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STAKES AND KIDNEYS

Why Markets in Human Body Parts are Morally Imperative

LIVE QUESTIONS IN ETHICS AND MORAL PHILOSOPHY

James Stacey Taylor

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LIVE QUESTIONS IN ETHICS AND MORAL PHILOSOPHY

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and London Business School, UK

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To Margaret

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My interest in the ethics of markets in body parts was later rekindled by reading Paul Hughes's article 'Exploitation, Autonomy, and the Case for Organ Sales,' published in the *International Journal of Applied Philosophy*. I wrote a response to this paper (entitled 'Autonomy, Constraining Options, and Organ Sales') that Paul very generously and constructively critiqued, and that subsequently appeared in the *Journal of Applied Philosophy*. This paper was an early ancestor of Chapter 4 of this volume, and I thank the editors of the *Journal* and Blackwell Publishers for granting me permission to reprint sections of it here.

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Author's note

Throughout the text, 'he', 'his', 'him' and 'himself' shall stand for 'he or she', 'his or her', 'him or her' and 'himself or herself'.

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Chapter 1

The Problem – and Some Proposed Solutions

It is well known that the number of human organs that become available for transplantation each year falls far short of the number that are required.[1] It is also well known that because of this thousands of people die each year as a result of the failure of one or more of their organs, and thousands more continue to suffer. What is not so well known, however, is that there is a simple solution to this shortage of organs. This solution would, if implemented, save the lives of thousands of people waiting for transplant organs who would otherwise die. It would also vastly improve the quality of life of thousands of others who would otherwise have to continue to undergo debilitating and painful procedures to stay alive. Moreover, this solution to the current shortage of human transplant organs would have significant beneficial side effects, helping to end the abuse and suffering of yet thousands more people who, although not in need of transplant organs, live in poverty. This solution to the organ shortage is also both inexpensive and practical, and could be implemented with ease.

This solution is to legalize current markets in human organs.[2] And there's the rub. To many persons markets have a whiff of sulphur about them. Market systems are, in the view of many, mechanisms that enable the strong to prosper at the expense of the weak, where everything is reduced to the lowest common cash denominator, and from which human feeling, sentiment and spirituality is absent. And markets in human organs are, in these persons' eyes, the very worst face of this morally bankrupt system. Such markets are frequently described in terms of the greedy rich and the exploited poor, so much so that a cursory glance at discussions of them might lead the casual reader to think that 'the rich, tired of gold

plating their bathrooms and surfeited with larks' tongues, had now idly turned to collecting kidneys to display with their Fabergé eggs and Leonardo drawings.'[3] And an international market for human organs is held to be even worse, since it is held to reinforce other forms of exploitation, with kidneys moving 'from East to West ... from black and brown bodies to white ones, from female to male or from poor, low status men to more affluent men.'[4] Indeed, so abhorrent is such a trade held to be that those who advocate it have been compared to Nazis in the correspondence pages of the respectable British medical journal *The Lancet*.[5] One author has even noted that his arguments might support the view that 'the state could justifiably bar publication of a book that advocates the sale of body parts,' on the grounds that even the mere discussion of such markets is harmful.[6] And at least one journal article has been rejected as its 'publication would imply approval of commercial unrelated kidney transplants from living donors.'[7]

The view that markets in human organs are beyond the moral pale is not only held by those whom one would expect to oppose the expansion of the market into a new area, such as neo-Marxists and those opposed to increasing commodification and consumerism. Even persons who are ideologically committed to the promotion of markets are opposed to this trade. Margaret Thatcher, for example, arguably the most pro-market Prime Minister that Britain had in the 20th century, stated that any trade in human organs was 'morally repugnant' after hearing in 1988 that several Turkish citizens had travelled to Britain to sell their kidneys to British citizens.[8] Even members of the medical profession, who might be expected to welcome a way to alleviate the chronic and severe shortage of organs and the suffering that this causes, believe that there is something special about a market in human body parts that justifies its condemnation.[9] The reasons that persons within these diverse groups give for their opposition to trading in human organs are very similar. It is generally believed by persons of all political and theoretical stripes that markets in human organs are likely to compromise the autonomy and well-being of those who participate in them as vendors, that they are likely to undermine the well-

being of those who receive the body parts thus procured, that they commodify what should not be commodified, that they are demeaning to the vendors and, most simply, that such markets are simply viscerally repugnant.[10]

But all these objections are flawed. Indeed, I will argue in this volume that not only do these objections to a current market in human organs fail to withstand critical scrutiny, but concern for the core values that they appeal to – personal autonomy, well-being and human dignity – *supports* the view that it is morally permissible to trade in human organs. Rather then being the most morally repugnant approach to organ procurement, then, I will argue that a legal trade in human organs is the best solution to the organ shortage, and that its implementation is morally imperative.

Alternative Methods of Organ Procurement

To argue that it is morally imperative to legalize the trade in human body parts is not to argue that other methods of organ procurement should be abandoned. Since one of the main reasons for advocating that such a market be legalized is to increase the supply of transplant organs, it is clear that any ethical means of achieving this should be encouraged. To advocate the legalization of markets in human organs is thus an *inclusive* approach to organ procurement rather than an *exclusive* one, for such markets could operate alongside other approaches to procuring transplant organs. Of course, instituting a market for human organs might adversely affect the number of organs that will be procured through other means. (It is likely, for example, that giving transplant organs a market value will decrease the number that are procured through voluntary donation.) However, even if this is so it does not necessarily tell against legalizing such a market, for (as I will discuss in Chapter 8) both experience and economics tell us that the additional number of organs that would be procured through the market would be greater than the resulting drop in the number of organs that would be procured by more traditional, non-market, methods.

Since the proposed current market for human transplant organs is not an exclusionary method of procurement it would be sensible to outline some of the methods that rival it. This will not only provide a better background to the debate over the moral legitimacy of markets for human organs. It will also show that many of these other approaches to increasing the supply of organs are subject to serious ethical objections, and so it is not the case that a market for human organs is the only approach that is considered (albeit mistakenly) to be ethically problematic. Furthermore, outlining these alternative approaches to increasing the supply of transplant organs will also demonstrate that they have been proposed on the basis that they exhibit respect for autonomy and concern for human well-being. Since these are the same values that undergird my arguments that a current market in human organs is morally permissible and should be legalized, my proposal of such a market comes from within the ethical mainstream of the debate over how to increase the supply of transplant organs – something that is not always acknowledged by those who oppose the commercial procurement of organs. Finally, outlining the four primary approaches to organ procurement will also show that they all suffer from a certain flaw that the market system is immune to – a flaw that results in their being suboptimal means of increasing the supply of transplant organs.

Donation

The most widely accepted method of procuring transplant organs is that of post-mortem donation, with the donation of the organs being performed either by the decedent prior to his death, or by his relatives post-mortem. This system of donation was formalized in England, Scotland and Wales with the Human Tissue Act of 1961, and in Northern Ireland with the Human Tissue Act of 1962.

Such donation of body parts was similarly formalized in the United States in 1968, when the Commissioners on Uniform State laws announced the Uniform Anatomical Gift Act. This was subsequently adopted (with some minor amendments) by all states and the District of Columbia by

1973. The assumption behind this method of organ procurement was (and is) that a person's organs were of no value to him after his death, and, recognizing both this and the fact that they were of enormous value to their potential recipients, persons would be moved by (consequentialist) moral considerations to donate them.

The most significant aspect of this method of procuring transplant organs is its clear failure to secure anywhere near the number of organs that are required. This method fails (and continues to fail) for three primary (and predictable) reasons. First, very few people are motivated to agree to have their organs removed from their bodies after their deaths for transplantation into others. Some people have religious objections to the intentional dismembering of the body (either before death or after it) and so will not consent to having their organs removed.[11] More typically, people might fear that if the staff of the emergency room found a signed donor card on them after they had been brought in with serious injuries they would be less likely to receive life-saving treatments, since their attending medical personnel would prefer to harvest their organs to save a greater number of lives.[12] Furthermore, even if these two concerns could be allayed this system of organ procurement offers no incentive to sign a donor card beyond the feeling of 'acting virtuously.' Since potential donors incur costs in signing a donor card (such as having to confront their own mortality and subsequent dismemberment, and the time spent in getting and signing the card) for most potential donors (that is, those for whom the satisfaction of 'doing the right thing' is low) this system provides a net *disincentive* to donate.[13] Second, even if a person does decide to donate his organs after his death this does not guarantee that his wishes would be carried out, even if his organs were needed and viable for transplantation. This is because there is no fail-safe method in place for ensuring that a willing donor could be readily identified in time for his organs to be harvested. (A person might not, for example, be carrying his organ donor card when he was brought into the emergency room.) Moreover, even if the decedent *was* identified as a donor his family could still object to the retrieval of his organs. Third, this system

also imposes considerable costs on the medical personnel responsible for approaching the decedent's relatives and requesting his organs. As Lloyd Cohen notes, it is difficult for a physician 'who only moments before was caring for an injured young man, to approach the man's mother and suggest that she donate her son's liver ... .'[14] This difficulty is made more acute by the need to maintain potential organ donors on life-support to preserve the oxygenated organs (that is, the liver, kidneys, heart and lungs) so that they will be suitable for transplantation. (Once an oxygenated blood supply is removed from these organs they will degenerate rapidly.) In such cases the physician will be requesting organs from the relatives of a person who appears still to be sentient. Moreover, maintaining a person on life-support for the express purpose of preserving his organs before the request for them was made is itself psychologically burdensome for the medical personnel involved.[15]

This system of post-mortem donation is supplemented by the donation of organs to others (usually family members) by live donors.[16] Unfortunately, even under ideal conditions this method of procuring organs could never provide enough organs to meet the current need for them. Not everybody who needs a transplant organ (or organs) will have a relative who could provide an organ for them, and the relatives of those who do might not agree to this procedure. Furthermore, this method of organ procurement cannot procure all the organs that are needed, for live donors obviously cannot provide some organs (such as hearts or pairs of lungs) without dying. At best, then, the system of procuring transplantation organs from live donors must be seen as a supplementary, rather than a primary, method of procurement.

Required Request

In 1984, in an attempt to enhance the numbers of organs that are procured for transplantation by voluntary donation, Arthur Caplan proposed that hospitals be required to request organs and tissues from the next of kin of a person who had recently died and whose bodily parts were suitable for transplantation.[17] The British Medical Association has

rejected this method of increasing the supply of transplant organs.[18] However, in the United States on 1 October 1987 the federal government instituted a version of this policy, pursuant to a provision of the 1986 Omnibus Budget Reconciliation Act and Section 1138 of the Social Security Act, such that hospitals must have in place some form of required request procedure in order to continue to be eligible to participate in the government-sponsored health programmes of Medicare and Medicaid.[19]

Like the system of procuring organs through voluntary donation, there is no obvious secular ethical barrier to the Required Request approach to increasing the supply of organs available for transplantation. However, there is an ethical difficulty with this approach that is not obvious: that it will lead to clinical conflicts of interest. In particular, Required Request legislation requires healthcare providers to switch their primary focus from the care of those of their patients they have identified as being potential organ sources (for example, those who have been the victims of accident trauma, sudden acute illness or self-inflicted injury) to securing organs for another recipient.[20]

The implementation of Required Request policies has also encountered practical difficulties. A study concerning Required Request policies that was conducted between 1991 and 1994 in 23 hospitals in the United States discovered that, although compliance with the Required Request laws was high, healthcare professionals did not always know what their legal responsibilities were under these laws.[21] Moreover, since no positive or negative incentives have been put in place to encourage the medical personnel charged with requesting the organs actually to request them, and such requests are psychologically burdensome to those who are charged with making them, the typical medical practitioner is faced with a net *disincentive* to make these requests.

Presumed Consent

Recognizing that neither a system of voluntary donation nor a system of Required Request (nor even both together) is likely to procure the numbers of organs that are currently

needed for transplantation, some medical ethicists argue that if a decedent has not *specifically stated* that he *does not* want his organs to be used for transplantation after his death, then they *should* be so used if they are viable and there is a need for them. This system of 'presumed consent' has gathered much support. The British Medical Association voted at its annual meeting in 1999 to implement this system, although the British government immediately rejected this proposed policy change.[22] Presumed consent systems operate in many European countries,[23] and (in a limited fashion) in several American states that permit coroners or medical examiners to remove corneas, pituitary glands and other specified tissues from cadavers where there is no knowledge of the decedent objecting to this.[24]

The systems of presumed consent that are both proposed and in place have faced serious legal and ethical challenges. In the United States presumed consent policies have been legally challenged on constitutional grounds. In each case the plaintiff argued that the state's taking of the decedent's tissues or organs without any explicit permission to do so violated the Fifth Amendment's prohibition on the taking of private property without due process and just compensation. These legal objections have been upheld to an extent, with the courts ruling that the constitutionality of this method of organ procurement is doubtful in the absence of any effective system for recording and respecting objections to having one's organs and tissues harvested post-mortem. If, however, there is an effective system in place whereby persons can opt out of having their organs removed, and such requests are honoured, then this method of procuring organs is held to be constitutional.[25]

The primary *ethical* objection to procuring organs through a system of presumed consent is similar to the legal argument against it: that it will enable the state to take a person's property without his consent.[26] Although the proponents of this objection to using presumed consent to increase rates of organ and tissue procurement assign a property right to persons with respect to their organs and tissues, this does not commit them to the view that it is ethical to trade in organs and tissues, for they might hold that this property right