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Two Ways to Transfer a Bodily Right

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Abstract

There are two ways to transfer a bodily right. One might transfer a bodily right in a detaching way – that is, without transferring jurisdiction over one's future bodily choices. Alternately, one might transfer a bodily right in an attaching way – that is, in a way that transfers such jurisdiction. For instance, A might sell his kidney to B for money paid at the time of the transplant. Alternately, A might accept money now, agreeing to give up his kidney some time down the road. In the latter case and not the former, B acquires normative jurisdiction over A's future bodily choices. In this paper I will argue that the distinction between attaching and detaching transfers of bodily rights has implications regarding whether certain contracts and agreements should be legally enforced – and whether problems arise when the moral and legal transferability of these rights comes apart.

Keywords

commercial surrogacy – kidney sales – markets – prostitution – rights

There are two ways in which a person might transfer a bodily right. This distinction is important in both discussions of legal rights and moral rights. One might transfer a bodily right in a *detaching* way – that is, without transferring jurisdiction over one's future bodily choices to another. Alternately, one might transfer a bodily right in an *attaching* way – that is, in a way that transfers such

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jurisdiction. For instance, Adam might sell his kidney to Bernardo and accept money from Bernardo at the time of the transplant. Adam would then be free to go about his life unconstrained by the will of Bernardo. Alternatively, Adam might accept money now in exchange for his kidney at some time down the road. In particular, Adam might enter into a contract such that: should Bernardo ever need a kidney in the future, Adam will render it to him. In the latter case and not the former, Bernardo acquires an element of normative jurisdiction over Adam's bodily choices in virtue of acquiring the right to Adam's kidney. For example, Bernardo would then have discretion over when and if Adam undergoes an invasive surgery and, depending on the terms of the transfer, might have some discretion over Adam's alcohol consumption and participation in contact sports.

In this paper I will argue that the distinction between *attaching* and *detaching* transfers of bodily rights has a variety of implications for popular debates in moral and political philosophy regarding controversial markets and whether certain contracts and agreements should be legally enforced. In particular, I argue that in cases of attaching transfers of bodily rights, the libertarian or free market advocate cannot complain that a state refusing to enforce a contract is interfering with individuals' rights. However, in cases of detaching transfers of bodily rights, a complaint such as this one might be warranted.

1 On the Transfer of Bodily Rights

What does it mean to transfer a bodily right? This *seems* quite clear in the case of a kidney sale. If Adam sells Bernardo his kidney, then Adam starts out holding a right to that kidney and Bernardo ends up holding a right to that same kidney. Of course, the word "transfer" suggests that the right is the same right – what was Adam's right *becomes* Bernardo's right. I will not argue for this specific metaphysical position, in which the right itself moves from Adam's possession into Bernardo's. The transfer of the right might just mean that Adam destroys his own right when he agrees to the sale (or signs the legal contract) and this agreement *generates* a right for Bernardo, a right that is constituted in the same way that Adam's right was constituted before its destruction. For the purposes of this paper, a rights transfer can refer to either of the changes just described.

What does it really mean to have a right to a kidney in the first place? Both legal and moral rights can be described within a Hohfeldian framework.[1]

1 Both Leif Wenar and Judith Jarvis Thomson have recently applied the Hohfeldian framework for describing legal rights relationships to the moral realm. I am implementing Wenar's

A right Adam has in relation to his kidney might be constituted of a variety of normative advantages:[2] a *claim* against others interfering with his kidney, which would correspond to duties on the part of others to refrain from interfering with his kidney; a *privilege* to do certain things with and to his kidney, such as use it to filter copious amounts of alcohol from his blood; he may or may not have an *immunity* from anyone else having the power to change his rights-relationship to his kidney without his consent; and, he might or might not have the *power* to change that rights-relationship himself, through gift or sale of his kidney. If Adam transfers his right to his kidney to Bernardo, then Adam gives up these normative advantages and Bernardo acquires them.

This is all very easy to grasp when it comes to kidneys. However, what about other bodily rights transfers? Consider the right Alice has against anyone other than herself controlling her reproductive life and reproductive parts. How can we explain the *transfer* of a right like this one? Supposing that the right to reproductive control of one's body *is* transferable, we could describe the transfer in the following way. Alice has a right against the interference of any other person regarding matters related to her reproductive life. If Alice transfers this right to Bernardo, (even temporarily through something like a binding commercial surrogacy contract) then Bernardo can make decisions that would normally be in the moral discretion of Alice. So, if Alice has a transferable right against reproductive interference, then: she has a claim against anyone else controlling her reproductive life; she has a privilege to engage in reproductive activities as she sees fit so long as she does not infringe anyone else's claims; she may or may not have an *immunity* against others changing her rights-relation to her reproductive parts and reproductive life without her consent; and, assuming the right is transferable, she has a *power* to give or sell this right. If she transfers this right to Bernardo, then he acquires these normative advantages – or some contracted subset of them. For instance, Alice might transfer all of these normative advantages to Bernardo (for a period of, say, nine months) except for the normative *power*. After all, Alice and Bernardo might agree that he may not sell her reproductive services to some third party instead of using them himself.

Of course, many transactions involving bodily rights do not involve a transfer, but just an exercise of rights. Further, there are ways of altering rights

version of the applied framework. Wenar, Leif "The Nature of Rights," *Philosophy and Public Affairs*. Vol. 33. No. 3 (2005). Judith Jarvis Thomson. *The Realm of Rights*. Harvard University Press. (Cambridge: 1990).

2 Sumner, L. W. *The Moral Foundation of Rights*. Clarendon Press. (Oxford: 1997). p. 47. Judith Jarvis Thomson refers to this notion of Hohfeldian rights as broad, cluster rights.

relationships that do not involve the transfer of rights. For instance, in the same way that Alice might abdicate her right to her bicycle (maybe by abandoning it in the desert for a long period of time), she might also abdicate a bodily right. For instance, she might have blood or plasma drawn from her body and simply give up her rights to those materials – without transferring them to any other particular recipient. Similarly, you can imagine a cruel punitive system in which the legal, sexual rights of certain criminals were deemed forfeit by courts – leaving any other person the legal privilege to have sex with them against their will. However, these actual and possible alterations of rights relationships are not the topic of this paper. This is an analysis of the transfer of bodily rights.

I will present a distinction between two different ways in which a bodily right can be transferred. In order to keep my explanations simple, I will refer to the individual who is giving up the right as the "seller" and the individual receiving the bodily right as the "buyer." This is not always accurate, of course. Some transfers of bodily rights are gifts, donations, or trades for other items, services, or rights. To spell out the distinction more exactly than I did in my introduction, I shall stipulate: the transfer of a bodily right that transfers rights of jurisdiction over a seller's body and bodily choices to the buyer is an *attaching* transfer. The reason why I have chosen the term "attaching" is because the right that is transfers comes, in a sense, with strings attached. They grant the recipient of the right normative powers over the seller. To be sinister, you might think of them as marionette strings – ones the buyer is entitled to use to determine certain actions of the seller.

On the other hand, a transfer of a bodily right that does not transfer rights of jurisdiction over a seller's body and bodily choices is a *detaching* transfer. When I refer to the seller's body and bodily choices after the transfer, I refer only to those bodily parts that are still physically connected to the seller. Of course, if Adam sells Bernardo his kidney after it has been extracted from his body then there is a sense in which Bernardo has jurisdiction over "Adam's body." That is, the part of Adam's body that is now within Bernardo is now under Bernardo's jurisdiction. However, what I mean by attaching transfer is that the recipient of the right has control over the behavior of the seller, or the parts of the seller of which the seller is still embodied.

Generally speaking, the most binding of commercial surrogacy contracts and certain labor contracts fall neatly into the *attaching* category. The sale of organs or body products (like sperm) fall into the *detaching* category since, typically, a buyer in such circumstances merely has rights to the detached body part or product – after their extraction or release. However, bodily contracts can be drawn up in unusual ways, as I suggested at the start of this paper. Adam

could sell Bernardo the rights to his kidney many years before the kidney is to be extracted from Adam's body. In this case, a kidney sale, which ordinarily only transfers the rights to an externally located kidney, would instead transfer jurisdiction over Adam's bodily choices for a period of time, and fall into the attaching category.

One notable similarity between attaching and detaching transfers of bodily rights is that both categories contain alarming types of transactions. Selling oneself into slavery is a type of attaching transfer of bodily rights. Selling one's heart (e.g. to provide money to one's desperate family) is a type of detaching transfer. Looking at these extreme cases is helpful in one respect – it demonstrates the *types* of moral considerations that we need to take seriously when considering practices in various bodily markets. For instance, our primary concerns about detaching transfers might have to do with the harms suffered by those giving up their bodily rights, or about the likelihood that very poor people will be vulnerable to exploitation when coming to agreements about the prices of their bodily organs, or that the wealthy might come to regard the poor in an objectionable way: as a pool of spare parts, for instance.

Attaching transfers might give rise to worries pertaining to the autonomy of contracting parties. Some philosophers argue that binding reproductive or sexual contracts might undermine rather than advance autonomy. That is, the autonomy that is preserved throughout an individual's life by remaining unbound by such contracts is more important than allowing individuals to *exercise* their autonomy by choosing to enter into them.[3] Even John Stuart Mill, who was otherwise opposed to paternalism, famously supported the prohibition of slave contracts because of the unique features of slavery.[4] He argued that the only reason for the state's enforcement of contracts in general is to protect liberty, and as slave contracts amount to the complete abdication of future liberty, they are at odds with the very purpose of an otherwise free market.[5]

These considerations are just a few among a variety of moral factors that I will not address in this paper. For instance, I will not tread into the vast literature pertaining to egalitarianism, commodification, objectification, and

3 See Scott A. Anderson (2002) on reasons against legalizing prostitution.

4 Mill, John Stuart. *On Liberty* (*1859*) in *On Liberty and Other Essays.* Oxford University Press, (London. 2008). p. 114.

5 Since then, philosophers have viewed this argument as the one instance in which Mill condones state interference with personal liberty for the sake of the person whose liberty is restrained. See Gerald Dworkin, "Paternalism," in *Morality and the Law*, ed. Richard A. Wasserstrom (Belont, Ca.: Wadsworth, 1971), p. 117; Joel Feinberg, "Legal Paternalism," *Canadian Journal of Philosophy* 1 (1971), pp. 116–117. Note that some philosophers think that Mill's justification is adequate, others do not.

the social value of gift-relationships.[6] I want to explore the relationship between moral and legal transfers of bodily rights, and what we should say about cases in which these two realms of rights come apart. I plan to remain agnostic about what grounds moral rights. Perhaps moral rights are grounded in deep human interests. Perhaps they are grounded in the sovereignty that rational beings enjoy over some range of choices related to their bodies, or to property and commitments from others over which they have acquired moral authority.[7] Whatever these moral rights are, or how they are grounded, they are more extensive than are "human rights," on popular, philosophical accounts. For instance, we might have a moral right that others keep their promises to us, but not a human right – certainly not one that should be incorporated into human rights legislation. We might also have bodily rights in the moral realm that do not correspond to human rights. For instance, we might have a moral right to know what happens to our sexual gametes (e.g. sperm), but this might not be a sufficiently important right to amount to a human right.

Conceive of a case in which an important right is successfully transferred from one person to another in the moral realm but, for very good reasons, the same right is not transferred in the legal realm. For instance, imagine a solemn verbal agreement made to you that *if* you donate your kidney to my daughter now, I will donate any expendable bodily organ to you in the future, if you ever need one. Imagine that this verbal agreement is more than just a promise to exchange, but is actually understood to *be* the exchange of these bodily rights. Ten years down the road when you need just such a life-saving service from me, I tell you, "I am sorry; I have changed my mind." It is possible that I have violated a moral right that you acquired when I made my agreement. Even so, the state might be perfectly justified in refusing to enforce this moral right. For reasons pertaining to exploitation, wrongful commodification, or human welfare, the state might choose to refrain from allowing certain bodily *legal* rights to transfer.

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6 For the most famous contemporary accounts of these moral problems with markets, see Anderson, Elizabeth. *Value in Ethics and Economics*. Harvard University Press. (Cambridge: 1995); Sandel, Michael. *What Money Can't Buy: The Moral Limits of Markets*. Farrar, (Straus and Giroux: 2012); Satz, Debra. *Why Some Things Should Not be for Sale*. Oxford University Press. (Oxford: 2010); Titmuss, Richard. *The Gift Relationship: From Human Blood to Social Policy*. (The New Press: 1997); Wertheimer, Alan. *Exploitation*. Princeton University Press. (Princeton: 1996).

7 The will-theorist who views a legal right holder as "the active manager of a network of normative relations connecting her to others" will also be interested in maximizing the powers held by an individual in virtue of her having a right. Sumner. L. W. *The Moral Foundations of Rights*. Clarendon Press. Oxford: 1997. p. 47.

My question is: Even if justified on other moral grounds, is the state infringing the transferred moral rights of individuals when it rejects the transfer of corresponding legal rights? My answer to that question is: it depends on the way in which the moral right is transferred. In cases in which the answer is 'no,' this answer has the power to undermine a purported reason supporting free markets in bodily parts and services that is popular with libertarians and others.

I will contend that in cases of *detaching* transfers of moral rights, the state infringes the moral rights of the individuals partaking in contracts by refusing to enforce those contracts. Of course, this might be permissible or required due to other moral considerations. However, those considerations must be especially strong.[8] On the other hand, in cases of *attaching* transfers of moral rights, the state does not infringe the moral rights of the individuals partaking in contracts by refusing to enforce those contracts. Consequently, the state needs much less, if any, reason for refusing to enforce such contracts unless there are particular social benefits associated with enforcement.

2 When Legal and Moral Powers Come Apart

I plan to start with premises that the advocates of free markets will accept. Therefore, I will assume that in the moral realm, bodily rights are transferable. Even if there are compelling reasons for a state to refuse to recognize some

8 I am assuming here a moral Generalist approach to the metaphysics of moral rights. The Generalist approach distinguishes between rights violations (i.e. unjustified) and rights infringements (that may be justified). On some views, "infringement" always refers to non-violations. However, I am using the term to mean all cases of doing what is at odds with another person's *pro tanto* rights. Understand rights violations to be a subset of rights infringements. Note that there is another view about the metaphysics of rights that I set aside in this paper. A Moral Specificationist argues that all justified exceptions to rights are built into the right itself, rendering rights absolute. For defenses of the Moral Generalist approach, see, for example, Judith Jarvis Thomson "Self-Defense and Rights," in *Rights, Restitution and Risk,* ed. W. A. Parent, 37 (1986); Phillip Montague "When Rights are Permissibly Infringed" *Philosophical Studies* 53, 347–366, (1988); and Herbert Morris "Persons and Punishment," *Monist* 52, (1968) pp. 475–501. For defenses of the Moral Specificationist approach, see, for example, John Oberdiek "Lost in Moral Space: On the Infringing/Violating Distinction and Its Place in the Theory of Rights," *Law and Philosophy*, Vol. 23, No. 4 (Jul., 2004), pp. 325–346; Oberdiek, John. p. 128. "Specifying Rights Out of Necessity," *Oxford Journal of Legal Studies*, Vol. 28, No. 1 (2008), pp. 127–146; William Parent and William Prior "Thomson on the Moral Specification of Rights," *Philosophy and Phenomenological Research*, Vol. 56, No. 4 (Dec., 1996), pp. 837–845; Russ Shafer-Landau "Specifying Absolute Rights," *Arizona Law Review* 37 (1995).

such transfers, let us take it to be possible for two people to arrange such transfers in the moral realm. Through an agreement, I might acquire a moral right to another person's sexual or reproductive services (for some period of time), much like I can acquire a moral right to another person's programming or construction services.

Even many liberals might be sympathetic to the view that, in the moral realm, bodily rights of many sorts can be transferred – rights to kidneys, rights to the control over reproductive organs. They might simply think that the successful transfer of these moral rights is not sufficient reason to enforce such contracts, given the many other moral problems with bodily markets.

Up until this point, I have made no distinction between legal rights and moral rights, except to say that Hohfeld's framework of rights for the legal realm can be applied to the moral realm. While the framework for discussing moral and legal rights is the same, the content of our moral rights is different from the content of what legal rights we should possess. Not only will there be differences in what our moral and legal rights regard, but even when they converge, the normative advantages that constitute those rights might be different. For instance, my moral right to my kidney might be partially comprised of a power to sell that kidney. Yet, my legal right to my kidney is not partially comprised of that power. So, for now, let us imagine two separate spheres of rights relations. A justified legal right does not imply a moral right. Similarly, a moral right does not imply that there should be a corresponding legal right.[9]

Since I will be discussing what legal rights there should be, instead of what legal rights there are, I am asking moral questions, even when I ask questions about legal rights. I will assume that legal rights must have moral justification. However, the relationship between moral and legal rights is not simple. I may have a morally justified legal right against being executed on the grounds that our jury system is too racist, classist, and sexist to make accurate convictions. However, I may not have a moral right against being executed. At least, the mere existence of my legal right says nothing as to whether I have a moral right. In this case, it is for the sake of the system, because our government needs to take strides against racism, classism, and sexism, that I have been granted the legal right, not because, in the moral realm, I hold a non-forfeitable moral right to life.

A moral contract is valid if it successfully transfers a moral right. Some contracts and agreements are morally valid but legally invalid. This discrepancy is often morally justified (e.g. consider monogamy agreements between unmarried romantic partners – these verbal agreements cannot be legally enforced,

9 Thomson. Judith Jarvis. *The Realm of Rights*. (Cambridge: Harvard University Press, 1990) p. 75.

but we tend to think that they generate moral rights held by the members of the couple). Sometimes this type of discrepancy means that individuals cannot enforce their written and verbal contracts – even ones on which they had heavily relied. Consider strict commercial surrogacy contracts, in which the parents-to-be would like to legally bind their surrogate to a particular diet, a pre-natal exam schedule, and commitment not to obtain an abortion.[10] Consider sexual contracts drawn between members of particular sexual communities. Consider the sale or donation of kidneys and other bodily organs. Consider the scientists who would like to give subjects in research trials extra money in exchange for the subjects waiving their right to withdraw from a trial.[11]

Libertarians, and other political theorists who place great stock in the ability of individuals to exercise personal autonomy, believe that an important, though not necessary, component of a moral and legal right is the power to transfer that right by any voluntary means. Libertarians believe this because of their strong commitment to extensive self-ownership.[12] Many believe that legal reproductive rights, legal rights to organs, even the legal right to withdraw from research should be transferable. [13] If the state refuses to legitimize my contract

10 For a description of common terms of surrogacy contracts in North America, see Berkhout, Suze. "Buns in the Oven: Objectification, Surrogacy, and Women's Autonomy" *Social Theory and Practice* Volume 34 No. 1 (2008) pp. 95–117. For arguments that the state should not interfere with the use of reproductive technology, including surrogacy, lest the state discriminate against people unable to bear biological children by suggesting that reproductive rights are tied to reproductive ability, see Dworkin, Ronald, 1993, *Life's Dominion*, New York: Knopf. Feinberg, Joel. 1986, *The Moral Limits of the Criminal Law, Vol. 1: Harm to Others*, New York: Oxford University Press; Shalev, Carmel, 1989, *Birth Power*, New Haven: Yale University Press.

11 For an argument that the right to withdraw from research *should* be legally alienable, see Chwang, Eric. "Against the Inalienable Right to Withdraw from Research," *Bioethics* 22 (7). (2008) pp. 370–378.

12 For instance, G.A. Cohen argues that an individual has a moral right, and should have a legal right, to do anything to his or her body that a slave-owner would be able to do to a slave's body. See Cohen, G. A. (1995), *Self-ownership, Freedom and Equality*, Cambridge: Cambridge University Press.

13 See Block, Walter, A Libertarian Theory of Inalienability, 17, Journal of Libertarian Studies, (2003) pp. 39–85. See also, Nozick, Richard. *Anarchy, State and Utopia*. (1974) and Samuel Wheeler's use of Nozick's account of bodily rights to ground a robust, naturalistic account of property rights. He argues that the distinctions between property rights and bodily rights are all suspect. His account demands that people be free to transfer and trade bodily parts. He does indicate that there *might* be some, powerful overriding reasons that might allow a state to interfere with such rights (Wheeler, 80: 186–187).

in which I transfer my right to my kidney, then they are failing to respect an important moral right – one grounded in autonomy considerations.[14] Some extreme libertarians believe that the right against being enslaved should be alienable for the same reason.[15]

The particular concern that I seek to address is the following: does the state's failure to enforce a morally valid contract involve the state's infringement of individuals' rights? Many have argued that a state's refusal to enforce a contract cannot be accurately called an interference since such refusals are passive; at most, a state's refusal to recognize a transfer of rights – and to enforce that transfer – is an omission.[16] Such theorists suggest that an individual does not have a right to the state's involvement in his or her agreements, and their enforcement, in the private or market realm.

However, I think that there is a strategy that libertarians can use to explain how a state's refusal to recognize and enforce the transfer of moral rights might yield an interference on the part of the state. Let us start with what I take to be two uncontroversial claims about the relationship between individuals and the state:

(a) The state[17] has a duty to protect citizens (and perhaps others in their jurisdiction, like resident aliens) against those who have violated, and sometimes against those who *would* violate their legal rights by providing enforcement of their rights.
(b) The state, like anyone else, has a moral duty to refrain from doing that which interferes with individuals' moral claims.

14 See Matt Zwolinski's discussion of sweatshop labor, which he often describes in ways that include the bodily abuse of employees by employers and by those hired to manage employees. Nevertheless, Zwolinski argues that those who seek to prohibit or regulate these labor agreements are guilty of significant autonomy violations. Guilty parties include the law-makers who prohibit these transactions, the human interest groups, NGOs, and those participating in the boycott of products made in sweatshops with the agenda of securing legislation that prohibits or restricts sweatshop use. See Zwolinski, Matt. (2007). "Sweatshops, Choice, and Exploitation," *Business Ethics Quarterly*, Volume 17, Issue 4.

15 Though not stated explicitly, this view might follow from the positions of Samuel Wheeler and G. A. Cohen (see footnotes 12 and 13).

16 See Hodson, John D. "Mill, Paternalism, and Slavery," *Analysis* 41 (1): 60–62 (1981); see also Shiffrin, Seana Valentine. "Paternalism, Unconscionability Doctrine, and Accommodation," *Philosophy and Public Affairs* 29 (3): 205–250.

17 By "the state" I mean law-makers as well as officers tasked with enforcing the law.

Now, if a moral right is transferable, then a prohibition on legal transfer creates a tension between (a) and (b).

Consider, if a moral right is transferred, and the state, according to the law, later enforces the right of the initial moral-right holder/current legal-right holder, against the current moral-right holder, then the state is in violation of the transferred moral right. Let me clarify this point with an example. Imagine that we agree that I will give you my car if you spend the year mowing my lawn. At the end of the year, you have acquired a moral right to the car, per our agreement. I no longer hold a moral right to my right to my car. We have dinner together when the year is over. At the end of the evening, I give you the keys, and you drive the car away as I wave goodbye. Let us imagine that the state does not recognize this rights transfer. Rights to cars are inalienable, in this example. After you leave, I maliciously call the police and report a stolen car. In response, law enforcement takes away the car from you; after all, by (a) they are committed to enforcing my legal right to the car. However, since you have a moral right to the car (including the moral right to control its whereabouts), and the state is taking away the car from you, it is failing to achieve (b) for the sake of (a).

Fortunately, since rights to cars, and most other things, *are* legally transferrable, (a) and (b) are not usually in tension in cases like this. Though, if cars were not legally transferrable, but were still morally transferrable, then every case of car trading could turn into a case in which (a) and (b) were in conflict. Similarly, one might worry that making legal contracts for bodily rights invalid will result in the same tension between (a) and (b).

If the moral rights we have to our kidneys are transferrable but not legally transferrable, then *detaching* transfers generate a tension between (a) and (b). We can construct an example of detaching kidney sales that resembles the car/lawn-mowing agreement.

Imagine that Adam agrees to give his kidney to Bernardo upon its extraction from her body. Bernardo takes the ice-packed kidney out of the hospital with him, preparing to use it for some other purpose (perhaps to sell, or to research, or to have implanted in his own body). Adam immediately calls the police, and explains that Bernardo has exited the building with *Adam's* kidney. Now, if such a transfer was not legally valid, the state would have an obligation to take the kidney *from* Bernardo, even though Bernardo has a moral right to the kidney. In this way, the state infringes Bernardo's moral right.

Yet, (a) and (b) do not come into tension when we are dealing with attaching rights transfers. Imagine that Alma agrees to sell her kidney to Bette in a way that attaching-transfers the moral right to the kidney from Alma to Bette. Bette has the moral right to decide when Alma undergoes surgery for

the extraction of the kidney. Thirty years down the road, Bette does need the kidney that still resides in Alma's body. Alma decides that she does not want to undergo the surgery and, as Bette has no legal right to the kidney, the state does not intervene to compel Alma to render the kidney to Bette. That is, the state, in doing nothing and thereby honoring Alma's legal right, allows Alma to infringe Bette's moral right to the kidney within Alma's body. However, the state does not *itself* infringe Bette's moral right. Of course, sometimes attaching transfers of moral rights that are legally valid will involve state interference that *appears* to generate a tension between (a) and (b).

Imagine that Addie and Bob currently live together, but that Addie is moving into a new house. Addie secures an agreement from Bob that Bob will load the moving van on moving day. Perhaps they have made a trade, and Addie has completed Bob's tax forms for him on tax day. Now, moving day comes along, and Bob decides that he does not want to help her move after all, but instead wants to go to the beach. However, as Bob has no car, Bob wants to use Addie's car to get to the beach. Addie refuses to surrender the keys, saying: I'm sorry Bob, but I have a moral right to your help and I am not going to give you the means to violate my right. Bob sighs and begins moving boxes. However, Bob then remembers that there are city buses that go to the beach. He scoots away from the moving-day activities and boards the bus. The bus driver, Claire, is a friend of Addie's and knows what Bob is doing. However, she does not prevent Bob from taking the bus to the beach. Claire, on behalf of the state, has only made it possible for Bob to violate Addie's right against Bob. The state itself runs these buses – transportation that makes it possible for individuals to shirk their moral duties. We do not have any rights against others, even the state, *making it possible* for people to violate our rights. Here are some examples that show how obvious this point is: we do not have rights against attractive third parties being available for sex with our monogamous partners; we do not have rights against other employers considering job applications from our contracted employees; we do not have rights against restaurants that make dessert items available to our unhealthily rotund family members who have promised us they will abstain from high-energy foods.

In cases of attaching transfers of moral rights that are not legally valid, the state takes on a role like it does in the case of the city buses described above. The legal officiants involved in these cases serve a role like Claire's. Similarly, the state does not infringe the right of the prospective parents of a baby by making it legally possible for their commercial surrogate to shirk her moral agreement. The state is not morally or legally required to enforce agreements made only in the moral realm. I have not argued that the state *should* refuse to enforce contracts that involve the attaching transfer of moral rights. I only

have argued that *if* the state refuses to enforce such contracts, they are not infringing any individual's moral rights. Indeed, there are many contracts involving attaching transfers that the state should enforce (e.g. the transfer of the bodily control a kindergarten teacher renders to her school district when she agrees to be bodily present in the classroom watching her pupils all day long).

Attaching alienation is at the heart of many contracts and markets that, broadly speaking, libertarians and advocates of free markets promote. My conclusion frustrates the libertarian's ability to appeal to the state's violation of individuals' moral rights to make a case for the legitimization of market agreements that involve attaching transfers.

3 Applying the Distinction

In order to illustrate this distinction between transfers of bodily rights, I will explain how the distinction applies to three controversial bodily markets: (A) prostitution, (B) commercial surrogacy, and (C) kidney sales. Of course, these markets are not easy to identify or describe – they are made up of many different practices. However, I am going to attempt to disambiguate the various ways that rights operate in such markets by using my distinction between attaching and detaching transfers and, of course, considering transactions that do not involve any transfer of bodily rights at all – but instead involve only an exercise of rights. This leaves us three categories to consider for each of (A–C):

(1) There are transactions that commodify bodily services that do not involve the transfer of a bodily right. These are cases in which the seller might waive certain claims she has against others using or accessing her body, but may opt out at any time, and may control the particular ways in which her body is used or accessed. These transactions involve the exercise of bodily rights without transfer.
(2) There are types of bodily rights transfers that involve the buyer having jurisdiction over the choices and the activities of the seller: Attaching Transfers.
(3) There are types of bodily rights transfers that do not involve the buyer having jurisdiction over the choices and activities of the seller: Detaching transfers.

In each section, I am going to first discuss the market and the rights transfers involved in the market without reference to legal or moral rights, in particular. However, I will end each section pertaining to attaching and detaching

transfers of bodily rights by explaining how the results of my last section can be applied to the market, generally speaking.

A1 and B1: Prostitution and Commercial Surrogacy Involving no Transfer of Rights

Sometimes sex or reproductive services are exchanged for money, but the seller may always choose to opt out of the activity, perhaps forfeiting some or all of the money. As long as the jurisdiction over choices, activities, and endpoints remains in the hands of the sex-seller (in the case of sexual rights) or the surrogate (in the case of reproductive rights), then no transfer of bodily rights occurs at all. In rendering *consent*, sex sellers waive their rights against particular others accessing their bodies sexually, but can retract their consent at will.[18] In order for commercial surrogacy to be free of rights transfers, the buyer would have to purchase the services of the seller *after* those services are performed. During the course of the services, the seller may terminate the services at any time.

A2 and B2: Prostitution and Commercial Surrogacy Involving Attaching Transfers of Rights

If a sex-seller signs a valid sexual contract that requires her to obey the will of another person for some stretch of time, or if a surrogate signs a valid and very strict contract – perhaps one that prevents her from ending her pregnancy, or controls what she may eat, drink, or with what she can medicate herself, then these contracts amount to the attaching transfer of bodily rights.

What might an attaching transfer of sexual rights look like? Of course, when we imagine someone with complete discretion over another person's sexual rights for any period of time, we imagine sex trafficking – a market that simply is a form of slavery. However, there are ways of contracting sexual services or transferring sexual jurisdiction to another person that are not forms of enslavement. For instance, couples in marriage regularly contract to be sexually monogamous with one another. As long as members of the couples can opt out of these arrangements, they involve no alienation of sexual rights in the moral or legal realm. This is probably true even insofar as the state sometimes allows divorce settlements and child custody arrangements to favor the member of a couple who has not forsaken this part of the marriage contract. However, if monogamy agreements were not attended by opt-out clauses, morally or

18 In my earlier work on prostitution, I explain why the ability to opt-out of a sexual agreement without penalty prevents a sexual agreement from involving the alienation of sexual rights. See, Liberto. Hallie Rose. (2009) "Normalizing Prostitution versus Normalizing the Alienation of Sexual Rights: A Response to Scott A. Anderson." *Ethics.* 120 (1): 138–145.

legally, then such agreements might indeed involve the alienation of certain sexual rights.[19] Here I am referring to sexual rights *to* have sex with other willing people (or, if you prefer rights to be characterized in negative terms: rights against others interfering with one's sexual activities with other willing people). The sexual rights are, perhaps, not as weighty as our sexual rights *against* having sex with other people. However, they are sexual rights nonetheless.

Until the 20th century, United States courts did not recognize the concept of marital rape. This means that American marriage contracts once transferred sexual rights jurisdiction from a woman to her husband upon marriage. Now I am referring to sexual rights of the very weighty sort – rights against having sex with another person. This sort of consent to future sexual acts in marriage is often referred to as a "Pauline Marriage," since St. Paul advocates this arrangement.[20] A woman could not opt out of this arrangement – even if she could divorce her husband, she could not instantaneously divorce her husband as he approached her, and so opt out of a sexual assault. The legal marriage entitled him to have sex with her as long as she was his wife. In this way, Pauline Marriage, as legitimized by American law, involved the attaching alienation of sexual rights.

Some people use sexual "contracts" as a means of communication, to be sure that they have achieved robust consent. Consider Bondage/Dominance/Submission/Masochism communities and the agreements that members of these communities make with each other. A fictional example of such a contract can be found in E. L. James' popular novel *Fifty Shades of Gray*. The hero and heroine of the novel negotiate and sign a contract that entitles them to certain types of (violent) sexual access, requires certain sexual behavior and physical exercise, restricts eating and sleeping habits, and stipulates the duration of the relationship.[21] Imagine that this contract is either morally or legally binding. If it were binding in either realm, then it would involve the alienation of sexual (and, perhaps, other bodily rights) in that realm.

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19 In my very recent work on sexual promises, I argue that monogamy promises (i.e. promises not to have sex with certain others) are promises that transfer sexual jurisdiction into the hands of another person, much in the same way that promises to have sex transfer such discretion. Of course, it is arguable whether promises transfer or grant moral rights. See, Liberto. Hallie. "The Problem with Sexual Promises." *Ethics*. 127 (2): 383–414. However, contracts – the topic of this paper – certainly grant legal rights, and often grant moral rights.

20 For an account of the role of consent in Pauline Marriage, see Soble, Alan. Antioch's "Sexual Offense Policy: A Philosophical Exploration," *Journal of Social Philosophy*. Volume 28, Issue 1. (1997). pp. 22–36.

21 James. E. L. *Fifty Shades of Gray*. (Vintage: 2012).

Commercial surrogacy involving an attaching transfer of rights would be one in which the buyer purchases the rights to the services of the seller. The pregnant woman may not terminate her pregnancy, and might be required to comply with certain dietary and lifestyle rules. She might also be required to undergo interventions during labor as medical staff see fit. Suze Berkhout points out that commercial surrogacy is unlike other wage labor in that the woman who agrees to the terms of a controlling contract is "unable to step out of this role for the duration of pregnancy- she labors for twenty-four hours each day, every day, up to and including birth."[22] In her comparison between surrogacy and other forms of wage labor, Berkhout says, "By requiring that the surrogate agree prior to insemination that she will keep any appointment scheduled for her, submit to medical procedures deemed necessary by the physician or the contracting agency, and follow all other instructions that occur during the course of the pregnancy, the arrangements limit the surrogate's agency."[23] Of course, in North America, many surrogacy contracts that are not legally valid are nonetheless used by agencies, leading surrogates to believe that they are bound by terms that are not, in fact, legally binding. If these contracts were legally valid, they would amount to the attaching transfer of extensive bodily rights in the legal realm. The contracted parents would enjoy a great deal of jurisdiction over the bodily choices of the gestational mother.

Now, in these attaching cases of rights transfers, let us assume (as we did at the outset of the last section) that the agreements made between sex workers and their clients, and between commercial surrogates and their clients, were true transfers of moral rights. I think that it is easy to feel the pull of the reasons to which a free market advocate can appeal – especially in the case of surrogacy. The moral rights arbitrated by the prospective parents, in cases of surrogacy, are significant. When they use their rights to exercise discretion over the surrogate's bodily behavior, they are doing so in order to protect the safety and health of the fetus. Nonetheless, the state need not provide any justification for refusing to enforce their moral right to control the surrogate's bodily behavior. The state does not infringe the prospective parents' moral right; the state merely allows/tolerates the surrogate's violation of the prospective parents' moral rights.

A3 and B3: Prostitution and Commercial Surrogacy Involving Detaching Transfers of Rights

Reproductive rights can only be transferred in an attaching way, since there is no way that one might truly transfer one's sexual or reproductive rights

22 Berkhout, 109.

23 Berkhout, 108.

without transferring jurisdiction over one's bodily choices and control. Some may speculate that there is *detaching* alienation of bodily rights involved in commercial surrogacy. After all, a surrogate does hand over an infant at the end of her pregnancy, and loses all parental rights and jurisdiction over that infant. However, whatever rights a person has to her fetus, and they may well be very important and powerful ones, are not bodily rights. Bodily rights can account for a woman's right to an abortion, to eat what she wants and drink what she wants during her pregnancy. However, the resulting child is not a part of the gestational mother's body.

Sexual rights, on the other hand, can be transferred in a detaching way. If Andrea has a sexual right against others seeing video footage of her naked body without her consent, then exercising her right amounts to controlling who can and cannot view that footage. However, she might transfer the sexual right away to someone else, in which case, it is in the buyer's control to determine who can and cannot see the footage. This is certainly a contentious case as, even if the right to control the footage counts as a sexual right when it is in the hands of Andrea, it is not clear that the right is still a sexual right once it is in the hands of her buyer – and being arbitrated by someone whose sexual activities do not appear in the footage itself. However, these interesting questions are beyond the scope of this paper. Even if this amounts to the transfer of sexual rights, it is not a form of prostitution – which, broadly speaking, is the market that I am using to apply my results about sexual rights transfers.

C123: Kidneys and Rights Transfers

Throughout my paper I have used the transfer of kidneys to illustrate my distinction between transfers of bodily rights – so this market requires less application here. To summarize: in attaching transfers, the buyer purchases the rights to the kidney before the kidney is extracted from the seller – granting the buyer a certain amount of control over the seller's bodily choices until the date of extraction (if it ever comes). In detaching transfers, the buyer purchases the rights to the kidney after the kidney is extracted from the seller. As argued in the last section, only in detaching transfers does the state risk infringing the moral rights of the kidney buyer by refusing to recognize his moral rights as legal rights.

Though there are probably no actual cases of transactions involving kidneys that do not involve rights transfers, there are possible cases. For instance, Judith Jarvis Thomson, in her famous essay on abortion, comes up with a thought experiment in which an individual is kidnapped and strapped to a dying violinist. Tubes are inserted, connecting the individual's kidneys to those of the dying violinist. If the individual stays connected to the dying violinist for nine months, then the violinist will be cured of his kidney disease, can be detached, and will live. Now, Thomson contends that the violinist, despite having a right

to life, has no right over the use of the other individual's body, and the individual has a moral right to cut himself free, or ask the doctor to pull the tubes that connect him to the violinist.[24] However, imagine that the violinist turned around and said, "Wait a second. What if I agree to give you two thousand dollars for each month that you stay hooked up to me, and another ten thousand at the end of the whole nine months?" Suppose the individual agrees. The individual is free to opt out at any time (in fact, he will be a richer man if he waits even one month before opting out). This would be a circumstance in which a kidney transaction has occurred without the transfer of a bodily right.

Conclusions

In this paper, I have distinguished between attaching and detaching transfers of bodily rights. I have argued that a state risks the moral cost of infringing the moral rights of individuals when it refuses to enforce moral contracts and agreements that involve detaching transfers of bodily rights, but that the state risks no such thing regarding the enforcement of attaching transfers. I have illustrated my results in the cases of kidney sales, commercial surrogacy, and prostitution.

These conclusions are important, as they undermine the libertarian's ability to appeal to reasons related to rights-violation for advocating the state's enforcement of certain contracts, such as sexual contracts and strict commercial surrogacy contracts. I have *not* argued that the state should enforce all contracts and agreements involving the detaching transfer of bodily rights. There may very well be moral considerations that outweigh the rights infringements in these cases. I have *not* argued that the state should refuse to enforce all contracts and agreements involving the attaching transfers of bodily rights. However, the state may refrain from enforcing any attaching transfer of bodily rights without infringing individuals' moral rights. Therefore, how a state chooses to distinguish between attaching transfers of bodily rights should be based entirely on other moral factors – exploitation, egalitarianism, autonomy, and welfare considerations – of which the philosophical literature on markets is replete.[25]

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24 Judith Jarvis Thomson "A Defense of Abortion," *Philosophy & Public Affairs*, Vol. 1, No. 1 (Autumn, 1971), pp. 47–66.

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