

THE MORALITY OF A FREE MARKET FOR TRANSPLANT ORGANS

Mark T. Nelson

I. INTRODUCTION: THE SHORTAGE OF TRANSPLANT ORGANS

IF you are poor and have a kidney to spare, then Count Rainer Rene Adelman von Adelmansfelden has a deal for you: give this German businessman your kidney and he'll give you \$45,000—and then he'll resell the kidney at a higher price to someone else in need of a transplant. Although the Count has lots of interested potential buyers and sellers, he also has lots of critics; "I'm doing good," he complains, "and people are acting as if I were just a cold-hearted brutal businessman."¹ *Is there anything brutal about this arrangement? This is the question I shall pursue in this paper.*

A few decades ago, this question would have been unthinkable; now it is not only thinkable, but pressing, because of recent medical advances, such as the development of cyclosporin, which have dramatically increased the success rates of transplant operations. The success rates for kidney and cornea transplants, for example, are now as high as 95%.² As a result, there are now long lists of medically needy persons waiting for suitable transplant organs, on something like a first-come, first-served basis.³ The American Council on Organ Transplantation estimates that some 15,000 Americans are now waiting for new kidneys alone. The fact is there simply are not enough transplant organs to go around, and many persons die before their turn comes up, or else live under years of debilitating sickness and painful treatment.

II. REMEDIES FOR THE SHORTAGE

What can be done to make up for this shortage of transplant organs? Three possibilities suggest themselves. The first would be to increase voluntary donation, which typically involves educating the public about the need for donated transplant organs, and making donation easier. Following the Uniform Anatomical Gift act, a signed statement suffices to make one a donor, and in 43 states, a simple checkmark in the appropriate box on a driver's license suffices. Further, some states have enacted "required re-

quest" laws, requiring physicians to ask the families of newly deceased persons to donate organs from the body of the deceased. While it is still too early to predict the effects of all these efforts, the sad fact stands that, at present, less than 20% of the 25,000 healthy persons who die unexpectedly in the U.S. each year become donors.⁴

A second possibility would be to compel "donation" via government policy. For instance some have suggested that the government require routine "organ harvesting" from neomorts, allowing the requirement to be overridable by the next of kin.⁵ Yet, such a policy has seemed undesirable to many, on the grounds that we do not need more governmental coercion, especially on a subject as sensitive as the human body. Even a policy of overridable harvesting has seemed undesirable because it implies that the government has at least *prima facie* rights of disposal over the bodies of its citizens—an implication which few in a liberal state are willing to accept.

The third possibility is to open up a free market for transplant organs and let transplant organs be bought and sold like any other commodity.⁶ Since there is already a precedent in the buying and selling of blood (in the U.S., e.g.), economists such as Marvin Brams have suggested that the free market be extended to transplant organs as well.⁷

Where the linkage of personal concern between potential donors and donees is absent or weak, potential donors apparently have to be provided with incentives other than altruism, not an unusual situation in American society. A market system can provide these incentives. (Brams 1977, p.6)

Brams' suggestion is based on the economic wisdom that we can usually increase the public supply of something if we increase the price for that thing, so we could increase the public supply of transplant organs by paying for them in a market. Of course, such a market would have to be carefully administered via hospitals, organ banks, and the law, but in *principle* it can work, argue its defenders, and would almost certainly result in more available organs.⁸

In fact, in Brazil and West Germany there has in recent years been just such a market for transplant organs, sometimes advertised in the classified sections of newspapers. In Brazil, for instance, corneas have been advertised for as much as \$40,000 and kidneys for as much as \$30,000.⁹ For the poor or even the middle class, this sort of money is attractive. A single mother might well regard it as a way of financing her child's education—indeed, as a way of escaping poverty altogether. German transplant entrepreneur Rainer Scherer asks, "Which is better: for me to give a poor guy 20,000 marks or for him and his two healthy kidneys to be thrown onto the corpse cart after he starves?" (*Newsweek*, Dec.5, 1988, p. 38) Given the unattractiveness of donation and coercion, this free market solution seems especially attractive.

Attractive or not, the market for transplant organs is illegal in the United

States. In 1984, Congress passed the National Organ Transplantation Act which prohibits the sale of transplant organs; moreover, the medical establishment in America has rejected the idea as well.¹⁰ Any physician or hospital participating in the transplant of a bought organ would most likely be ostracized. Yet why should this be? Why should there not be a legal market for transplant organs, if that would increase the number of transplant organs available and save lives, all through non-coercive means?

Of course, it might be argued that a free market would not increase the supply of transplant organs. Similar arguments have been made by Titmus, e.g., against the sale of blood, and could be made against the sale of transplant organs as well.¹¹ Such arguments are inconclusive at best in my view, but more importantly are beside the point of the present inquiry, since the moral problems with the sale of organs might still hold even if the supply of organs were increased. So let us assume for the sake of argument that economists such as Brams are right, and that a free market for transplant organs would result in a greater public supply of the needed organs. On this assumption, what *moral* objections might there be against such a free market?

III. OBJECTIONS TO THE FREE MARKET REMEDY

Malcolm Muggeridge says that,

"One cannot actually nail down why it seems horrible that a kidney should be sold for a huge sum of money, or that there are people so desperately in need of kidneys that they are prepared to pay large sums for them, but to me these contracts have something very creepy and unpleasant about them." (Bach 1987, p.69)

In surveying the literature and thinking about the problem, I see three sorts of moral objections emerging against a free market for transplant organs: the "horrible side effects" objection, the unfairness objection, and the "commodification" objection. I shall discuss each of these in turn, paying special attention to the commodification objection.

IV. THE HORRIBLE SIDE EFFECT OBJECTION

The first objection to legalizing a free market for transplant organs is that this would have numerous and particularly nasty side effects. It might be argued, for instance, that a free market for transplant organs would worsen the quality of available organs, since it would give incentive to winos, drug addicts and derelicts to sell their organs; that it would make physicians readier to "pull the plug" on near-death patients in order to get saleable organs; that derelicts and disadvantaged children might disappear from alleyways and wind up in illicit "chop shops" to provide organs.¹² These are just some of the horrible side effects of a free market for organs which some critics have foreseen and worried about.¹³

Clearly, these are legitimate worries; anyone who has read or seen Robin Cook's thriller *Coma* can imagine them vividly. Still, I submit that these are *practical* problems to be solved, and that this objection does not strike at the heart of the free market for transplant organs. For one thing, it is not at all obvious that all such markets would bear such consequences, since procedural safeguards against such abuses could be built into the market system. For instance, it would be reasonable to require that all sales be made through government approved organ banks and only by the consent of the living owner. Such a requirement would serve as a check on physicians over eager to pull the plug, and on "organ pirates" with their illicit chop shops.

Still, critics might argue that the negative side effects of a free market for transplant organs would be less direct and obvious than the ones that I have just mention, but no less negative for all that. Specifically, it might be argued that a free market for transplant organs would have unintended, large-scale *social* consequences, such as

... a heightened demoralization of the poor, accompanying the realization that one can be worth more as body parts than in any other way ... [and] heightened class antagonism, with an increased tendency on the part of the very poor to think that the well-off people view them as there to be used.¹⁴

Of course, it is by no means certain that a free market for transplant organs would have such consequences; still, it is a sufficiently serious possibility that it deserves attention. Perhaps the most plausible response to this objection is that such negative consequences would probably be offset, at least in large part, by the gains that the poor—not to mention everyone else—could achieve in such a market. Admittedly, it is difficult to compare the magnitudes of these negative and positive consequences, but it is worth noting that, although many of us are now worth more dead than alive because of our life insurance policies, most of us still think that having life insurance is, on balance, a good thing. Similarly, the very poor might realize that they are worth more as body parts than in any other way, but still think that the opportunity to sell their organs was, on balance, a good thing.

These remarks are sketchy, of course, but they are intended only to suggest that there could be effective responses to predicted horrible side effects or negative social consequences. Even if we could practically eliminate or offset all of these consequences of a free market for transplant organs, however, the other two objections would still need to be addressed.

V. THE UNFAIRNESS OBJECTION

The second moral argument against a free market for transplant organs is the "unfairness" objection. According to this objection, if there were a free market for organs, then the price for these organs would be high—in the tens of thousands of dollars, typically, as we have already seen. Further,

this cost would be added to the already high cost of the transplant operation and recovery: \$30,000 - \$40,000 for a kidney transplant; \$180,000 - \$460,000 for a liver.¹⁵ The result would be that some potential recipients would be priced out of the market for transplant organs and would be forced to rely on the probably smaller pool of donated organs. As things stand now, medically needy persons get "in line" for organs; all things being equal, if I get in line ahead of Rockefeller, I am supposed to get the next available organ.¹⁶ The fact that he is wealthier is supposed to make no difference.

In a free market for transplant organs, however, the fact that Rockefeller is wealthier could make all the difference. If we are competing for the same organ and he can pay more for it, then presumably he will get the organ. That is, while the number of people getting life-saving transplants will go up, there is no guarantee that I will get the organ that I would have got under a non-market system of distribution. This, some object, is unfair, since all persons needing transplants deserve equal access to satisfactory transplant organs.

Now this objection seems to me very important, yet there are two reasons for not treating it at much greater length here. The first is the plausibility of the response that the result is not unfair at all, at least no more unfair than the free-market-for-yachts' result that Rockefeller has a yacht and I do not. Brams makes the same point when he argues that

...to dismiss a market system because some cannot obtain the funds to purchase organs is the equivalent of denying other forms of health care to people who can obtain funds simply because not all can. Such a social policy ought to be considered manifestly inequitable.... (Brams 1986, p. 13)

Of course, it might be countered that the difference between health care and yachts is that one is a basic right or need and the other is not, and that this explains why a free market is permissible for yachts but not for transplant organs. While this might be true, it is a substantive claim about fairness and requires support in a developed political and economic theory of distributive justice, which goes far beyond the scope of this paper.

The second reason is that there might be a straightforward way to limit the problem of unfairness. The problem of unfairness could be limited, if not eliminated altogether, by fixing a price ceiling for transplant organs. If prices for transplant organs were limited to, say, \$10,000, it would provide a considerable incentive to increase the public supply of organs (at least from posthumous sources), but it would not allow for the bidding wars in which the wealthy would inevitably win.¹⁷ I turn, then, to the third moral objection to the free market for transplant organs, the "commodification" objection.

VI. THE COMMODIFICATION OBJECTION

The noun "commodification" derives from the verb "commodify", which

means "treat as a commodity," as something to be bought and sold. The "commodification objection," therefore, is the claim that a free market for transplant organs would make human organs a commodity, something to be bought and sold, and that this is intrinsically morally wrong. That is, apart from the horrible side effects of their sale and apart from distributional unfairness, there is something "plain, old wrong" about buying and selling certain kinds of thing, and that human organs are just that kind of thing.

Certainly, it seems clear that there are some things which it is wrong to buy or sell even apart from the side effects of their sale. For instance, most of us are convinced that it is wrong to buy or sell living persons, and that this is not wrong just because of the bad consequences it would have. Most of us suppose that buying and selling persons would still be wrong even if it had, on balance, better consequences than did not buying and selling persons.¹⁸ (Indeed, such a point is the basis of a frequently made criticism of utilitarian ethical theories.)

So, the question is: Horrible side effects and distributional unfairness aside, is there anything intrinsically morally wrong with the buying and selling of transplant organs?¹⁹ In considering this question I shall make the following assumptions: first, that it is morally permissible to buy and sell some kinds of thing, and for there to be free markets for these things, such as food, clothing, automobiles, and televisions; second, that it is morally permissible to *donate* transplant organs. These assumptions seem intuitively correct to me and to most persons in the West these days, though certainly not to everyone. Certain radical socialists may reject the legitimacy of free markets for *anything*, and certain religious groups, such as the Jehovah's Witnesses, perhaps, might reject the legitimacy of organ *donation*. Still, these assumptions seem at least reasonable, and I will make them for the purposes of the present inquiry. Having made these assumptions, I plan to examine a list of things which we commonly think ought not to be bought and sold, i.e., things for which there *ought* not to be a free market (whether or not there is a legal sanction against such a market). I shall try to uncover the moral reasons why these things should not be bought or sold, and see if these reasons apply in the case of transplant organs, entailing that transplant organs can be donated but not bought or sold.²⁰

VII. THINGS FOR WHICH THERE OUGHT NOT TO BE A FREE MARKET

Things of this type include:

- | | |
|------------------------------|------------------------------|
| 1. Another person's property | 7. Release for punishment |
| 2. Persons | 8. Release from draft |
| 3. Sex | 9. Academic grades |
| 4. Pornography | 10. Certain weapons, such as |
| 5. Votes | hand grenades and silencers. |
| 6. Citizenship | |

These are things which many of us believe should not be bought or sold on a free market. Some should not be bought or sold at all; others, perhaps, may be bought and sold, but only within such limits as would fail to be a free market. Not everyone will agree that all of these things should be on this list, but most will agree that most should be. In any event, my aim in listing them is to uncover a set of principles limiting the extent of the free market. The first such principle is:

1. *Selling X is wrong if X does not belong to the seller.*

This plausible principle explains why it is wrong for me to sell you some third person's car (let alone the Brooklyn Bridge), but does it explain why it would be wrong for me to sell you my kidney? It would explain this only if I didn't own my kidney, but most of us think that we *do* own our bodies, including our organs—if we've thought about it at all. Still, some thinkers might argue that it would be inaccurate to describe the relation of familiarity and control that we have over our bodies as one of ownership. Moreover, some religious thinkers might argue that we *don't* own our bodies, because God does, and that this is precisely what is wrong with the sale of organs.

Even if we do not own our organs, however, this principle does not answer in the present case. That is, it does not explain why it is wrong to sell but right to donate, since if we do not own our organs, we cannot rightly give them away either. Perhaps another principle will fare better. Another principle which suggests itself is:

2. *Selling X is wrong if X has "dignity"*

This explains why it is wrong to sell persons. While this idea has any number of sources, it finds a clear exponent in Kant, who argued that persons have a special status or property which he called dignity.²¹ Just what dignity is, on Kant's view, is not altogether clear, but whatever it is, it seems to accrue upon those features of ours which make us persons: self-consciousness, freedom, and rationality, for example. These characteristics endow me, for example, with a status which makes it wrong for me or anyone else to sell my person. Perhaps principle (2) will explain why it is wrong for me to sell my parts, too. But does principle (2), the dignity principle, apply here?

The dignity principle applies here only if our organs can properly be said to have dignity, and this is doubtful at best. For one thing, they don't (individually, at least) possess the characteristics such as self-consciousness, rationality, and freedom, which are supposed to be the necessary conditions for dignity. For another, it does not follow that since a person has dignity, each of his parts has dignity, too, any more than it follows from a person's weighing 200 lbs. that each of his parts weighs 200 lbs, too.²²

Yet, even if our organs did have dignity, principle (2) would not answer to the present case, either, since it would rule out the donation of organs as well. Dignity is incompatible with *ownership*, not just with sale. If a person has dignity it means I cannot *own* him: I can't sell him, and I can't make a gift of him either. If organs have dignity, then the same is true of them, too.

A third principle which might prohibit the sale of organs is:

3. *Selling X is wrong when X involves degrading or physically harming some specific person.*

This principle explains, at least in part, why it is wrong to sell sex and pornography. In the cases of child pornography or "snuff" films, children or other persons actually had to be harmed to make the pornography. In the case of more "ordinary" pornography, the models are (arguably) degraded, and in the case of prostitution, the prostitute himself or herself is degraded. Can principle (3) be extended to cover the sale of organs? Does the transfer of a transplant organ physically harm or degrade some specific person? Clearly, the removal of an organ does no physical harm to a posthumous source, and while risky, it is not necessarily harmful to a living source. Again, the transfer of an organ to a needy recipient is still somewhat risky, but is not necessarily a harm. Moreover, it is hard to see how the removal of an organ degrades its source or its recipient, where degrade means "treat as an inferior, or sully." Instead of degrading them, the transfer would, if anything, enhance the recipient and ennoble the donor.²³

More importantly, even if the transfer of an organ were physically harmful or degrading to some specific person in a way which made it wrong to sell a transplant organ, then presumably this would be enough to make donation wrong as well. In sum, principle (3), concerning the harm or degradation of specific persons won't do the trick either.

Perhaps, however, (3) is only a partial explanation of what is wrong with the sale of sex and pornography. Principle (3) focusses on harmful consequences to specific persons, but perhaps it is worth considering the general, social effects of such sales. That is, some might argue that prostitution is still wrong, even when it does not involve physical harm or degradation to either party, because it weakens certain crucially important institutions, notably marriage. It might be suggested, for instance, that marriage is built in part on sexual need, but that the commitment marriage requires is crucial for a stable society.²⁴ Prostitution, then, is a way of getting sex without any commitment, which weakens the incentive for marriage, which in turn is bad for society overall. All of this suggests another principle prohibiting the sale of certain things:

4. *Selling X is wrong if the sale of X weakens some crucially important social institution.*

Not everyone will agree that (4) is plausible, that (4) adequately explains

what is wrong with selling sex outside of marriage, that prostitution weakens marriage, or that marriage is a crucially important social institution. Yet, even if we do agree, the question remains, does (4) apply in the case of organ sales?

It seems unlikely that (4) does apply, since it seems unlikely that the sale of transplant organs weakens any crucially important institution. It is difficult even to think of a near equivalent to, say, marriage in this case. Monogamous organ swapping? The institution that first comes to mind is, perhaps, the medical profession, but it is hard to see how the sale of organs would weaken that institution. Indeed, if the aim of the medical profession is healing, and organ sales would increase the number of persons who are healed, then organ sales would presumably strengthen that institution.

Still, perhaps there is another crucially important institution (broadly speaking) which *would* be weakened by the sale of organs, namely the institution of altruism. Perhaps the sale of organs would tend to discourage altruistic donations in favor of self-interested sales. It is not at all obvious, however, that this would be the consequence of a market for transplant organs. Altruistic donation would still be possible in such a market; indeed, it would be endowed with greater significance, since it would involve foregoing financial rewards. Moreover, even if the organ market did discourage one kind of altruistic behavior, it might encourage a new kind of altruistic behavior: the altruism of a middle-class person selling an organ in order to give the proceeds to a needy cause.

Finally, it should be noted that, as far as altruism is concerned, (4) would apply to all sales. Everything which can be sold can also be given away altruistically, but this is not ordinarily taken to be a reason for prohibiting all sales whatsoever, so principle (4) would not explain why it was permissible to sell food and clothing but not organs. Apparently we need to look further.

Continuing our examination of prohibitions against the sale of sex, we find another promising principle. It might be suggested that selling sex is wrong because sex is an intimate thing, and that the selling of it is inconsonant with its intimacy. This would partly explain why selling sex outside of marriage is wrong (as in prostitution), but it would also explain why the sale of sex *inside* marriage is wrong as well. Let us consider then

5. *Selling X is wrong if X is an "intimate" thing.*

Principle (5) applies in the case of transplant organs only if there is something about organ transplantation which is intimate. Three possibilities suggest themselves: the organ, the personal relations between the source and the recipient of the organ, and the act of transfer. Are any of these things necessarily intimate in the relevant sense? Consider the organ itself first. It is no doubt true that I enjoy an especially close relation with my own liver, which makes it "intimate" in some way or other. Yet it is not

enough that my liver and I are intimate in some way or other. If principle (5) is to be plausible and apply here, our organs need to be intimate in the same way that sex is intimate. But are they? Intimacy is a fairly vague notion, but whatever it means (in the relevant sense), it can only be predicated of activities or relations between conscious and mutually aware agents, or of certain aspects of things in relation to conscious and mutually aware agents.²⁵ If this is so, then it would seem that my liver is not intimate in the relevant sense, and (5) does not apply to it specifically. But what about the relations between the organ source and recipient? In the case of posthumous transplants, this sort of intimate relation is no longer possible, but what about relations between living source and recipient? While the relations between some organ sources and some recipients—family members, say—are intimate in the relevant sense, surely not all such relations are. Indeed, many organ transfers are anonymous, and therefore could hardly be called intimate in the relevant sense, and principle (5) would not apply to them. Perhaps, however, it will be suggested that there is something intimate about the very transfer of an organ to a recipient from any source, living or dead, known or unknown. In the narrower sense of the term “intimate,” there need be nothing intimate about a technical medical procedure, during most of which the patient is anaesthetized. But if we broaden the notion of intimacy to include such medical procedures, then principle (5) might well be too strong. On such a broadened notion of intimacy, principle (5) might well rule out the sale of many things which are intimate in some broad sense, including education, counselling, writing, and entertainment.

Another principle we might consider is:

6. *Selling X is wrong if X is something that it is bad to want.*

Principle (6) explains, in part perhaps, why it would be wrong to sell even pornographic *fiction* about sex with children. In such fiction, no actual person is harmed or degraded, but we are still inclined to think that the sale of such material is wrong. Of course, some might argue that what is wrong with such fiction is that it encourages the harming or degrading of actual persons, in that it encourages actual child molestation. Yet the evidence concerning causal relations between pornography generally and sex crimes is ambiguous, it seems, and even if such pornography did not tend to encourage such crimes, I expect that many of us would still think that there was something wrong with the sale of it. That is, according to (6), there are some things that it is simply morally bad to want, and that it is *eo ipso* wrong to pander to these bad wants by selling such things.²⁶

Perhaps most would agree with (6) that it would be bad for a free market to appeal to, and be driven by, exceedingly nasty and prurient interests, but does (6) apply in the case of transplant organs? That is, is the desire for a transplant organ itself a bad desire? Clearly, such a desire (in cases of

standard medical need²⁷) is not nasty or prurient, but notice, even if it were, it would presumably rule out organ donation as well. (Presumably, giving away child pornography is also wrong. Sale does not make its transfer appreciably worse.)

So far, many of the principles that we have examined have arisen out of considerations prohibiting the sale of sex or things involving sex. Perhaps we would do well to consider other prohibited sales. Another sort of thing whose sale is forbidden or at least limited, is certain types of weapons, for examples, hand grenades and silencers. While these things are legitimately sold, perhaps, by their manufacturers to government armies, no civilian has a legitimate interest in owning these things. Probably, the only civilians who really need silencers or hand grenades are criminals, and this suggests another principle:

7. *Selling X is wrong if X will tend to be used only in violent, criminal activities.*

This principle explains why we allow ordinary persons to buy deer rifles, but not hand grenades, or (in my opinion) silencers. Unfortunately, (7) is no help in the present case, since transplant organs manifestly do not tend to be used in violent criminal activities.²⁸ Moreover, even if transplant organs, like silencers, did tend to be used only in violent, criminal activities, (7) would not answer to the present case. It would not answer to the present case because, again, it would not explain why it is wrong to sell organs but right to donate them. Presumably, no one would be happier about the open donation of silencers than about their sale, and under (7) the same would apply to organs as well.

A very different principle limiting the free market emerges from backward looking considerations of things like punishment. To consider one example, it seems that in previous centuries in India, wealthy people who had been convicted of crimes could buy exemptions from punishment. Specifically, wealthy people could pay some desperately poor person to take their places at the whipping post or on the gallows. The wealthy people avoided execution, and the poor proxies were able to leave their families better off.²⁹ Even though such an arrangement was presumably voluntary, most of us would think it irremediably flawed. We think it so flawed because it distorts the connection between crime and punishment. When someone commits a crime, it is not enough that somebody someplace be punished. Rather, the criminal, and the criminal alone, should be punished, and only because he or she deserves it. Considerations such as these give rise to:

8. *Selling X is wrong if X should be apportioned only on the basis of desert.*

Principle (8) explains why it is wrong to buy and sell punishment and

exemption from punishment as well as induction into national service, exemption from national service, grades, votes, and public office.

In each case, we think that persons should receive a certain harm or benefit only if they deserve it, and we are able to specify in each case what it takes to deserve it: in the case of punishment, it is guilt; in the case of exemption from punishment, innocence; in the case of national service, being a citizen; in the case of grades, academic achievement; in the case of a single vote, being a citizen; in the case of public office, being voted in or chosen by the appropriate parties.³⁰ Doubtless, (8) has a firm intuitive hold on most of us, but does it apply to the sale of transplant organs?

Unlike punishment, organ transplantation is a new phenomenon, and our intuitions on the subject have not had comparable time to emerge and be resolved. It should not be surprising if we find that we have no clear intuitions on the apportioning of transplant organs comparable to those concerning the apportioning of punishment or votes. In fact it is hard even to say what the ground of desert should be in the case of transplant organs. Academic performance, guilt, innocence, being a citizen, and winning enough votes are obviously irrelevant, but notions like need and future productivity are unworkably vague. Once again, however, even if we could be sure that (8) was true and applied to transplant organs, it would be, as some of other principles have been, too strong. It would be too strong because it would rule out donation as well as sale. If something should be distributed on the basis of desert alone, it should not be sold, but it should not be given away willy-nilly, either. I cannot rightly sell good grades to students, but I also cannot just give them to whichever students I please; the students must deserve them. Similarly, if (8) applied to transplant organs we could not just give them to whomever we pleased; we would have to give them only to someone who deserved them on the basis of some specifiable merit. This probably would run contrary to the standard policy of kin donation in the case of kidneys, as there is no *a priori* reason to suppose that one's kin would tend to exhibit this merit more than anyone else. Principle (8), then, seems to fare little better than its predecessors.

Another principle which arises out of distributive concerns is:

9. *Selling X is wrong if X may be sold by the poor to the rich on terms which are less favorable to the poor.*

For some, this is another objection to prostitution, the idea being that the poor will be tempted to engage in it because of their plight, but in so doing will get the worse end of the deal. Indeed, just this objection has been levelled against organ sales in Brazil, so it is worth considering whether (9) answers to the present case.³¹ First, the principle would apply here only if the poor would in fact "get a bad deal" in such transactions. Presumably, "getting a bad deal" could amount to two things: not getting a fair price, or its being the case that *no* price is a fair price; that one is lured into giving

up what is so vital that no one should ever give it up. If (9) assumes that one should *never* give up something as vital as an organ, then it is implausible when applied to posthumous transplants. Also, (9) would then rule out donations, if it is indeed true that organs should never be given up under any circumstances. On the other hand, if (9) allows that some price is a fair price, it doesn't rule out all sales. It rules only that needy would-be vendors get a good price. Finally, we should be reluctant to accept (9) at all, since it could apply to any commodity whatsoever. It is possible, for instance, for the needy to sell their labor to the wealthy on unfavorable terms, but most of us do not think that is a reason to prohibit the sale of labor. No doubt, radical Marxists will disagree, but one of the assumptions of the present inquiry is that a free market is an appropriate tool for distributing many kinds of things, including labor.³² Even principle (9) fails plausibly to rule out the buying and selling of transplant organs. With the failure of (9) it is perhaps time to draw our inquiry to a close.

VIII. DISCLAIMERS AND CONCLUSIONS

In closing, I will retrace the path our inquiry has followed. The question which prompted the inquiry was: Is there any good reason to allow the donation of transplant organs, and a free market for lots of things besides transplant organs, but not to allow for a (relatively) free market for transplant organs? Specifically, we asked whether there was anything intrinsically morally wrong with treating transplant organs as commodities. We looked at things commonly prohibited as commodities, we looked at the most plausible reasons for prohibiting them, and we tried to see whether such reasons would hold in the case of transplant organs, too.

Our results have been negative. Every principle which we have considered either fails to apply plausibly to transplant organs at all, or, if it applies, would rule out the donation of transplant organs or the selling of numerous accepted commodities. Of course, a few disclaimers are in order. First, I may have missed some relevant principle which would plausibly prohibit the buying and selling of transplant organs. It is possible that I have failed to list some indisputable non-commodity which is relevantly similar to such organs. It is equally possible that I missed some very good reason behind the non-commodities which I did list. Moreover, my strategy of argument via analogy has its limitations; it is possible that there is some true *sui generis* moral principle such as

10. *Selling X is wrong if X is a human organ*

which probably could not be discovered in this way.

Still, in the absence of further considerations, I think that the preceding discussion points to the conclusion that there is nothing intrinsically morally wrong with buying or selling human organs for implantation. Now, it

does not follow from this that I think we should take steps to legalize a free market for organs. Not everything that is morally acceptable need be legal, and there may be insuperable practical and distributional problems with such a market, or with the move from the present regime to such a market. I leave these questions to other times and other thinkers.³³

Hampden-Sydney College

Received June 28, 1990

Notes

1. "Kidneys For Sale: The Issue in Tissue," *Newsweek*, Dec. 5, 1988, p. 38.
2. See *Newsweek*, Sept. 12, 1988, p. 63, with information from the American Council on Transplantation.
3. With the appropriate qualifications made for tissue matching, etc.
4. *Ibid.*
5. For a discussion of this possibility see Clifton Peery, "Human Organs and the Open Market," *Ethics*, vol. 91 (1980), pp. 63-71.
6. A fourth possible response, rarely discussed, is to get the medically needy to want transplants less, by reshaping their ideas and expectations concerning life, death, health and medicine. In a slightly different context, Malcolm Muggeridge gestures in this direction. See "Medical Progress and the Human Soul," in J. Bach (ed.), *Biomedical Ethics: Opposing Viewpoints* (St. Paul, 1987), pp. 69-72.
7. Of course, there has been vigorous debate over whether there should be a free market for blood, too. See, for instance, Richard M. Titmus, *The Gift Relationship: From Human Blood to Social Policy* (New York, 1971); and *The Economics of Charity: Essays on the Comparative Economics of Giving and Selling with Applications to Blood* (London, 1973).
8. Naturally, there are many questions to be answered before setting up such a market. George Mavrodes addresses some of these questions in "The Morality of Selling Human Organs," in *Ethics, Humanism and Medicine* (New York, 1980), pp. 133-39. Henry Hansmann offers cogent, concrete proposals for such a market in "The Economics and Ethics of Markets for Human Organs," Yale Law School Program in Civil Liability, Working Paper No. 91, August 1988.
9. See "Kidney, Cornea Sale Flourishes in Brazil," *The Washington Post*, Oct. 12, 1981, p. A22. See also *Newsweek*, Dec. 5, 1988, p. 38.
10. See Marvin Brams, "Property Rights in the Human Body: Legalizing Markets for Transplantable Human Organs, paper presented to the Annual Conference of the Public Choice Society, March 1977, esp. p. 16.
11. See Hansmann, pp. 20-25. See also "Human organ trade blamed for fall in kidney transplants," *The Times*, July 31, 1989.
12. Indeed, the U.S. government is reportedly fighting a Soviet-inspired disinformation campaign to this effect in Latin America. Persistent rumors in Latin

America claim that orphaned children are being smuggled into the U.S. to provide organs for wealthy "Gringos."

13. Another version of the horrible side effect objection is that the existence of such a market for human organs might lead to increased medical use of aborted fetal tissue. In order to avoid this objection, let me stipulate that, in this paper, I am considering exclusively the sale of organs from consenting adults. Moreover, I do not regard this stipulation as arbitrary, since the use of aborted fetal tissue involves all of the problems of abortion generally, including the impossibility of consent, which problem would not be involved in the sale of organs from consenting adults, whether living or dead.

14. These objections were raised to me by an anonymous referee for this journal. This referee's wording of the objections was so apt and succinct that I have quoted it almost word for word.

15. *Newsweek*, Sept. 12, 1988, p. 63.

16. Of course, all of this is subject to the constraints of tissue matching and the urgency of need.

17. Of course, it is possible that the prices which would provide enough incentive actually to increase the public pool of transplant organs would be so high that only the most wealthy could afford to pay them, but presumably this is a matter for empirical economic research.

18. A notable exception is Richard Posner who defends the practice in his *Economic Analysis of Law* (New York, 1986).

19. While I have treated the horrible side effects objection, the unfairness objection and the commodification objection as separate, they do in fact overlap considerably; some of the points which I consider under the heading of commodification clearly have consequential or distributive dimensions.

20. This line of inquiry is also suggested, though not pursued at length, by Mavrodes (1980).

21. See Immanuel Kant, *Foundations of the Metaphysics of Morals*, translated, with an introduction, by L. W. Beck (Indianapolis, 1959), pp. 53-54.

22. This is simply the fallacy of division.

23. I am assuming that the donor and the recipient are the only persons who could be harmed or degraded in the transfer of an organ, and the fortunes of third parties are not relevant here.

24. William Paley argues something like this. See his *Principles of Moral and Political Philosophy* (New York, 1837), pp. 144-64.

25. Or at least potentially conscious and mutually aware agents.

26. For a philosophical treatment of good and bad wants, see, for example, Brand Blanshard, "The New Subjectivism in Ethics," *Philosophy and Phenomenological Research*, vol. 9 (1949), pp. 504-11, esp. section II. 4; Franz Brentano, *The Origin of Our Knowledge of Right and Wrong* (London, 1969); and Roderick Chisholm, *Brentano and Intrinsic Value* (Cambridge, 1986), esp. ch. 5.

27. I mean here persons who have a medical need for such an organ, as distinct from those who might want to own such organs for non-medical reasons, such as cannibalism.

28. Even if a terrorist were given a new lease on life by a liver transplant, and went on to commit violent crimes, we could not properly say that she had used her liver in violent criminal activities. Not everything that is a necessary condition for doing A

can be considered *used* in doing A; a terrorist requires oxygen to breathe while committing crimes, but we would not say that she used her oxygen in violent criminal activities.

29. I am indebted to William Hendley for this example.

30. Here the commodification objection clearly overlaps with the unfairness objection, since both concern just distribution of harms and benefits. However, my treatment of the unfairness objection concerns persons who deserve transplant organs but don't get them, and principle (8) concerns persons who don't deserve transplant organs but do get them.

31. See "Kidney, Cornea Sales Flourish in Brazil," *The Washington Post*, Monday, Oct. 12, 1981. An interviewed doctor complained, "We are selling our blood at banana prices to the industrialized countries."

32. If it be objected that this is precisely the reason we do not have a free market for labor in that we have minimum wage laws, then we can allow that a market for organs could have minimum price laws.

33. This paper developed out of a lecture I gave at Old Dominion University, Norfolk, Virginia in October, 1988; its development was supported by a grant from Hampden-Sydney College. I thank Bradford Hooker and David James for numerous helpful comments, William Hendley, Kenneth Townsend, and an anonymous referee for this journal for helpful discussion, and Pauline Brand Nelson for helpful comments and help in preparing the manuscript.

References

- Andre, Judith. "Blocked Exchanges: A Taxonomy," Unpublished manuscript.
- Bach, Julie, ed., *Biomedical Ethics: Opposing Viewpoints* (St. Paul, MN: Greenhaven Press, 1987).
- Blanshard, Brand. "The New Subjectivism in Ethics," *Philosophy and Phenomenological Research*, vol. 9 (1949), pp. 504-11.
- Brams, Marvin. "Property Rights in the Human Body: Legalizing Markets for Transplantable Human Organs," paper presented to the Annual Conference of the Public Choice Society, March 1977.
- _____. "Markets for Organs to Reinforce Altruism," *Economic Affairs*, Nov. 1986, pp. 12-14.
- Brentano, Franz. *The Origin of Our Knowledge of Right and Wrong* (London: Routledge and Kegan Paul, 1969).
- Brooke, Jim. "Kidney, Cornea Sale Flourishes in Brazil," *The Washington Post*, Oct. 12, 1981, p. A22.
- Clark, Matt, Robinson, Carl, and Wickelgren, Ingrid. "Interchangeable Parts," *Newsweek*, Sept. 12, 1988, pp. 61, 63.
- Chisholm, Roderick. *Brentano and Intrinsic Value* (Cambridge: Cambridge University Press, 1986).
- Cooper, Michael H., Culyer, Anthony J. "The Economics of Giving and Selling Blood, The Economics of Charity (London: The Institute of Economic Affairs, 1973).

- Hansmann, Henry B. "The Economics and Ethics of Markets for Human Organs," Working Paper no. 91, Yale Law School Program in Civil Liability, August, 1988.
- Kant, Immanuel. *Foundations of the Metaphysics of Morals*, translated, with an introduction, by L. W. Beck (Indianapolis: Bobbs-Merrill, Co., 1959).
- Maier, Frank. "A Second Chance at Life," *Newsweek*, Sept. 12, 1988, pp. 52-61.
- Mavrodes, George. "The Morality of Selling Human Organs, in *Ethics, Humanism, and Medicine* (New York: Alan R. Liss, Inc., 1980), pp. 133-39.
- Muggeridge, Malcom. "Medical Progress and the Human Soul," in Julie Bach (ed.), *Biomedical Ethics: Opposing Viewpoints* (St. Paul, MN: Greenhaven Press, 1987), pp. 69-72.
- Paley, William. *Principles of Moral and Political Philosophy* (New York: Collins, Keese, and Co., 1837).
- Peery, Clifton. "Human Organs and the Open Market," *Ethics*, vol. 91 (1980), pp. 63-71.
- Posner, Richard. *Economic Analysis of Law* (New York: Little, Brown, and Co., 1986).
- Sapsted, David. "Human Organ Trade Blamed for Fall in Kidney Transplants," *The Times* (London), July 31, 1986.
- Schuck, P. H. "The Role of Government in Paying for Organ Transplants," Working Paper no. 101, Yale Law School Program in Civil Liability, 1989.
- Schwartz, Harry. "Providing Incentives for Organ Donation," *New York Times*, July 25, 1983.
- Siebert, Sam, Waldrop, Theresa. "Kidneys for Sale: The Issue is Tissue," *Newsweek*, Dec. 5, 1988, p. 38.
- Titmus, Richard M. *The Gift Relationship: From Human Blood to Social Policy* (New York: Pantheon Books, 1971).
- Trucco, Terry. "Sales of Kidneys Prompt New Laws and Debate," *New York Times*, Aug. 1, 1989.