the agent's end in doing it. The second

formulation of the categorical imperative further specifies the requisite ends, which include always acting so as to treat humanity as an *end in itself.* Even those actions that are otherwise unobjectionable are not morally praiseworthy if they fail to treat humanity as an end in itself. And the third formulation, depending on how one parses it out, requires acting in accordance with the laws that would characterize a kingdom of ends. Kant maintained this emphasis on ends as determining the morality of actions in the later *Doctrine of Virtue,* where he argues that ethics gives laws for maxims, not actions (1996b, 6:388), and in which he explains that the chief requirement of virtue is the duty to adopt the two ends that are also duties: one's own perfection and the happiness of others (1996b, 6:385-386).

Kant comments decisively that public laws cannot prescribe the ends put forth in his moral philosophy. The only means that a state has at its disposal for achieving conformity with the law is coercion, and coercion cannot make a person adopt ends (Kant 1996b, 6:381). In other words, mandating or forbidding actions cannot actually make people act according to duty, as Kant understands it. It can, at best, force persons to do the right thing for the wrong reason. It is for this reason that Kant adopts a principle intended only to govern the *external* use of choice in his political philosophy, rather than a principle that governs free choice itself or the ends for which one acts: attempting to use coercion to force a person to adopt specific ends would be "self-contradictory" (Kant 1996b, 6:381).

Because interpreters have looked to the various formulations of Kant's moral principles in order to ground the prohibition against organ sales, they fail to ground the prohibitions. The formulations of the categorical imperative all ultimately prescribe acting *for certain ends*, and since laws cannot force persons to adopt ends, laws also cannot make persons obedient to the categorical imperative.
Merely passing a law prohibiting the sale of organs cannot make persons treat others as ends in themselves or as beings possessed of a dignity above all price. At best it incentivizes actions that are in conformity with, but not are not done from, duty.

IV. CONCLUSION

The most plausible Kantian position, all things considered, is to permit the sale of organs through unenforceable contracts. This position is justified largely on the basis of Kant's political, rather than

moral, philosophy: but as I have argued, Kant's approach to political philosophy develops in part from an awareness of the inherent limitations in his moral philosophy. The limitations of his moral philosophy are rarely if ever acknowledged by his recent interpreters, at least those applying Kantian philosophy to the question of the legal permissibility of markets in organs.

Kant's conclusions are both surprising and intriguing. They raise numerous complex questions often overlooked by those attempting to simply apply Kantian moral philosophy to markets in organs. If contracts for organs cannot be enforced, then how could anyone agree to buy or sell an organ without fearing that the other party would violate the agreement? In what ways could such a market be regulated, if contracts cannot be enforced? Could at least some contracts related to organ transplants be enforced? For example, could patients enter into contracts with physicians for services related to the removal of a kidney? In what way would consent be documented in kidney transactions? We might also wonder about the consequences of such a system. Would the legalization of kidney sales obtain the salubrious effect on the waiting list that the market in Iran has produced,[15] or would it lead to even more drastic organ shortages than we now have?

Because the purpose of this essay has not been to defend Kant's position as a policy recommendation all things considered, we shall be content to merely note these questions. Because I have only argued for Kant's conclusions insofar as they rest on his own premises, the conclusions reached here are not expected to justify any major normative conclusion about the legalization of kidney sales, except insofar as one accepts the Kantian premises on which they rest. I do, however, wish to note that the present argument suggests at least one modest normative conclusion.

In light of Kant's own explanation about why his moral philosophy cannot underwrite laws or policies, arguments that address laws and policies solely on the basis of moral principles should not be considered tenable—at least, not from a Kantian perspective. Bioethicists attracted to Kant's deontological approach would do better to follow Kant here by treating the debate about the legality of kidney sales primarily as raising issues concerning the source and nature of state authority, rather than raising issues about the nature of our moral duties. Those wishing to continue discussing the morality of kidney sales

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[15] According to Ghods and Savaj (2006), the renal transplant waiting list in Iran was completely eliminated 11 years after the implementation of compensated kidney donation.

from a Kantian perspective would do well to explicitly note that there are good reasons to believe that their conclusions *cannot* have direct relevance to the laws and policies regulating kidney distribution. Alternatively, they might explain why it is that they reject Kant's own arguments against using moral principles to determine legal duties.

Reconfiguring the debate about the laws governing organ distribution so as to become one primarily about the source and nature of state authority would make the debate more properly the domain of political, rather than moral, philosophy. But, as Kant shows, such a move need not be understood as abandoning moral theory in politics, so much as gaining a clear understanding of its proper role and inherent limitations.

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