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## In Defense of a Regulated Market in Kidneys from Living Vendors

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### IV. DEFENDING A REGULATED ORGAN MARKET: THE PRIORITY OF SAFETY, TRANSPARENCY, INSTITUTIONAL INTEGRITY, AND THE RULE OF LAW

In his treatment of the philosophical implications of viewing the body as alienable property, James Childress observed that the most common arguments against organ markets simply fail. Childress argued that prohibiting organ markets was nevertheless justified because proponents of organ markets had not, to date, come up with a safe alternative to the current system of organ procurement (Childress, 1992). To answer that challenge, I begin with what a morally defensible organ market is *not*.

Two salient differences distinguish a regulated market in organs from the current practice of organ trafficking. First, virtually all of the reports of organ trafficking in developing countries describe a substantial decline in health of the vendor after harvesting, a finding that stands in stark contrast to reported outcomes from altruistic living donors in developed countries.<sup>26</sup> The data for altruistic donor outcomes in developing countries is lacking, but anecdotal reports from India (V. Jha, personal communication) suggest that altruistic living donors have comparable outcomes to those in developed countries. The question remains as to why vendor outcomes in organ trafficking are substantially worse. Obvious answers suggest themselves: (a) the vendors are disproportionately poor, thus exposed to substantially greater health risks compared to altruistic donors; (b) organ traffickers are far less motivated to care about the health of the donor, surgical quality or medical care; (c) the illegality of organ vending encourages subterfuge regarding disclosure of risks to vendors or recipients. Neither vendors nor recipients have avenues for redress if defrauded or physically harmed. These factors conspire against the capacity of vendors to make free decisions about their life and property. Trafficking built on principles of fraud subverts the autonomous decision-making capacities of vendors and virtually ensures harm to the vendor and/or the recipient.

Second, payment promised to vendors is routinely much less than what was promised (Zargooshi, 2001; Goyal, Mehta et al., 2002; Jha, 2004). Systematic corruption and the absence of any appeal to an enforceable rule of law that binds individuals to contracts means that defrauding vendors is

routine. Arrangements in which one party routinely defrauds another, exacts a measurable harm through the fraud, and in which the defrauded have no method of recompense or appeal, is a minimally controversial definition of harmful exploitation, and would be prohibited in a regulated organ market without contradiction (Cherry, 2000).<sup>27</sup>

The current system of underground organ trafficking may be *intentionally* designed to use vendors whose health will deteriorate, and whose economic status will decline. Since vendors from the lowest strata of society are more likely to do poorly, unlikely to be informed of these risks and unlikely to have effective means of redress when deceived through application of a transparent and promulgated rule of law, they are also the least capable of acting freely in deciding to become vendors. This is *not* to say that they aren't capable of acting freely, or that poverty in itself deprives persons of the capacity for free decision-making. But, a system in which 80% (Goyal, Mehta et al., 2002) to 85% (Zargooshi, 2001) of vendors unequivocally stated they would not be vendors if they had it to do over again plausibly suggests a system that subverts rather than upholds free and informed decision-making by design rather than by chance alone.

In sum, organ trafficking as described and as currently practiced is not morally permissible, and legal prohibitions against it are justified. However, the reason organ trafficking is not morally permissible is not because vendors are poor, or are somehow incapable of autonomous decision-making regarding organ vending. It is because the successful operation of organ trafficking *depends* on defrauding vendors and recipients by routinely violating contractual agreements without avenues for redress, and deceiving vendors and recipients about the short- and long-term risks to their health. Trafficking fraudulently trades on the successful outcomes of reputable transplantation, at the expense of vendors and recipients through inadequate medical and psychological screening.

Opponents of organ markets suggest that permitting a regulated market in human organs would open the door to "unregulated" markets (Kahn & Delmonico, 2004). On the contrary, an organ market would offer a plausible alternative to organ trafficking, addressing the need of recipients while providing mechanisms to avoid the dangers and abuses of organ trafficking. On the other hand, the many previous public condemnations by individuals, editorial boards, and professional organizations, as well as international legal prohibitions on organ trafficking, do not appear to have substantially abated the practice. Without a plausible alternative to reduce the growing demand for transplantable organs, there is no reason to suppose the failing policies of past and present will be any less of a failure in the future.

A defensible market in human organs should, at a minimum, have the following four characteristics:

- The priority of *safety* of the vendor and recipient;
- *Transparency* regarding risks to the vendor and recipient, and regarding institutional outcomes and follow-up care;
- *Institutional integrity* with regard to establishing guidelines which broadly reflect the conditions under which a given institution will and will not participate in organ vending, including a mechanism of mediating institutional financial conflicts of interest; and
- *Operation under a rule of law*, providing an avenue of enforceable redress if contractual obligations are violated.

### A. Safety and Transparency

Safety has both moral value and market value. The moral value of safety has its foundations in the obligations of physicians to treat donors, vendors, and recipients in a manner consistent with the current state of knowledge regarding best practices and standards of care. In accepting this responsibility, individual physicians are therefore under no moral or legal obligation to participate in a transplant if it is their opinion that either the donor or the recipient are medically unsuitable for donation or transplantation. Further, the transplant professional may be morally obligated to abstain from participation in such circumstances. Evidence-based practice guidelines regarding the pre-transplant evaluation of donors (Davis, 2004), vendors, and recipients (Kasiske et al., 2002), obligations regarding proper informed consent regarding the risks of donation (Abecassis et al., 2000), and the expected morbidity and mortality rates from living donation (Matas et al., 2003) and risks of subsequent renal failure after donation (Ellison et al. 2002) could stand as the standards of safe practices. There is no reason that the obligations of transplant professionals to operate according to standards of care in organ markets should be any more or less stringent than those expected of such professionals and institutions involved in non market-based organ procurement.

Along with moral value, safety and transparency have market value. If it is true that the desperation of vendors and recipients motivates them to overlook the many attendant risks of participating in organ trafficking, an alternative without those hazards would be more appealing, and would be more likely to be patronized. Indeed, the *market* value of safety may well succeed where moral prohibition and legal sanction have failed in reducing the practice of organ trafficking. One might correctly object that viewing safety and transparency merely as a market value opens up the possibility that safety might be *compromised* in exchange for a reduction in cost to the recipient, or an increase in compensation to the vendor. Recipients and vendors might be willing to incur more risk for a less costly vending transaction. However, when safety and transparency are also viewed as concomitant moral obligations on the part of transplant professionals, when the

standards of proof regarding safety are clear (institutionally established practices of safe evaluation, transplantation, and provision for follow-up care) and the burden of proof is placed on transplant centers to be transparent regarding safe practices, the “negotiability” of safe practices ought to be negligible.

## B. Institutional Integrity

Some who view organ vending as permissible will nevertheless also view it as a morally reprehensible practice. But nothing *obligates* individual vendors, donors, recipients, transplant professionals, or transplant centers to participate in an organ market. Just as some donors will manifest their moral objection to organ commodification by refusing to accept compensation, some transplant centers may communicate opposition to all organ markets by refusing to cooperate with vendors. By fashioning policy on an institutional level, professionals, vendors, donors and recipients with compatible moral commitments can cooperate with each other, and, unlike the current system, the forbearance rights of each can be respected in full.

Beyond the other side-constraints, the specific content of different institutional policies might vary widely. Different institutions may alternatively welcome, exclude, or maintain a case-by-case policy regarding vendors, internet-based donor-recipient pairs, non-directed donors, and directed donations to members within a specific moral community (such as within a religious faith or ethnic group). Indeed, with enough agreement across individual transplant centers, few changes need be made to the current system that governs the allocation of deceased kidneys by privileging waiting time and HLA-matching. Alternatively, in conjunction with a willing transplant institution, some wait-listed recipients might choose to bargain with the state, offering Medicare an opportunity to save the cost of a lifetime dialysis welfare entitlement in exchange for acting as the purchasing agent for a transplantable kidney and a few decades of coverage for immuno-suppression medications. In the event a directed deceased donation is requested that is incompatible with the moral commitments of one institution, the deceased donor organ might be shipped to another institution with compatible moral commitments, perhaps in exchange for an in-kind deceased donor organ transfer in the future.<sup>28</sup> The specific content of individual institutional policies would be of less relevance than the more general requirement for institutions to formulate policies that articulate the moral commitments of the institution’s members.

## C. Rule of Law

Legislative oversight of an organ market is necessary to ensure that standards of safety are met, to ensure good-faith enforcement of contracts

between vendors and other entities, and to protect against fraud. Ideally, the law should serve as a side-constraint on other means of assuring institutional integrity, such as accrediting powers of professional organizations with voluntary membership.

In the context of an organ market, and using a distinction developed by James Buchanan, the rule of law should have two basic functions (Buchanan, 2000). First, the rule of law should have a *productive* function, which facilitates freely agreed-to arrangements between individuals and institutions. Second, the rule of law should be designed to *protect* the contractual and forbearance rights of vendors, donors, recipients, professionals, and institutions. The productive functions of law include provisions for a common market in which potential vendors and institutions can meet and negotiate transactional terms, as well as opportunities for vendors to bargain with the State regarding the exchange-value of existing welfare entitlements. The protective functions of the law might include designing sample contracts that satisfy the side-constraints of safety and transparency, offering adjudication and mediation mechanisms for resolving a range of contractual disputes, and mediating conflicts of interest such as financial inducements to increase vending through subversion of safe practices.

I have not offered a specific account of what a regulated organ market would look like in practice. This is a deliberate omission. The proscriptions I have argued for are side-constraints, which do not entail a single, specific account of how an organ market must be structured in order to be considered morally permissible. These side-constraints are hypothetically compatible with the monopsony model advocated by (among others) Nicholas Tilney (Radcliffe-Richards et al., 1998) and Arthur Matas (2004) or with more decentralized market models. On my account, fulfillment of the side constraints is a necessary condition for a morally defensible organ market. Of course, the decision of *individuals* to be participants in an organ market would depend on much more than that, namely, the dictates of the moral commitments of the individuals in question. But, all such interactions ought to satisfy the side constraints of safety, transparency, institutional integrity, and operation within the rule of law.

## V. ENDURING PROBLEMS FOR ORGAN MARKETS

Several problems remain for this view of organ markets, even operating under the side-constraints previously described.

### A. The Ambiguity of “Safe Practices” and Conflicts of Interest

The limitations and controversies in the literature on the evaluation and long-term outcomes of living donors should be of special concern to

proponents of an organ market. In the context of abuses of organ trafficking, the burden of proof is on transplant institutions to prove that properly evaluated organ vendors can safely vend. Though there is no *a priori* reason why properly regulated organ vending cannot be as safe as organ donation, conclusions from the literature on living donors is not transposable onto potential organ vendors, and the outcomes of organ vending would require similar study to prove safety. Along these lines, reported short- and long-term outcomes of living donors in developed countries suggest a reasonable standard of safety. However, concerns and controversies in the literature on living donors merit special consideration in the context of an organ market.

A few examples of controversies about the safety of donating a kidney include: patients with easily controlled hypertension (Textor et al., 2003), who are obese and therefore at risk for developing kidney disease (Davis, 2004), or who have a strong family history of kidney disease (Davis, 2004) or have had a kidney stone (Lee et al., 1994; Davis, 2004). Adjudication of these risks is currently done institution-by-institution, and in some instances on a case-by-case basis. Though donors are routinely apprised of these risks when they are identified, the unique burdens of the donor role can conspire to encourage both potential donors and transplant professionals to judge the benefits to outweigh those risks that don't rise to the level of an absolute contraindication to donation (Fox & Swazey, 1992; Surman et al., 2005). This problem is complicated by the dynamics of an organ market, but the problem remains essentially the same. In this case, any number of influences may cause vendors and transplant professionals, even acting in good faith, to modify judgments about acceptable risk. Financial incentives may motivate either vendors or professionals to act in bad faith by deliberately setting aside even less controversial assessments of risk. The slippery slope is in clear view.

The problem can be addressed (if not resolved) with the companion side-constraint to safety: transparency. Transplant centers should formulate and publish policy governing the center's criteria for evaluation of donors and vendors alike, with the goal of setting policy on acceptable and unacceptable medical criteria based on a good-faith assessment of the available evidence. Donor and vendor evaluation would be overseen by an evaluation committee, which could include committee members who have no financial or professional obligations to the vendors, donors, or transplant center. Included on the committee might be the equivalent of an ombudsman, charged with publicly reporting on the efforts of transplant centers to ensure safe practices. Nevertheless, the question of who watches the watchers would remain an important and persistent concern. The ever-present realities of organ trafficking place the burden of proof squarely on those seeking to morally distinguish a defensible market in organs.

## B. Vendors from Nations That Do Not Afford Protections Which Fulfill the Side-Constraints

An obvious strategy to circumvent the side-constraints of safety and transparency is cross-border brokering of human body parts. Countries in which the side-constraints were enacted and enforced would be faced with screening potential organ vendors from other countries which have no provisions for vendor protection. With minor adjustments to existing schemes of organ trafficking, organ brokers could arrange the passage of vendors from countries without protections to countries with protections, only to return the vendor to the country of origin after the transaction. Vendors would be as unprotected from fraud and abuse as they are under the current practice of organ trafficking.

Organ trafficking operates outside the laws of most countries. The success of a legalized organ market governed by side-constraints rests on a fragile trust. It requires trust in transplant professionals and institutions operating according to a moral and professional commitment to place the safety of vendors first, and in accord with a rule of law which protects the contractual rights of vendors that is credibly enforceable. While some vendors, even apart from the pressures of organ brokers or the constraints of poverty, might be prepared to forego standards of safety, transplant professionals have a moral obligation not to participate in a vendor relationship that violates the side-constraint of safe practices. In some circumstances, this may result in a policy of not accepting any vendor who is not a citizen of the country in which the transplant center is located, simply out of an abundance of caution (Matas, 2004).<sup>29</sup> It is possible that some vendors, frustrated at being turned away by transplant centers which take the side-constraints seriously, will turn to organ brokers and organ trafficking. In response, defenders of organ markets can observe that an organ market governed by side-constraints is the only plausibly effective means of substantially reducing the demand that drives the practice of organ trafficking, by offering a safe and morally defensible alternative.

A central argument of this paper is that the documented realities of organ trafficking should serve as a basis for how a defensible market in human organs can and should be distinguished. The longer prelude to this argument is that purported analogies between a regulated organ market and various dystopias should be viewed skeptically to the degree that they trade on distortion for rhetorical gain. The side-constraints of safety, transparency, and the rule of law all stem from what is conspicuously lacking in the recorded practices of organ trafficking. These side-constraints are designed to permit persons and institutions that share moral commitments to peaceably pursue their projects and goals. It is not presumed that all persons will choose identically, or that each person's moral choices are somehow "equal" in value to the choices of others, or that the choices of some would not represent examples

of grave evil to others. The side-constraints are designed with the *assumption* that persons do and will continue to disagree radically over the answers to substantive moral questions, and proceeds on the assumption that such persons can nevertheless sometimes peacefully cooperate with one another. An organ market, subject to side-constraints, is of instrumental value in the peaceable mediation of these profound moral differences.

### C. Portia's Wisdom: Limits on the Fungibility of Organs *qua* Commodity

Viewing organs as things that can permissibly be bought and sold raises the question of whether entities other than a single buyer and seller can legitimately claim property rights over an organ. In the case of deceased donor organs, this question is partially addressed by the model of a futures market (Cohen, 1989). In this model, the organ of a living person is purchased in advance, and the property right is transferred upon death to the possessor of the "organ future."

The question remains as to whether the owner of an organ future is thereby free to dispose of the organ in any way they see fit. For example, could the owner of a deceased organ future (a) destroy "surplus" transplantable organs in order to make remaining organ futures more valuable, or (b) allocate procured organs according to criteria of the owner's choosing? Cognizant of these problems, futures market proponents stipulate that the owner of an organ future should be a single entity, and disposal of the procured organ should be limited to allocation for transplantation (Cohen, 1989). However, the rationale for why property rights over organs should be curtailed in this way is important, because such a rationale (whatever it is) may entail other commitments as to how property rights may permissibly be conferred and transferred. So, if the rationale for limiting organ property rights to a monopsony is to prevent manipulation of the supply of organs for personal gain at the direct expense of recipients, the source of this obligation and what other restrictions on organ property rights becomes an important question.

This is not an idle concern. Scheper-Hughes has alleged that hospitals in several developing countries have conspired to dispose of transplantable organs from potential deceased donors to avoid damaging the underground trade in organs from live vendors (Scheper-Hughes, 2000). Other commentators in India have observed that the presence of organ trafficking dilutes the political will to institute a robust program for deceased donor procurement (Jha, 2004). This is conceptually identical to the owner of an organ future destroying an organ to manipulate the value of competing financial interests. If it is impermissible for an individual to destroy an organ in his possession to advance his financial self-interest, it would seem equally impermissible for institutions to deliberately destroy transplantable organs

for the same reason. Even if the lack of a robust deceased donor procurement program is not conspiratorial, the lack of a deceased donor program that results in an increase in demand for organs from living vendors is a system which benefits organ traffickers.

A market in organs from living vendors poses further problems. Since the vendor is selling an organ while alive, an organ *qua* commodity could also be viewed as a valuable asset by third parties who have other financial relationships with vendors. Throughout, I have argued that vendors might choose to sell their organs for a wide variety of reasons, including the repayment of accumulated debt. If this is permissible, and absent other means of payment, may a creditor require the sale of an organ (for living vendors, or after death) for the purpose of debt repayment? If an organ *qua* property is part of the estate of a living or deceased vendor, this question tests the limits of viewing a vendor's "right to vend" as a forbearance right. If it is permissible to allow vendors to sell their organs and use the exchange to further their own ends, it seems arbitrary to prohibit third parties from insisting that vendors fulfill a financial obligation by selling a kidney. Nor does this scenario necessarily violate Epstein's (1995) caveat regarding contracts that do not mutually benefit both parties, since paying off a debt is arguably a benefit to the debtor.

However, it does not follow that such exchanges (or such contracts) are therefore defensible. When, in *The Merchant of Venice*, Shylock demands a pound of flesh as payment for a broken contract, Portia (disguised as a judge) pronounces that the extraction of this gruesome restitution is indeed part of a legally valid contract. But, Portia qualifies a crucial difference between what the law permits, and what justice demands.<sup>30</sup> Portia's admonition is a reminder that the side-constraints previously discussed do not only apply to health care providers and institutions. To treat the side-constraints as merely *pro forma* conditions for permissible action is to fail to accord individuals the respect required by their moral agency. Persistent or systematic violations of respect for moral agency may require that the content of the side-constraints be revisited and revised accordingly.

## VI. CONCLUDING REMARKS

In this paper, I have argued for the following propositions:

- The current system of organ procurement, which inconsistently but insistently emphasizes donor altruism, is positioned to fail;
- Arguments by analogy against organ markets rely upon demonstrably false comparisons, involve circular moral reasoning (organ trafficking, human slavery, commodity fetishism), or fail when the analogized system is considered in greater detail (blood product sales);

- Participation in an organ market, subject to the side-constraints of safety, transparency, institutional integrity, and the rule of law, is sharply distinguished from the current practice of organ trafficking; and
- Questions regarding the structure of and limits on the property rights of organs from living vendors persist.

Public policy in renal transplantation is at a crossroads. There is no serious disagreement regarding the forecasted increase in demand for organs in the next decade, nor about the fact that current strategies and current reforms of organ procurement are vastly insufficient to meet this demand. Transplant professionals are increasingly put in the absurd position of evaluating patients for transplantation who will be far more likely to die on the waiting list than receive a deceased donor organ. Potential transplant recipients face something worse than absurdity because the possibility of transplantation offers a fading hope: not hope for eternal life, but the hope that they might be spared a life cut short too soon. It is a hope that is becoming progressively out of reach for thousands more each year.

None of this justifies policies that treat people as "spare parts," or any other epithet denoting organ vendors as less than the moral agents they unmistakably are. Taking the moral agency of organ vendors seriously entails abandoning the easy, but ultimately false, generalizations about the moral and psychological makeup of vendors and the workaday dismissals of a market solution. These generalizations reduce vendors to characters in a passion play about exploitation and greed, rather than as human beings capable of fashioning and acting on their own moral commitments, hopes, and aspirations. This is not an argument, as some will undoubtedly assume, that "the ends justify the means." The argument is that the means themselves, as I have argued for them here, do not warrant blanket prohibition.<sup>31</sup>