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# Introduction

*In modern capitalism, all are "brothers" in being equally "others."*[1]

Benjamin Nelson, *The Idea of Usury*

"Would it be wrong of me to sell my kidney?" For many people, the answer to this question most certainly would be yes. Practical concerns about the potential for abuse, coercion, and exploitation hardly account for this near-visceral reaction. What seem to fuel this response are deeply rooted attitudes regarding human dignity, the meaning of money, and boundaries between people and property. Even in nonreligious discourse, this reaction is often explained by invoking the idea of "sacredness," referring perhaps to both the special status of the property at issue and the meaning associated with the act of transfer itself.

The nearly universal worldwide ban on the sale of human organs for transplant is a classic example of a moral limit to the market, enacted into law.[2] It illustrates the "compartmentalizing" approach to resolving problems of markets and morals, pursuant to which transactions deemed ill suited to a commercial milieu are relegated to the nonmonetary sphere; in other words, such items are expected to be gifted, or given without remuneration.

The results of the prosaic ban on organ sales illustrate the way in which the compartmentalization approach can be insufficient and even problematic. The immense discrepancy between the number of organs needed to save lives and the number of donated organs available has caused contemporary theorists and policy makers to consider whether some form of payment ought not to be

[1] Benjamin Nelson, *The Idea of Usury*, Chicago: University of Chicago Press (1969), p. xxv.

[2] It could also be referred to as the "blocked exchange" of a "contested commodity." See, e.g., Michael Walzer, *Spheres of Justice*, New York: Basic Books (1983); Margaret Jane Radin, *Contested Commodities*, Cambridge: Harvard University Press (1996).



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permitted. For indeed, notwithstanding the murkiness of the term "sacred" as used in ordinary (nonreligious) parlance, what is clear is that the very "sacredness" of the human being that theoretically renders payment for organs off limits is desecrated by the tens of thousands of deaths each year of those unable to secure organs within a system dependent on altruistic donation.[3]

As is true with many of the issues raised by problems of markets and morals (and by what are often related advances in science and technology), the ethical conundrum of "organ sales" is played out through the complications it presents and the ambiguities it highlights regarding the legal and philosophical meanings and boundaries of the concepts of property, ownership, personhood, and individual autonomy.[4] This theoretical puzzle is not solved but, rather, is further complicated by the prevalent perspective that appears to allow for only two options: a market in human organs or exclusive reliance upon (insufficient) altruistic donations. The impracticality and arguable immorality of the restrictive choice of either commodity or free gift hints at a deeper truth – that many of the ideas articulated in the contemporary debate over commodification are rooted in silent assumptions that surreptitiously overdetermine the very questions that they pretend to answer.

This book takes as its starting point the problem of "commodification," using the hypothetical lens of "selling" body parts for transplant. It is this case that perhaps best represents the rich intellectual complexities of a larger dilemma, providing a locus for the intersection of the most significant theoretical and philosophical issues involved in the problem of commodification. Chapter 1 introduces the way in which questions such as these have caused scholars to interrogate "the market" and to theorize about what limits, if any, ought to be imposed thereon. While the literature is replete with critiques of the theoretical underpinnings and political structures that support the

[3] There are other ways in which the status quo is claimed to be immoral. For example, under the current system, everyone involved in an organ transplant, including the doctor, is paid (or benefits in some substantial way) except the person providing the organ. See Stephen J. Dubner, "Flesh Trade: Why Not Let People Sell Their Organs," *New York Times Magazine* (Jul 9, 2006), pp. 20–21.

[4] The theoretical confusion this problem generates is manifest, for example, in the way arguments from "sacredness" quickly become self-contradictory or even mutually exclusive. On the one hand, a concern for that which is "sacred" (human life? the human body?) is said to demand a ban on organ sales; on the other hand, the imperative to protect "the sanctity of the individual" – the "first principle" of Western society that guarantees near-absolute sovereignty over one's body – would seem to militate in the opposite direction. See e.g. *McFall v. Shimp*, 10 Pa.D. & C.3d 90 (1978) (Intractable moral quandries illustrated in a case where the court refuses to compel someone, who had previously consented, to submit to a bone marrow transplant necessary to save the life of a relative).

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market,[5] it is clear upon closer examination that those arguing on both sides of this question, anti-commodifiers as well as those who are pro-market, are caught up in a certain way of thinking about these issues. Entrenched in a particular discourse (organs are either gifted altruistically or sold), even those scholars (particularly anti-commodifiers) who recognize the impoverished nature of traditional conceptions underlying markets (such as social-contract theory) have offered few if any theoretical alternatives.

This quandary, and the paucity of practical and theoretical options, invites consideration of other analytical constructs. One way of getting out of this discursive and theoretical bind is to tap into the "potentially subversive possibilities" of anthropology.[6] Comparative analyses invoking the perspectives of other traditions represent an ideal way to try to address category-challenging moral dilemmas such as "organ sales." Applying a comparative approach to analyze novel scenarios can help elucidate foundational ideas in our tradition that are not readily visible. Marilyn Strathern's observation, that models from other cultures can turn out to be "more appropriate to the post-industrial Western world than outdated models of private ownership and possession,"[7] might be particularly true in this context.

With this in mind, this book explores certain legal aspects of exchange, payment, and property relations in Jewish law, particularly in the realm of the sacred. The theories and ideas elucidated by this case study provide a different conceptual framework for analyzing modern-day problems associated with commodification, such as those related to organ transfer and possible payment for organs. Through a proposed alternative approach illustrated by the model of Jewish law, this book exposes, challenges, and rethinks some of the assumptions associated with our market-based society. While articulating a new theory of the economy of the sacred in Jewish law, it supplies the theoretical grounding for a different perspective on contemporary questions of markets and morals.[8]

[5] Critiqued constructs include social-contract theory, a specific theory of the person, theories of distributive justice, and (limited) notions of obligation.

[6] Alexandra Ouroussoff, "Illusions of Rationality: False Premises of the Liberal Tradition," *Man* 28/2 (Jun 1993), pp. 281–298 at 282.

[7] Chris M. Hann, "Introduction: The Embeddedness of Property," in Chris M. Hann (ed.), *Property Relations: Renewing the Anthropological Tradition*, Cambridge: Cambridge University Press (1998) at 44.

[8] Anthropological literature is replete with comparative projects that come to be relevant to our own cultural predicaments. The work of Marcel Mauss, in his essay entitled *The Gift: The Form and Reason for Exchange in Archaic Societies* (New York: W. W. Norton and Co. [1990]), is an example of such an enterprise. Like this book, it is based, in method and in substance, on literary texts and ancient practices. This examination of property and obligation in Jewish law builds upon some of the themes and concepts at work in *The Gift*.

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While one might expect there to be more inhibitions on the use of money in the realm of the sacred within the religious Jewish legal system, there actually appear to be far fewer. In fact, among the underexamined questions that are brought to light by the contemporary problem of organ sales is the role and meaning of money in Jewish law. This phenomenon highlights a ubiquitous yet rarely noticed aspect of Jewish law: that in most contexts, the transfer of money has little legal effect; neither will it render permissible that which is prohibited, nor is it likely to render prohibited something otherwise permitted. Indeed, the payment of money often does not even register on the legal radar screen as a juridically significant event.[9]

This might explain why, while there is a considerable amount written about organ transfer and Jewish law (considering relevant prohibitions, such as the prohibition against mutilating the human body), there is relatively little mention in the literature of the impact the introduction of money has on the legality of the transaction.[10] In one of the few statements by a contemporary Jewish legal decisor, Rabbi Israel Meir Lau, wrote, during his tenure as Ashkenazi Chief Rabbi of Israel (1993–2003), that in any situation where organ transfer is otherwise permissible (e.g., to save a life), there is no impediment under Jewish law to the "sale" of human organs for transplant.[11] Noting the potentially troublesome consequences of this finding, Rabbi Lau conceded that Jewish law would abide the development of a market in human organs.

This only confirms what might seem instinctive to some, that Jewish law might be an inappropriate candidate for this comparative project regarding the sale of organs for translplant, given Judaism's popular association with private property and the market.[12] However, to so understand the Jewish tradition and its historical

[9] Of course, one reason for the relative lack of concern regarding many of the problems that fall under the rubric of invidious commodification is the fact that the rabbinic tradition predates capitalism. As the material in Chapter 1 makes clear, however, this fact in no way delegitimates a comparative examination of Jewish laws on the question of money and exchange regarding contemporary questions.

[10] This issue has begun to receive slighly more attention in the past few years.

[11] Lau, Israel Meir, "The Sale of Organs for Transplantation" (Hebrew), *Tehumin* 18 (1998), pp. 125–136.

[12] See, e.g., Werner Sombart, *The Jews and Modern Capitalism*, New York: Collier Books (1951); Wolf Heydebrand (ed.), *Sociological Writings of Max Weber*, New York: Continuum (1984). Even Jonathan Parry assumes that Jewish law epitomizes an association with money when he remarks somewhat critically, "[i]t is not I think coincidental that the ideology of the 'pure gift' is accorded such prominence among groups – such as the Jews and the Jains – which have a particularly close historical association with market trade, for the two spheres ('pure gift' and sale) define each other"; Jonathan Parry, "The Gift, the Indian Gift and the 'Indian Gift'," *Man* 21/3 (Sep 1986), pp. 453–473 at 469. Parry's remark can be viewed as one instance within a tradition of scholarship concerning the relationship between Jews and money, some of which includes invidious stereotyping. Some of the books that deal critically with this tradition include Hillel Levine, *Economic Origins of Antisemitism*, New Haven: Yale University Press

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association with money matters is to mistake accident for cause. While it is true that many Jews in medieval Europe were involved in trade and business, this was not a product of the Jewish tradition but, rather, was related to severe externally imposed restrictions on the kinds of economic activities in which they, as legal aliens, could engage.[13] Thus, while engaging in economic activity that results in the accumulation of capital is certainly within the bounds of Jewish law,[14] the historical impression ought not to be confused with the larger conceptual framework envisioned or imagined by this legal system. Moreover, looking in isolation at the situation during a few medieval centuries in Eastern Europe, which represent but a fraction of Jewish history, both historically and geographically, is to present a skewed image of the Jewish tradition. It is also to insufficiently attend to the canonical legal texts upon which Jewish law is founded. The canon produced in late antiquity – that is, Mishnaic and Talmudic literature (upon which ensuing Jewish legal decisions rest) – will be studied here to uncover the basic conceptions upon which later developments are based.

Rather than pointing to its supposed proto-capitalist character, it is more likely that the reason Jewish law has not been the source for this type of project on commodification is due to the nature of Jewish Studies scholarship, much of which tends to focus almost exclusively on critical-historical questions, literary and philosophical matters,[15] and internal legal analysis. To the extent that there is literature that draws on ancient Jewish texts to address contemporary problems, it primarily takes the form of religious legal Responsa (*she'elot* and *teshuvot*) and internal religious discourse. As illustrated in the context of organ sales, present-day traditional scholarship can also fail to sufficiently ground itself in the conceptual matrix of the ancient texts; ironically, contemporary religious decisors can be unreflectively influenced by their modern liberal cultural environments. At the same time, there is also a well-trodden conventional approach to choosing and analyzing those precedents deemed relevant that can lock the decisor into what is often a very narrow, and ultimately peripheral or tangential, way of dealing with some of the deeper issues at stake.

This study of Jewish law explicitly attempts to avoid these pitfalls. In so doing, it suggests a different approach in Jewish law, one that can also help extend the debate over commodification beyond the deep discursive and theoretical

(1991); Derek J. Penslar, *Shylock's Children: Economics and Jewish Identity in Modern Europe*, Berkeley: University of California Press (2001); James Shapiro, *Shakespeare and the Jews*, New York: Columbia University Press (1996).

[13] See, e.g., Jacob Katz, *Tradition and Crisis*, Syracuse: Syracuse University Press (2000), chapters 6 and 7.

[14] Although, as the noted historian Jacob Katz points out, this was by no means the only way in which Jews made a living during the medieval period. *Id.*

[15] Jewish Studies is a relatively young field and is still heavily influenced by the founders of the *Wissenschaft des Judentums* tradition, a nineteenth-century historical method.

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constraints described earlier. Conceptions borrowed from law (e.g., the notion of the "lien") and anthropology (e.g., neo-Maussian ideas of gift exchange) are invoked to help analyze Talmudic texts and to aid in the elucidation of a new theory of the Jewish sacred economy, a theory that, in fact, suggests a way to reconceptualize the so-called donation versus sale of organs for transplant. By highlighting the embeddedness of exchange practices in the obligatory framework of law, and in building on the idea of obligatory gifts as an integral form of social relations, this book provides a different perspective on this question. As a more general matter, Jewish law is offered as a model that enables us to move beyond the sharp divide between gift and commodity, and some of the constraints implicitly imposed by that dichotomy.

Some of the background principles used in this analysis of Jewish law, traceable primarily to the work of Marcel Mauss, are developed in Chapter 2, "Alternative Property Conceptions: The Donor's Lien." Renowned as "the inventor of the gift in anthropology,"[16] Mauss conceives of a gift as something other than the voluntary, free gift of contemporary Western usage. According to Mauss, a gift is an obligatory act; the practice of gift giving is characterized by a set of interlocking obligations: the obligation to give, the obligation to receive, and, most important for present purposes, the obligation to reciprocate, or to make a "return gift." Through his study of "ancient societies," he established that gifts are part of a web of interconnected obligations, and, as such, they play a critical role in social bonding.

Critical about Mauss's approach, for purposes of this book, is his claim that the character of most exchanges is neither purely altruistic nor purely self-interested.[17] He highlighted the interrelational focus of exchange, whereby the interests of both parties to a transaction are always and at once taken into account. This perspective reflects a kind of hybrid morality that is characterized by the fact that both "generosity and self-interest that are linked in giving."[18] This hybrid morality, where the "life of the monk, and the life of a Shylock are both equally to be shunned,"[19] is at the heart of the Jewish legal approach to organ transfer and sales that is outlined in this book.

[16] Marilyn Strathern, "Divisions of Interest and the Languages of Ownership," in C. M. Hann (ed.), *Property Relations*, Cambridge: Cambridge University Press (1998, pp. 214–232 ) at 220.

[17] This insight is key to Mauss's purpose in reviewing the archaic institution of gift exchange, which was neither to aspire to an earlier evolutionary stage of (pure) gift giving (in contrast to self-interested commodity exchange) nor to show that all exchanges, including those taking the form of gifts, are always about individual (economic) self-interest. His aim was to turn (in part) to ancient society and reveal subtle complexities about gift exchange that continue to be true today.

[18] Mauss (1990) at 68.

[19] *Id.* at 69. Mauss aspires to a society in which people "give, freely and obligatorily." *Id.* at 71.

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A second and related theme that underlies this hybrid morality is the paradoxical notion of "freedom and … obligation inherent in the gift."[20] Distinct from but linked to the idea of the combination of interest and disinterest (here meaning lack of self-interest), the paradoxical notion of freedom and obligation being combined in the gift appears with nearly every mention thereof, throughout Mauss's essay. And yet, it is the interest/disinterest idea that is the focus of most discussion of Mauss's work, particularly in the context of the debate over commodification (where the issue involves the character of gift giving as an alternative to sales as altruistic – or not). This is, for example, the critical feature that Jacques Derrida focuses on in his critique of Mauss's exposition on the gift.[21] Even Mauss pays more attention to this facet of his theory in his essay and in his discussion of its possible policy implications.

Indeed, the fact that these two themes (interest/disinterest and freedom/obligation) are separate and distinct in Mauss' essay often goes unnoticed. Yet, for purposes of analysis, the question of (the degree of) altruism – which is the usual focus of attention in matters relating to gifts – and the question of (the degree of) voluntariness point in two different (albeit, at times, overlapping) directions. Although the first theme, of the inextricable mixture of self-interest and generosity, underlies my critique, in Chapter 1, of using the idea of a pure gift as a response to the problem of commodification, it is Mauss's second observation, of the paradoxical mixture of the free and the obligatory that is mixed in giving, that propels and supports my new approach to these questions, as illustrated here by Jewish law.

Marcel Mauss's insights on gift exchange form part of the theoretical framework for this analysis of the sale of organs for transplant under Jewish law, and for the larger theory of property to which it gives rise. His notion of the obligatory "return gift" is particularly helpful in understanding the Talmudic materials. Mauss's work is credited with recognizing the dimension of obligation that inheres in many forms of gift exchange. His analysis does more, however, than simply articulate the prosaic sense of responsibility to reciprocate that one feels, for example, when one is invited to someone's house for dinner. Indeed, the word "obligation," by itself, fails to capture the various facets of what Mauss was describing, which is a duty with the following set of attributes:

(1) it resides in particular property ("*in rem*") – thus, I make reference to this neo-Maussian obligation as a "lien" (on property) or as an "embodied obligation";

[20] *Id.*

[21] See Jacques Derrida, *Given Time*, volume 1: *Counterfeit Money*, translated by Peggy Kamuf, Chicago: University of Chicago Press (1991); see also Jacques Derrida, *The Gift of Death*, translated by David Wills, Chicago: University of Chicago Press (1992).

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(2) it is not directly enforceable at law (and, thus, might perhaps better be termed an indefinite obligation or an obligation without a right, in Hohfeldian terms);[22]
(3) it presumes that both the impetus for its fulfillment and the terms thereof (how much, when, whether, to whom, etc.) are dependant upon the volition of the gift recipient; and
(4) its fulfillment is motivated by a mixture of concerns for oneself and for the other (interest and disinterest, generosity and self-interest, are combined).

It is the latter three features of this embodied, indefinite duty (2)–(4) that explain why the act of fulfillment might be described, paradoxically, as both "free and obligatory."

This complex concept, of an act that is both free and obligatory, and interested as well as disinterested, that emerges from Mauss's ethnographic and historical analysis is not readily apparent or recognizable in contemporary society. One can glean, from his essay, an explanation for why, today, it is difficult to perceive or comprehend this phenomenon. He provides a portrayal of so-called primitive societies in order to tell a particular story whereby, in early gift exchange, entities that are, today, presumed to comprise or reflect binary constructs, such as interest and disinterest, or persons and things, were actually fused. Later, these theoretical pairs were split, resulting in the perceived opposition between interest and generosity, sale and pure gift, or people and things. Today, this related set of distinctions as distinctions, between interest and disinterest, freedom and constraint, people and things, are presumed to underlie our conceptions of property and market exchange. It is this set of distinctions that presupposes the problematic twin ideologies of the pure gift and of the purely interested individual pursuit of utility. Tracing the theoretical heritage of these ideas reveals the problem with anti-commodifiers' embrace of the pure gift approach to the notion of organ sales. Endorsing the theory of pure gift reinforces its supposed theoretical counterpart, interested monetary exchange. The alternative response suggested here is to focus on bonding-enhancing exchanges, ones that entail the combinations of interest and disinterest, obligation as well as freedom, and in which the divide between persons and things (as well as between persons and persons) may be understood to be more porous.

The blurring of the lines between people and things, and the mixture of freedom and obligation, is particularly reflected in a key element of Mauss's theory known as "the spirit of the gift." According to this concept emanating from Mauss's empirical findings, it is imagined that when something is gifted, part of the donor – or the "spirit" of the donor – continues to "reside in" the item and yearns to return

[22] See Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," *Yale Law Review* 23 ( 1913 ), pp. 16ff.

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to the donor. This is one way to think about the need for a "return gift" (an obligation that is left to the discretion of the gift recipient to fulfill) that is presumed to accompany every gift. Thus understood, it is possible to see how gift exchange establishes a web of interlocking obligations that create social solidarity.[23]

The notion of the "spirit of the gift" might be conceived of as a sort of nascent lien or claim residing in particular property that creates a bond between persons in its representation of their indebtedness to each other. Defined as a "claim or charge on property for payment of some debt, obligation or duty,"[24] a lien (or, perhaps in this case, something more akin to an equitable lien) communicates the essential element of an obligation to another that resides within particular property, such that the property is implicated by another.

The terms "lien" or "donor's lien" will be used in this book to communicate this concept; it is, of course, not meant to imply the existence of an actual debt enforceable at law by a particular individual – to the contrary, in this context it refers to a duty (or compulsion to give) that is defined precisely, in part, by its indefiniteness, by the openness of some or all of its terms. The property holder is often left to decide whether, when, what, and to whom something ought to be given as a "return." Yet, despite its somewhat open-ended and volitional nature, it is, nevertheless, an *in rem* obligation that is built into the property.[25] Thus, while being in one significant sense an obligation, the return gift is still a gift.[26] This is precisely the explanation for the phenomenon whereby "obligation and liberty intermingle."[27]

[23] Mauss's theory has been seen as providing an alternative to the originary myth of social contract, with the institution of gift exchange seen to arise from human beings' early realization of their reciprocal dependence. As Marshall Sahlins put it, one can see the gift operating as "the primitive way of achieving the peace that in civil society is secured by the State." Marshall Sahlins, *Stone Age Economics*, Chicago: Aldine Publishing Company (1972) at 169. The reason the gift "succeeds in suppressing the Warre of all against all [is] because it creates spiritual bonds between persons by means of things which embody persons." *Id.*

[24] Henry Campbell Black, *Black's Law Dictionary*, 5th ed., St Paul: West Publishing Co. (1979), p. 832. The anthropologist Jonathan Parry mentions the word "lien" in describing this notion of "the spirit of the gift," although he does not develop the legal concept and its relevance to the Maussian gift. In his words, the gift is understood to "contain some part of the spiritual essence of the donor, and this constrains the recipient to make a return." Parry, (1986) at 456. In other words, "because the thing contains" its original owner, "the donor retains a lien on what he has given away …, and it is because of the participation of the [donor] in the object that the gift creates an enduring bond between persons." *Id.* at 457.

[25] What is meant here is a legal obligation that does not carry with it a corresponding (directly enforceable) legal right. While "a lien is, in essence, an *in rem* obligation," in the sense that it is built into the property itself, not every *in rem* obligation represents a lien enforceable at law by an identifiable party. Jeffrey K. Robison, "Note: The Debtor's Right to Restrict Lienholder Recovery to the Value of the Encumbered Property under Section 506 of the Bankruptcy Code," *Journal of Corporations Law* 11 (spring 1986), pp. 433–455.

[26] As will be demonstrated, while this donor's lien might be more loosely understood as a moral or social obligation, it is nevertheless also possible to conceive of it as legal.

[27] Mauss (1990) at 65.

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The legal and anthropological conceptions described above are outlined in the first two chapters of the book. Against the backdrop of these ideas, the latter three chapters undertake an in-depth study of Talmudic sources, focusing primarily on the Talmudic legal institution of divine ownership. In so doing, this book sets forth a novel understanding of the ideas of ownership, people and property in Jewish law. When the idea that God is the original owner and donor of all things is taken seriously as a legal concept, human ownership, even of oneself, is shown in the Talmudic framework to be neither total nor absolute. As subjugated within the "divinely" mandated Jewish legal system, the person is shown to be caught up in a web of responsibilities and obligations that relate directly to limitations on ownership and self-ownership. These limitations inhere in a legal notion of divine ownership, an overarching property conception that can elide people and things as originally owned by God.[28] Chapter 3 elucidates this principle of divine ownership and the connection thereto of myriad legal obligations, thus laying the foundation for a theory of the divine donor's lien as embedded in the Jewish conception of property. As will be seen, in Chapter 4, certain transfers that occur under this rubric of limited ownership can be seen to illustrate complex exchanges that parallel and, in important ways, go beyond those contemplated by the Maussian theory. In Chapter 5, human organ transfer and transplantation are seen to exemplify this type of free and obligatory "exchange."

This book analyzes the Jewish law of the classical rabbinic texts from late antiquity. These texts form a touchstone, or even a foundation, for the Jewish legal tradition that follows. In juxtaposing the ancient, living Jewish legal tradition with the very contemporary problem of payment for organs, this book focuses attention on some of the conceptual foundations of Jewish law that have heretofore been largely unexamined, undeveloped, or unappreciated both in the academic field of Jewish Studies and in the *halakhic* (internal Jewish legal) literature.

[28] Limitations on the Jewish notion of self-ownership are evinced both in the way the person is always imagined as a relational social unit, and also, more concretely, in restrictions and prescriptions relating to the body and its use, including the prohibition against *chavalah* (self-mutilation) and suicide, laws of *peyot* (shaving one's beard), burial, redemption of the firstborn son, circumcision, and the obligation of *pikuach nefesh*. (See e.g. *hatra'ah*, (the rabbinic law that prohibits imposition of the death penalty unless the person is warned, beforehand, that he is about to commit a crime that could result in the death penalty) and, conversely, the rule prohibiting the acceptance of money to save/redeem the life of a convicted murderer.)

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