This is an unformatted version of the final published article, available online at https://doi.org/10.5840/ijap201822790.

Rippon, Simon. 'Organ Markets and Disrespectful Demands': *International Journal of Applied Philosophy* 31, no. 2 (Fall 2017): 119–36.

ORGAN MARKETS AND DISRESPECTFUL DEMANDS

Simon Rippon, Central European University

ABSTRACT

There is a libertarian argument for live donor organ markets, according to which live donor organ markets would be permitted if we simply refrained from imposing any substantive and controversial moral assumptions on people who reasonably disagree about morality and justice. I argue that, to the contrary, this endorsement of live donor organ markets depends upon the libertarians' adoption of a substantive and deeply controversial conception of strong, extensive property rights. This is shown by the fact that these rights would prevent states intervening in cases of preventable and intuitively impermissible wronging of others that can arise when free individuals engage in voluntary offers and exchanges. I outline two forms of such wronging: discrimination and disrespectful demands. I argue that although these types of acts are morally impermissible, the policy question of whether and how they should be regulated by states is non-trivial. I then argue that there is good reason to think that organ markets would rely on disrespectful demands. This may help explain the widespread moral repugnance people feel toward organ trading. It also provides a *prima facie*, though not decisive, case for states to prohibit such markets.

KEYWORDS

organ donation, organ trading, noxious markets, libertarianism, discrimination, disrespect

I write in the wake of the republication of a landmark libertarian work defending markets in human organs. Mark Cherry's Kidney for Sale by Owner sets out a powerful case for permitting organ sales, and convincingly replies to the best-known moral objections to organ markets existing at the time of its first publication in 2005 (Cherry 2015). The book is no ideologicallydriven libertarian manifesto, however. To his credit, Cherry takes the fundamental diversity of moral viewpoints in society, and between societies, very seriously. In fact, Cherry is sceptical that pure rational argument can support a substantive morality that is binding on all, and treats diversity of opinion as a primary reason for setting aside what he calls the consensus of "Western liberal, social-democratic bioethics" that would proscribe the selling of organs (Cherry 2015, 67, 147–49). While Rawlsian liberalism offers a procedure for obtaining consensus, Cherry believes it can achieve it only by illicitly excluding a range of tradition- or religion-based moral voices, and assuming the sovereignty of the individual above familial and communal values (Cherry 2015, 49–54, 64, 160). Cherry suggests that instead of treating one substantive moral viewpoint as uniquely true, we ought to build on modest foundations, grounding the authority of states in nothing more than forbearance rights (that is, rights to freedom from interference), and the actual consent of freely contracting parties (Cherry 2015, 70, 140). Since an organ market is a social space for making consensual contracts, this view strictly limits the authority of states to interfere with them, beyond enforcing forbearance rights and the contracts actually consented to. States have no right to prohibit the making of consensual contracts in organ markets—even if, on some views, it would be desirable if they did so. (Cherry 2015, 158)

I. LIBERTARIANISM AND DISCRIMINATORY OFFERS: MUST WE PERMIT

VICTIMIZATION?

Is it true that there are no substantive moral assumptions in a conception of state authority that limits the state's role to protection of forbearance rights, (i.e., rights to be left alone and to be protected from physical interference, or use of one's person or property without consent), and, beyond this, enforcement only of contracts that have actually been consented to?

Consider the following case:

Golf Club

Some racist white friends legitimately acquire some land, build a golf course on it using only their own labour, and form a private golf club. They invite only whites to join for a fee. Thanks to their exceptional natural aptitude for the kinds of skills involved in golf course building, the golf course turns out to be truly outstanding; the club becomes famous, and membership becomes highly desirable. Non-whites seek to join. Eventually, an agreement is reached that enables non-whites to join, while also satisfying existing members: non-whites are to be offered membership, with one special condition: in addition to paying the usual fee, they also agree to have a healthy kidney removed and preserved in a jar in the club's trophy cabinet. A few very keen non-white golfers, after reflecting and fully informing themselves about the potential costs and benefits, accept the deal and go on to enjoy the course; the displayed kidneys become a source of amusement to the racist club members. Everyone considers themselves better off than they would have been had the membership offers not been accepted.

It is obvious that the racist members of the golf club have acted in a morally impermissible way. But, in what way did they act wrongly? What kind of moral norm have they violated?

We can first note that the racist members did not engage in battery: all parties knowingly and voluntarily consented to the transactions engaged in, and to all appearances, these transactions were also mutually beneficial.

Now, one might argue that an offer is *coercive* if it violates a normative baseline. For example, suppose a highwayman routinely makes an "offer" of the following kind: 'Your money or your life!'—and that his victims routinely respond by taking the "offer" to part with their money. It might be claimed that victims rationally consent (in some sense) to give their cash to the highwayman, and that it is a mutually beneficial transaction: the highwayman gets the cash, and the victims get to escape with their lives. But the highwayman's "offer" is, undeniably, a paradigm case of coercion. Why so? How is it different from, say, the everyday purchase of a newspaper, in which the newspaper is withheld until (and unless) the cash is handed over? The answer is that the highwayman engages in a rights violation by first unjustly restricting the options of his victims: the victims have rights to both their lives and their property, but the highwayman impermissibly withholds from them the option of keeping both, forcing them to choose between one or the other.

Should we, analogously, see *Golf Club* as an example of an offer that violates a normative baseline, and is thereby coercive? It is a tempting move, but there is an important disanalogy with the highwayman here. The highwayman unjustly restricts the options of his victims. But it does not seem impermissible generally for people who build private clubs to refuse to open up membership to members of the general public. There is no general right to become a member of private golf clubs. But if no one has a right to join the golf club, then *a fortiori*, no one has a right to join the golf club without having to provide a kidney in order to do so. Given that we lack grounds for thinking that non-members possess a general right to membership of golf clubs, and that the transactions in question were voluntary and mutually beneficial, it is difficult to argue that the racist members made a *coercive* offer.

It could be argued that even if nobody was coerced, still the racist members *exploited* the non-white members. Mark Cherry, following Alan Wertheimer, defines three categories of exploitation in the context of organ markets: *harmful* exploitation occurs if purchasers gain while vendors are harmed, *mutually beneficial* exploitation occurs if vendors benefit too, but in a way that remains unfair (e.g., because purchasers take unfair advantage of vendor's

impoverished circumstances, or purchasers benefit substantially more than vendors), and finally *moralistic exploitation*, which is said to occur if both purchasers and vendors benefit from a transaction that is freely consented to, but the transaction itself is fundamentally immoral (e.g., because it commodifies body parts) (Cherry 2015, 88–89).

Is Golf Club an example of harmful exploitation? It could be argued that non-white members were in fact harmed, in an all things considered sense, by the transaction they agreed to, even though they (mistakenly) considered themselves better off. Perhaps they failed to sufficiently appreciate the gravity of the risks they subjected themselves to, or perhaps the transaction violated their dignity in ways they cared insufficiently deeply about. This view is worryingly paternalistic, in that it substitutes the verdict of the moral theorist for that of the agents themselves. It might be claimed that no fully informed and reflective person could agree to such a transaction, but this claim seems to overlook the facts that (i) the risk of having a kidney removed is comparatively low (about a 1 in 3,000 risk of mortality, which is a significantly lower risk than that of pursuing a number of common occupations for a prolonged period) (Taylor 2005, 125-27), and (ii) in some circumstances, it seems perfectly rational to subject oneself to some indignity in the service of a greater good. Socrates's trial and execution by the men of Athens on charges of "corrupting the youth" certainly involved an indignity, but one can see the pull of Socrates's argument for subjecting himself to it. Who are we to judge that the good of playing a great golf course is insufficient compensation for suffering the indignity of losing the kidney and having it displayed for the amusement of others?

Perhaps, even if the non-white golfers were not harmed, they were victims of *mutually beneficial* exploitation. It certainly seems as if there is something unfair about the way they were treated. But it is hardly that the racist members kept most of the benefits of the transaction for themselves. (To reinforce this point, we might add the stipulation that the non-whites felt *much* better off overall, as a result of the transaction, whereas the racist members felt that their lives were only very slightly improved.) Nor do the racist members seem to have taken advantage of the disadvantaged circumstances of the non-white golfers—at least no more than a seller of anything highly desirable and scarce takes advantage of these facts in setting the price.

The claim that an action is an instance of *moralistic* exploitation suggests that it is intrinsically wrong. Perhaps there is something intrinsically wrong with demanding or giving up a kidney for golf club membership. Perhaps commodifying body parts, demanding or taking unnecessary medical risks, or wasting perfectly good human kidneys, are intrinsically wrong kinds of action. But if there are such wrongs, they do not strike me as the *primary*, *most obvious* explanation of the wrong in *Golf Club*. Suppose that the golf club members, as a sort of hazing ritual, similarly demanded a kidney of all new members, including whites. Then we might well be critical of their foolish, wasteful, and needlessly risky behaviour, but at least the transactions would not manifest the kind of appalling *racist* behaviour that is apparent in the case outlined.

Let us focus, then, on the racial aspect of the case. What is most obviously and egregiously wrong in *Golf Club* is not that a kidney is demanded in exchange for membership, but that a kidney is demanded specifically *of non-whites* in exchange for membership. The fact that the nature of the offer made depends on an irrelevant characteristic, the person's skin colour, expresses the discriminatory message that some are less welcome and less equal than others on this basis. Moreover, the nature of the offer propagates a system of exclusion, inequality, and disrespect for non-whites, even while admitting them to membership of the golf club. To see what's wrong with transactions of the kind described in *Golf Club*, we should focus our attention not on *coercion* or *exploitation*, nor on *all things considered harm*, but on the way in which the system of offers is *unfair* and *disrespectful* toward non-whites.

The first moral of the *Golf Club* story then, is that a transaction can be voluntarily consented to, and can be mutually beneficial, and yet can still be morally wrong because of the way that the offer made manifests unfairness or disrespect towards a particular group.

We can draw a second moral from the *Golf Club* story. Consider now not just the nature of the wrong in question, but also *who* is wronged. It is often as-sumed that if a voluntary transaction is morally impermissible, this must either be because one of the parties to the transaction is harmed by it (in an all things considered sense), or because it is intrinsically

wrong to exchange goods of the kind in question. As we have seen, the nature of the goods exchanged does not explain what is most obviously wrong with the offer made in *Golf Club*. Nor is what is most obviously wrong best explained in terms of an all things considered harm to either of the parties as a consequence of the transaction. What explains the wrongness in *Golf Club* is the way in which *the offer itself*, in comparison to offers made to others, is discriminatory, and manifests unfairness and disrespect. But who, exactly, is wronged by the offers in *Golf Club*: who should we say are the victims of discrimination? We should consider first not only the non-whites who accepted the offer and joined the club, but also those non-whites who rejected the offer. The non-whites who considered and rejected the offer cannot, of course, have been harmed as a consequence of transactions they took part in. But, they were clearly victims of discrimination in *Golf Club*. They were already treated with disrespect at the point of receiving the discriminatory offer. So, the victims in *Golf Club* are not limited to parties to voluntary transactions: some of the victims were recipients of offers who then declined.

In addition, there is a powerful case for broadening our view of the class of victims further. The discriminatory system of offers made by the racist members of the club, if it occurs in a society like ours, propagates and contributes to a broader system of disrespect for *non-whites in general*, including people who have no interest in golf. A much larger group of non-whites is wronged by the broader system. Since the discriminatory offers contribute to the persistence of the broader system, which wrongs the larger group, we can conclude that this larger group is at least indirectly wronged by the discriminatory offers made in *Golf Club*.

I introduced *Golf Club* with the question: Is it true that there are no substantive moral assumptions in a conception of state authority that limits the state's role to protection of forbearance rights, protection from battery, and, beyond this, enforcement only of contracts that have actually been consented to? We have now seen that people may act in a morally impermissible way just by making a certain pattern of offers that form part of a system of voluntary, mutually beneficial transactions. We have seen that those who make the offers may, in doing so, wrong other people including some who choose to participate in transactions with them, but also many others who do not.

It is a further question, of course, whether the state ought to intervene to try to protect anyone from being wronged in cases like *Golf Club*—for example by banning racial discrimination when offering goods or services. There might be sound reasons for a policy of non-intervention. Here are a few possibilities:

One might think that as a conceptual matter, state intervention could not possibly prevent the kind of wronging that is exemplified in discrimination cases. States lack the power to force people to respect others equally and without discrimination, insofar as respect is a private attitude. Any kind of coercively enforced "respect," it can be argued, would not be genuine respect at all. But this claim overlooks the point that those wronged in *Golf Club* are not merely targets of disrespectful attitudes, but also targets of actions which *express* those insulting attitudes, and which substantively *victimize* the disrespected group. Being the target of insulting and victimizing actions, such as the offers in *Golf Club*, is significantly worse than merely being the target of private disrespectful opinion (that may be subject to social sanction if expressed). Since the state could, in principle, regulate such acts, it follows that it is within its power to prevent a significant wronging.

Still, it is possible that any feasible interventionist policy would predictably bring about a harm of equal or greater significance than the harm prevented. Whether this is indeed the case is partly an empirical question, and partly an evaluative one. The ability to openly and freely express one's views is undoubtedly a good of great significance, and it might be thought that intervention in cases like *Golf Club* would impede freedom of expression in a significant enough way to make intervention harmful on balance. John Stuart Mill forcefully argued on utilitarian grounds for nearly unrestricted freedom of expression in *On Liberty*, because he thought that restrictions on freedom of expression are also barriers to one's freedom to form personal opinions, and tend to inhibit the radical "experiments in living" that bring about social progress and improvement (Mill 1978, chap. 2). Still, even if Mill was completely right about the primacy of freedom of expression, a case like *Golf Club* is not a pure case of expression (of the inferiority of non-whites), but also of *action* that discriminates against a social group, placing

the group at a significant disadvantage relative to others. By analogy, Mill did not suppose that the denial of votes to women should be a protected form of expression of the opinion that women are mentally feeble and unequal to men—even though he believed there should be freedom to express that opinion. So it is doubtful that Mill would argue that the kinds of offers made in cases like *Golf Club* should be a protected form of expression of the opinion that non-whites are inferior—even though he certainly would say that there must be freedom to express that opinion. This suggests that a policy of non-intervention in *Golf Club* cannot be defended by appeal to the value of unrestricted freedom of expression. This does not, of course, serve to establish the claim that offers of the kind made in *Golf Club* can be banned without bringing about *any* harm of similar significance. But the onus is on those who would limit intervention to make the case that some specific, significant harm would result from any intervention.

Even if the kind of wronging in Golf Club could be prevented, and even it could be prevented without bringing about any harm of similar significance, it might still be wrong for a state to prevent it if it lacks legitimate authority to do so. Certain conceptions of the nature and limits of political authority would not permit states to intervene in cases like Golf Club. For example, one might begin with Robert Nozick's belief that independently of any social contract or political institutions, "Individuals have rights, and there are things no person or group may do to them" even if doing these things would further some desired conception of the social good (Nozick 1974, ix). Like Nozick, one might suppose that our power to rationally set and pursue our individual ends, thereby shaping our own lives, is what makes our lives meaningful. With Nozick, one might suppose that this fact about human beings grounds strong libertarian sideconstraints against the sacrifice of the good of one person for the good of another, taking any of the fruits of another's labour, and in general against aggressive force, except in defence (Nozick 1974, 32, 50). One might then argue that the racists in Golf Club are no threat to the rights to life, liberty, property or contract of others, and that these are the only rights in defence of which the use of force is permissible (Nozick 1974, ix). If so, your libertarian conception of rights as side-constraints would rule out any meaningful legal restriction of the racists' options concerning whether, to whom, and on what terms, they choose to offer membership of their club.

It is arguable that this libertarian response to *Golf Club* contains a flawed empirical assumption: that the white racist members' participation in a discriminatory system poses no threat to the life, liberty, property or contract rights of others. There is plentiful empirical evidence for the claim that discriminatory systems in the real world pose threats to the lives of non-whites. It follows that actions that contribute to propagating those systems do at least contribute to genuine threats to libertarian rights. We may therefore need to consider broader systemic effects when considering whether states may intervene on libertarian grounds. Still, for the sake of argument, let us grant either that there is no such threat to the libertarian rights of non-whites in *Golf Club*, or that at any rate, the contribution made to any such threat is too indirect and insignificant to licence the use of defensive force.

Granting, then, that the libertarian view of our rights and obligations prohibits state intervention in *Golf Club*, should this libertarian view be accepted? Instead of directly arguing against the libertarian view, let me focus on a different question that may be easier to resolve: does it contain any substantive moral assumptions? The libertarian posits strong rights of title and transfer over the fruits of one's labour. What we saw in *Golf Club*, on the face of it, was the spectacle of non-whites being wronged by the discriminatory actions of racist whites exercising title rights. To say that you are wronged by another's action is to say that they are under an obligation not to perform the action, and that you have a right that is violated if they do perform it. So, what we see in *Golf Club* is that the libertarian's strong rights of title and transfer can come into conflict with what I have supposed are rights of others not to be wronged by being subjected to racially discriminatory actions.

There is, then, an apparent conflict between rights. Which set of rights takes precedence here? Shall we say that, just as my general right to do what I want with my knife does not give me a right to store it in the space between your ribs, my general right to build a golf course and offer memberships on conditions of my choosing does not give me a right to build a white racist institution? The libertarian purist will insist that if there is a genuine conflict between rights in

Golf Club, then there is only one way to resolve it: the libertarian rights including rights of title and transfer must take precedence. But that is, undeniably, a substantive moral assumption—and one that many will find counter-intuitive to boot.

It turns out, then, that there are substantive and controversial moral assumptions involved in the libertarian conception of the state's proper role. Either the libertarian must deny that anyone is wronged in cases like *Golf Club*, or if he accepts that some people are wronged, he must insist that libertarian property rights trump rights not to be subjected to discrimination, so that this is a case of permissible wronging, or at least, of a wronging that no state may prohibit.

Once we recognize and begin to wonder about these libertarian moral assumptions, and we recognize that there is a conflict of rights in a case like Golf Club, how shall we decide which rights prevail? I do not wish to pretend that there will necessarily be easy answers to such questions of justice. But John Rawls gave us a method for thinking about them: imagine yourself in the so-called original position, in which we come together before the formation of the state, as free and equal contracting parties aiming to jointly decide on principles of justice for the basic structure of our future society (Rawls 1999). In Rawls's original position, a socalled "veil of ignorance" deprives us of knowledge of our particular personal characteristics (such as skin colour, social class, talents, or position in society), of our personal preferences (including, for example, racist preferences), and of our personal religious views and conception of the Good, though not of general knowledge, such as facts about the fundamental interests of human beings, and society's conditions of moderate scarcity and limited altruism. If you had to choose a set of rules for the basic structure of society from here, wouldn't you be concerned about the possibility that you might end up being a member of a victimized group, and wouldn't you therefore choose a set of rules which ensures, as far as possible, that everyone is accorded equal respect, without discrimination on the basis of irrelevant characteristics like skin coloureven if this requires that certain limits be placed on property and contract rights?

One might wonder why the rights and obligations derived from the hypothetical contract drawn up in the original position are worth as much, in the real world, as the paper they are not written on. The answer is that the original position is a heuristic for the discovery of the fair and impartial *moral* point of view; it is simply a thought experiment designed to ensure that nobody's particular interests can be privileged above the interests of others. This hypothetical contract device is not intended to identify new obligations to impose upon ourselves, but to reveal the obligations to which we are committed by our existing concepts and convictions about justice.

If I am right in thinking that in the original position, we would choose rules that limit racial discrimination above an unconstrained system of property rights, this tells us that such limits on property rights are already implicit in our everyday convictions about justice. Not only, then, are there substantive moral assumptions in the libertarian claim that it is illegitimate for states to intervene in a case like *Golf Club*, but they are assumptions that conflict with our ordinary moral convictions. Far from refraining from assuming any substantive moral viewpoint, the libertarian assumes (or must offer a convincing argument for) a deeply controversial one.

II. DISRESPECTFUL DEMANDS (WITHOUT DISCRIMINATION)

Can cases like *Golf Club* teach us any lessons about other cases in which there is no discrimination, that is, no offers that discriminate between different people on the basis of non-relevant criteria such as skin colour? The general lesson we have learned from *Golf Club* is that people may wrong others by participating in a system of voluntary, mutually beneficial transactions. And further, that the nature of the wrong in question may be a kind of insulting and victimizing action—a kind of disrespect—that is expressed by and manifest in the offers and transactions themselves. Could a live donor organ market exhibit any similar wrong, even if it is non-discriminatory in the above sense?

Few of us would consider selling an organ to obtain frivolous luxuries. Would-be organ sellers are not normally among the affluent, but rather the poverty-stricken. In general, those who wish to sell their organs wish to do so rather because they find themselves in desperate

economic circumstances—unable to pay their debts or meet their family's basic needs for things like food, shelter or healthcare—and because they have no better options (Goyal et al. 2002; Cohen 1999; Hippen 2008). Unlike the affluent, people in poverty find themselves subject to pressing economic *demands* which, where an organ market exists, they may only be able to meet by selling an organ. This observation raises the question: Could organ markets expose people in poverty to impermissibly disrespectful demands to surrender their bodily organs? I believe so. To see this, consider first the following, unfortunately rather gruesome, case:

Claw Hammer

Chip is standing on the shore of a lake in which a woman is drowning. There is a very small boat Chip could use to try to reach and save her. The water is choppy and attempting to bring her back in the boat would overload it and pose a significant risk to Chip's life; enough to make the rescue attempt supererogatory. He is willing to take that risk. However, he is wearing a shiny new suit, and if he were to save the woman by reaching out to haul her up with his arm, he would certainly wet and ruin his suit. Chip has with him, however, a claw hammer. He could save the woman without damaging his suit, if he jammed the claw hammer into her eye and pulled her to safety by the eye socket, painfully blinding her in one eye. As he reaches her, he shouts that he is willing to save her, but only if she consents to his jamming the claw hammer into her eye socket so as to avoid wetting his suit. The desperate woman, quickly realizing that this is the better of her two terrible options, agrees.¹

It is clearly morally impermissible for Chip to use the claw hammer to save the woman; this despite the fact that she has voiced her agreement, despite the fact that his actions will make her better off than she would otherwise be, and despite the fact that, *ex hypothesi*, Chip is under no obligation to save her.

It also seems clear that Chip would be wronging *the woman* in particular by using the claw hammer, and indeed already has wronged her by proposing to use it. By treating something as insignificant as the preservation of his suit as a reason to cause serious bodily harm to her, his proposal expresses serious disrespect for her interests. If the case of *Golf Club* showed us that offers can be impermissible because a pattern of offers manifests disrespect for and discrimination against a certain group, here we have a case in which an offer is impermissible because it manifests disrespect for an individual, quite apart from any actual or counterfactual offers made to others, and quite apart from whether it closes off any options that the individual has an entitlement to.

One might argue that the moral problem with Chip's using the claw hammer is that the woman could not have provided valid consent, since her circumstances provide her with no decent alternatives, and this leaves her in no position to consent voluntarily (Eyal 2012, sec. 5.3). This may be right. But let's alter the case a bit: suppose that Chip is not concerned about his suit, but rather is piloting a boat whose sides are high and slippery. The woman is too weak to hold on, and can only be reached and saved by jamming the claw hammer into her eye. Again, Chip asks for consent to use the claw hammer and the woman agrees. In this revised version of the case, it clearly *is* permissible for Chip to use the claw hammer. It follows that either there *is* valid consent in this revised case, in which case the possibility of valid consent cannot depend on the presence of decent alternatives after all, or else it is permissible, in this instance, to use the claw hammer to save the woman in the absence of her valid consent.

Why does it make a difference whether it is *impossible* to save the woman without using the claw hammer, as in this revised case, or there is mere *unwillingness* to save the woman without using the claw hammer, as in the original case? Maybe, as suggested, it makes a difference to the possibility of providing valid consent. It may be impossible to provide valid consent to offers that violate certain moral baselines, even if consent to similar offers is possible

¹ This is a variation on a case used for another purpose by Victor Tadros (2011, 161), who credits Matthew Clayton with its invention.

when the offers are not immoral. Perhaps sufficiently disrespectful demands make consent impossible because they manifestly fail to treat their target as the kind of thing capable of providing valid consent (that is, as an agent whose interests matter). But we need not commit ourselves to this supposition: whether or not the difference between impossibility and mere unwillingness makes any difference to the possibility of valid consent, it clearly does make a difference to permissibility. Putting certain conditions on one's provision of assistance, the *Claw Hammer* case shows us, can transform a supererogatory action or offer into an impermissible one, even if the assistance would still make the victim considerably better off than they otherwise would be.

Should the state intervene to punish or try to prevent Chip's unnecessary use of the claw hammer? As in the *Golf Club* case, this policy question is separate from the moral questions of whether the action is itself morally permitted, and whether anyone is wronged by it. We must ask, among other things, whether such a wrong could, in principle, be prevented by state coercion; whether any feasible interventionist policy would predictably bring about a harm of equal or greater significance than the harm prevented; and whether states have legitimate authority to intervene in such matters.

Let's return our attention to organ markets for a moment. Mark Cherry gives an oft-repeated objection to prohibition: it only makes things worse for the poor. As he puts it:

Paternalistically protecting the poor from a market in human organs only closes a miserable range of options still further. To the dreadful difficulties of poverty are added the moralistic coercions of the state, removing options that the potential vendor may see as the best that they have to improve their lot in life (Cherry 2015, 93).

We can easily imagine a structurally analogous, if fanciful, objection to state intervention in cases like *Claw Hammer*:

Paternalistically protecting the drowning from offers to be saved with claw hammers only closes a miserable range of options still further. To the dreadful difficulties of drowning are added the moralistic coercions of the state, removing options that the drowning may see as the best that they have.

The point I want to make is that, shorn of its rhetorical flourishes about "moralistic coercions," and "paternalistic" protection, the objection is straightforward: if the state prohibits its Chips from making their disrespectful demands, they will be unwilling to save the victims. Since drowning is worse for the victims than their being rescued with claw hammers, the state should refrain from interfering. Note that this argument does not depend on the fact that, in *Claw Hammer*, the rescue was supererogatory: the argument would apply equally to cases in which there is a threat of violating a strict moral duty of assistance, in case the demand is not met.

If the prediction that prohibition of disrespectful demands like Chip's will only make things worse for the victims is plausible, there is indeed something to be said for a policy of non-intervention. As mentioned above, we must ask whether a policy of intervention would predictably bring about a harm of equal or greater significance than the harm prevented. On non-consequentialist normative views, this consideration may not be decisive—but on any plausible view it must have some weight. The main problem for this line of argument, though, is that it is far from obvious that the prediction is true. Law must be made not for the individual case, considered in isolation, but for a range of cases, between which it may be difficult to distinguish subtle differences in practice. Would a legal permission for cases like Claw Hammer not make it difficult to prosecute grievous bodily harms in cases where bystanders would still be willing to engage in rescue, if barred from inflicting such harms? Doesn't legal prohibition that covers cases like Claw Hammer help to reinforce the message that such disrespect for the interests of another is morally and socially beyond the pale, and thus help motivate bystanders to properly weigh the interests of others in their decisions and assist in more generous ways? In order to judge the consequences of a general prohibition, we must consider not just the effects on single cases taken in isolation, but the probable effects on the system as a whole. Just as a legal permission to kill another in case of necessity for sustenance was rejected in the famous

trial of the shipwreck survivors Dudley and Stephens, primarily on the grounds that accepting such a permission would set a dangerous precedent, there is a strong case here for refraining from setting the dangerous precedent of permitting a case like *Claw Hammer* (*R. v. Dudley and Stephens* 1884).

Fortunately for us, there's no serious question in the real world about permitting cases like *Claw Hammer*, so we can leave our discussion of it here; drawing only the lessons that (i) there are such things as demands that are morally impermissible because they are disrespectful, though in non-discriminatory ways, and (ii) the policy question of whether to regulate such demands is a complex one, and must take into account the probable effects of regulation on the system as a whole. They cannot be settled straightforwardly with the claim that prohibition would only make a miserable range of options worse in a particular case, considered in isolation.

III. HOW LIVE DONOR ORGAN MARKETS RELY ON DISRESPECTFUL DEMANDS

In the previous section, I suggested that organ markets might expose people in poverty to demands to surrender bodily organs that are impermissibly disrespectful. There is a significant disanalogy between what happens in the prior thought experiments and in organ markets, however: in the thought experiments, the harms seem *needless*. At least, it is certainly true that the harms inflicted are very severe in comparison to whatever meagre benefits are to be gained by those inflicting them. On the other hand, in organ markets the harms of the major surgery for the seller pale in comparison with the potential life-saving benefits to the recipient of an organ. Could an offer to impose a harm that will bring about great social benefits still be impermissibly disrespectful?

Yes, it could. This is plain to see in a discrimination case: consider Golf Club again, but now let's stipulate that the kidneys required of non-whites are used for transplant rather than for mere amusement. In this case, there would be a significant moral consideration in favour of the racist members' behaviour: it saves lives! This might make us less willing to endorse state intervention, if the kidneys would not be harvested otherwise. But this does not alter the fact that the racist members' offers are impermissible because of the way they express disrespect for non-whites. Now, we can formulate a similar case without discrimination: return to the Claw Hammer case, but let's leave aside the claw hammer. In this modification of the case, Chip demands that the woman irrevocably agrees to become a living kidney donor as a condition of saving her. This, too, is clearly impermissible: Chip shows disrespect for the woman's autonomy by taking advantage of the circumstances to try to override what ought to be a matter of her fully voluntary and autonomous choice. Since economic forces may impose similar pressure on people in desperate poverty to that faced by the drowning woman, we can now see how legalizing organ markets may impose impermissibly disrespectful demands on people in poverty to sell organs. But is this merely a speculative, hypothetical concern about organ markets? Or is it, rather, a serious moral objection?

In an earlier article (Rippon 2014), I set out an argument that live donor organ markets should not be permitted because they would impose options on people in poverty that they may rationally prefer not to have, and may be better off without. I claimed that if live donor organs become commodified in a market system, then social or legal pressure to raise funds (of the kind that people in poverty face on an everyday basis) could be transformed into pressure to sell organs—and this pressure appears to be morally objectionable. My claim that it is morally objectionable to be pressured to sell organs does not depend on the judgment that selling organs is intrinsically morally repugnant or harmful: being *pressured to X* may harm you, in a morally significant way, even when *X*-ing is not ordinarily itself wrong or harmful to the person who does it. For example, having sex with a celebrity is not ordinarily wrong or harmful, but being pressured to have sex with a celebrity could harm you. So, I found a moral objection to organ markets not in any supposed intrinsic repugnance of trading in body parts, but in the intrinsic and widespread harm to people in poverty of being pressured to surrender them.

While I concede that regulation could prevent people being subject to undue pressure to sell their organs, I argued that such regulation would make markets ineffective in increasing organ supply. For example, suppose that only people with a relatively high income were

permitted to be organ vendors. This could prevent people who are undue financial pressure selling organs, but it is hard to imagine that there would be a great number of qualified, willing vendors in such a market, because few wealthy people want to sell their organs. Compounding this problem, I cited evidence that markets tend to "crowd out" altruistic motivation, so that many people who would have donated organs if there were no market may no longer be willing to do so. A well-regulated organ market, designed to avoid harmful pressure to sell, might actually *reduce* rather than increase the organ supply.

Economic pressure to do things is an essential feature of capitalism. So why is the above specifically an argument against live donor organ markets rather than a radical anti-capitalist argument; in other words, why is it worse to be pressured to sell an organ in comparison to being pressured to sell some ordinary property, or hours of one's labour? I cited two distinctive features applying to organ selling to answer this question: first, the fact that it is somewhat risky, and that people in poverty would in practice be pressured to take an unfair share of the risks by markets, and second, the "peculiar importance to human beings of our having fully autonomous veto control over any physical incursions on the intimate parts of our bodies by other people" (2014, 149). This latter, I noted, explains why we value consent in medical contexts, why we find rape a particularly appalling crime, and why a public policy of redistributive organ allocation has no political support, even while redistributive taxation is widely accepted.

The normative significance of our having fully autonomous veto control over physical incursions on the intimate parts of our bodies by other people—the fact that we have a *right* to such control, we might add, is why demands to accept such incursions are generally impermissibly disrespectful demands.² Since, as we have seen, buyers in live donor organ markets would typically rely on such impermissibly disrespectful demands, they would typically wrong the would-be vendors.

IV. SHOULD LIVE DONOR ORGAN MARKETS BE PROHIBITED?

I argued in the foregoing section that effective live donor organ markets would lead to violations of the rights of poor prospective organ vendors by subjecting them to disrespectful demands to surrender their "excess" organs and by undermining their right to fully autonomous veto control over incursions on the intimate parts of their bodies. But the argument for prohibiting organ markets that I summarized above has been subjected to a serious challenge by Luke Semrau (2015). In this section, I will first respond to Semrau's challenge to my earlier argument, indicating one way in which the challenge calls for an amendment to the argument. I will then assess the overall case for prohibiting live donor organ markets.

Semrau claims that my earlier argument fails because it ignores an important distinction between two kinds of pressure: first, what Semrau calls "pressure to vend," which is pressure specifically to sell an organ, and second, what Semrau calls "pressure with the option to vend," which is pressure to secure cash (by whatever means) which one may choose to respond to, after assessing one's options, by selling an organ. Semrau rightly points out that I believe it is the character of the act one is pressured to take that renders pressure to vend objectionable: specifically, the fact that organ donation involves a physical incursion on intimate parts of one's body, as well as the fact that it involves significant risk. If someone instead comes under pressure with the option to vend, these concerns need not apply. Slightly adapting an example given by Semrau: Suppose Ann, with student loans coming due, is under economic pressure. After considering pawning some heirlooms, and working in retail, Ann decides she would be prefer to make the money by selling a kidney. Ann does not seem to have been put under any objectionable kind of pressure (Semrau 2015, 444). Since, according to Semrau, organ markets need only rely on harmless pressure with the option to vend, and not harmful pressure to vend, my objection to markets is unsuccessful.

² One exception to be made here is for cases where—as in one of the version of Claw Hammer discussed above—it is impossible to provide those who will suffer the incursions with significant benefits, such as life-saving benefits, without committing such a violation.

Semrau anticipates the objection that his distinction between kinds of pressure is a distinction without a difference, in cases where one's range of options is narrow enough (we might well imagine here someone under *pressure with the option to vend* whose only option is to sell a kidney, or who has only a poor range of options such as, e.g., selling a kidney, working in a dangerous sweatshop, or prostitution). Semrau responds that there is a "conceptual difference" between these two ways of being pressured, which is demonstrated by the fact that *pressure to vend* can be relieved if the option to vend is removed, whereas removing the option to vend if there is *pressure with the option to vend* does nothing to remove the pressure. In fact, Semrau claims, "as economic pressure to take an option increases, so too does the harm caused by eliminating that option" (Semrau 2015, 444).

Semrau is incorrect if he believes that, as a general principle, removing the option to vend cannot have the effect of reducing *pressure with the option to vend*, at least if *pressure with the option to vend* can still apply to someone whose only option is to sell a kidney. A straightforward example: if the option of vending is removed, and a lender can see that the debtor has no remaining available options to pay back the debt (the lender doesn't care how the cash is acquired), then it may be pointless for the lender to continue to put pressure on the debtor to do so. Of course, if the debtor's options consist in, for example, selling a kidney, working in a dangerous sweatshop, or prostitution, and only the option the debtor prefers (selling a kidney) is removed, that may well make the debtor's situation worse. But at most, this shows that states should *either* permit organ selling, *or* should consider regulating markets in these other options, at the same time as prohibiting organ markets.³ Regulating all these markets at once might well have the effect of reducing *pressure with the option to vend* on such debtors.

This brings me to a second point about Semrau's pressure with the option to vend. Semrau may be right that it is conceptually distinct from pressure to vend. But he offers no argument for the claim that pressure with the option to vend is generally morally innocent, and thus that his distinction can do the moral work he needs it to do. Pressure with the option to vend does seem morally innocent in a case like Ann's, but Ann has at least one option that it would not seem objectionable to be pressured to take if it were her only option (call this a pressure fitting option). What about cases of pressure with the option to vend where the only options are options that it would be morally objectionable to be pressured to take on their own (call these pressure unfitting options)? How is pressure with the option to vend any less objectionable than pressure to vend would be, for example, if my only options are the pressure unfitting options of selling my kidney, or selling my child into slavery? There is indeed a conceptual distinction here, but it is a conceptual distinction without a moral difference. Disrespect can still be manifest in a demand to take any of a range of pressure unfitting options, just as it is manifest in pressure to vend. We can conclude that insofar as organ markets rely on pressure with the option to vend applied to people who only have pressure unfitting options, they are still morally objectionable. And, though the empirical evidence about kidney vendors is limited, the evidence that there is suggests that most vendors, both in black markets and the world's only regulated market in Iran, are in pretty dire circumstances and see selling an organ as a last resort (Goyal et al. 2002; Cohen 1999; Hippen 2008). That strongly suggests that either the vendors typically have no other options to meet the economic pressure they face, or that they only have very limited and poor quality ones (such as excessively dangerous, exploitative work)—the kind of options which themselves seem very likely to be *pressure unfitting* options.

There is, however, one significant weakness in my earlier argument that Semrau identifies. I earlier argued that "if organs can be easily exchanged for cash they will then become *commodified*, and naturally subject to the kinds of social and legal demands and responsibilities that govern our other transactions in the marketplace" (Rippon 2014, 147). On this basis, I supposed that the number of those subjected to harmful pressure to sell organs like kidneys would be large in a market system, indeed, "the social and legal pressures that would arise if

³ While I will not spell out the details here, I believe that the preceding argument can be straightforwardly extended to show why markets in these other goods would subject people in poverty to impermissibly disrespectful demands, and I believe this to be the most important moral objection to markets in these goods.

organs were commodified would apply generally to people in poverty who had organs worth selling" (Rippon 2014, 149). Semrau, defending a regulated kidney market of a kind advocated two decades ago by Erin and Harris (1994), replies that a regulated market could be geographically-bounded, meaning that vendors and recipients would be drawn from the same general population (rather than vendors being concentrated in a particular, poverty-stricken area which exports kidneys). Semrau points out that even if all demand for kidney donors were met, this would result in only around 1 in 9,000 people in a geographically-bounded market becoming donors each year (Semrau 2015, 445). Given the comparative rarity of kidney selling in such an area, it is unrealistic to suppose, as I previously supposed, that a legal market would necessarily lead to people in financial need routinely being expected to sell a kidney. For the majority people in poverty, it seems likely that a geographically-bounded organ market such as the one advocated by Erin and Harris would have no impact at all. My earlier claim that a live donor organ market would impose widespread harm thus seems overstated.

Nevertheless, the core of my objection to live donor organ markets survives Semrau's critique, insofar as it is true these markets in practice need to rely on obtaining organs from vendors who lack *pressure fitting* options. These prospective vendors, at least, are harmed by pressure to sell an organ, or to take any of a range of options that are *pressure unfitting*. If, as I have suggested, we have a *right* to fully autonomous veto control over physical incursions on the intimate parts of our bodies by other people, and if this right, or other rights, are undermined by *pressure with the option to vend* when you lack *pressure fitting* options, then the fact that organ markets need not harm *most* people in poverty does not affect the fundamental objection to them. Prospective vendors who lack *pressure fitting* options have rights that are violated by the pressure that organ markets subject them to. They are subjected to impermissibly disrespectful demands.

Should the state prohibit live donor organ markets, then? There are three main reasons for doubt:

First, not everyone will be convinced that we have a right to fully autonomous veto control over physical incursions on the intimate parts of our bodies by other people. The utilitarian Jeremy Bentham famously described talk of imprescriptible natural rights as "nonsense upon stilts." But, a right of this sort does seem to be supported by our deepest ordinary moral convictions, nor by nearly every major moral theory.

Second, when deciding on policy, we must consider the potential costs and benefits. The benefits of live donor organ markets include the prospect of saving the lives of thousands of people who currently die awaiting a donor each year. On a crude consequentialist calculation, this benefit seems to clearly outweigh any harms to potential vendors. But we should beware of such crude consequentialist comparisons: as I noted in my earlier article, "we could adopt a general policy permitting us to abduct and cut up a healthy person in order to take his organs and save five others who are in desperate need of organ transplants. If we did so, we would be able to save five times as many lives as are lost, and increase general life expectancy. It would nevertheless be implausible to claim that such a policy is morally justified" (Rippon 2014, 148). A different potential benefit of live donor organ markets is the financial benefit to vendors. It might seem obvious that, even if vendors face impermissibly disrespectful demands and rights violations, they are more than compensated by the financial benefits they receive. After all, by definition, vendors prefer to sell organs when given the choice! But this overlooks the facts that, first, not all rights violations can be legitimated by paying compensation, and second, the wrong of the disrespectful demand has already occurred by the time a vendor decides whether to sell an organ. Recall that in the Golf Club and Claw Hammer thought experiments earlier, the subjects of the offers also preferred to take them, and were better off for having done so. But this did not show that the offers were permissible, or that the subjects were not wronged by them, or that the state should refrain from intervening. The potential financial benefits to vendors must be considered when determining whether to prohibit organ markets, but they are not determinative.

Third, the argument against live donor organ markets set out here depends on the assumption that markets in practice need to obtain organs from vendors who lack any *pressure fitting* options. If organ selling need not be seen as a last resort; if enough people with decent

pressure fitting options, like Semrau's imagined Ann, could nevertheless be persuaded to sell their organs, then the success of markets need not depend on impermissibly disrespectful demands. Whether this is possible is partially an empirical question (Under what circumstances could people be persuaded to sell organs, in practice?), and partially a moral-philosophical one (Which options are pressure fitting?). Each of these questions calls for further research.

Given the moral and empirical uncertainties surrounding these policy questions, it would be premature to say that live donor organ markets should be prohibited. I have instead provided only a *prima facie* case for prohibiting organ markets, by indicating how they may rely on disrespectful demands, and the manner in which potential vendors are wronged when they do

Moral repugnance to organ trading is often dismissed as nothing more than an irrational gut reaction (Radcliffe Richards et al. 1998), but my own informal surveys indicate that people report moral repugnance to organ trading far more readily when the vendor is described as poor and desperate than when the vendor is described as secure and middle class.⁴ My theory of disrespectful demands suggests that moral repugnance toward organ trading is often an inchoate expression of moral concern about an issue that should be taken seriously, whether we choose to permit live donor organ markets or not.⁵

⁴ I conducted an online survey in July 2013 with 63 participants. Subjects were randomly allocated a scenario that described the kidney vendor as either middle class and secure, or as poor and desperate. Of the subjects encountering the middle class vendor, less than a third affirmed that the transaction was "morally repugnant." Of the subjects encountering the poor and desperate vendor, almost two thirds affirmed that it was.

⁵ Acknowledgments: I am grateful to the members of audiences at Central European University, the University of Zurich, and the University of Pennsylvania for comments on drafts of this manuscript. I am particularly grateful to Waheed Hussain, Japa Pallikkathayil, and Andrew Pearson for their written comments.

REFERENCES

- Cherry, Mark J. 2015. *Kidney for Sale by Owner: Human Organs, Transplantation, and the Market*. Washington, DC: Georgetown University Press.
- Cohen, Lawrence. 1999. "Where It Hurts: Indian Material for an Ethics of Organ Transplantation." *Daedalus* 128.4: 135–65.
- Erin, Charles A, and John Harris. 1994. "A Monopsonistic Market—or How to Buy and Sell Human Organs, Tissues and Cells Ethically." In *Life and Death Under High Technology Medicine*, edited by Ian Robinson, 134–53. Manchester: Manchester University Press, in association with the Fulbright Commission, London.
- Eyal, Nir. 2012. "Informed Consent." In *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta (Fall 2012). http://plato.stanford.edu/archives/fall2012/entries/informed-consent/
- Goyal, Madhav, Ravindra L. Mehta, Lawrence J. Schneiderman, and Ashwini R. Sehgal. 2002. "Economic and Health Consequences of Selling a Kidney in India." *JAMA* 288.13: 1589–93. https://doi.org/10.1001/jama.288.13.1589
- Hippen, Benjamin E. 2008. "Organ Sales and Moral Travails: Lessons from the Living Kidney Vendor Program in Iran." In *Cato Policy Analysis Series*, no. 614. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1263380
- Mill, John Stuart. 1978. On Liberty, 8th edition. Indianapolis: Hackett Pub. Co.
- Nozick, Robert. 1974. Anarchy, State and Utopia. Oxford: Basil Blackwell.
- Radcliffe Richards, Janet, A. Daar, R. Guttmann, R. Hoffenberg, I. Kennedy, M. Lock, R. Sells, and N. Tilney. 1998. "The Case for Allowing Kidney Sales." *The Lancet* 351, no. 9120: 1950–2. https://doi.org/10.1016/S0140-6736(97)08211-1
- R. v. Dudley and Stephens. 1884, 14 Q.B.D. 273.
- Rawls, John. 1999. *A Theory of Justice*, rev. ed. Cambridge, MA: Belknap Press of Harvard University Press.
- Rippon, Simon. 2014. "Imposing Options on People in Poverty: The Harm of a Live Donor Organ Market." *Journal of Medical Ethics* 40.3: 145–50. https://doi.org/10.1136/medethics-2011-100318
- Semrau, Luke. 2015. "The Best Argument against Kidney Sales Fails." *Journal of Medical Ethics* 41.6: 443–6. https://doi.org/10.1136/medethics-2014-102390
- Tadros, Victor. 2011. *The Ends of Harm: The Moral Foundations of Criminal Law*. Oxford: OUP Oxford. https://doi.org/10.1093/acprof:oso/9780199554423.001.0001
- Taylor, J. S. 2005. Stakes and Kidneys: Why Markets in Human Body Parts Are Morally Imperative. Aldershot: Ashgate.