

From Gerald Dworkin, Morality, Harm,
and the Law (Westview, 1994).

GERALD DWORKIN

Markets and Morals: The Case for Organ Sales

Arthur Caplan has said that "perhaps the most pressing policy issue facing those within and outside of the field [of organ transplantation] concerns the shortage of organs available for transplantation to those with end-stage organ failure" (1). The options available to increase the supply of scarce goods are basically three—donation, conscription, or sale. A good deal of attention has been focused on the first two methods (I take presumed consent to be basically conscription with an option to opt out before death), but the sale of organs has been little discussed.

I focus on the issue of whether there are good arguments of an ethical nature which rule out a market in organs. I leave to one side discussion of whether such markets would in fact increase the supply of organs, whether there are practical difficulties in the implementation of such a scheme, whether political considerations (in the broad sense) would make it difficult to gain support for such a system. My only task today is to assess the moral arguments.

The first distinction we must make is between a futures market and a current market—that is, between the decision of an individual to sell the right to his organs after his death, and the decision to sell organs while he is alive.

I assume, for the sake of this discussion, that if there are moral objections to the sale of organs they will take their strongest form against the sale of organs from living donors. Hence if one can show that there are no conclusive arguments against such sales, one will have shown, ipso facto, that there are no conclusive objections against the sale of cadaver organs.

I first briefly consider the arguments in favor of a market in organs and claim that in the absence of moral objections, there is no reason for not having such markets. I then want to consider all the plausible arguments against the sale of organs and show that they are not legitimate objections. My conclusion will be that, in the absence of further arguments which survive critical scrutiny, there are good reasons for favoring a market in organs.

Arguments for a Market

We currently accept the legitimacy of noncommercial solid-organ donations. We also accept the legitimacy of the sale of blood, semen, ova, hair, and tissue. By doing so we accept the idea that individuals have the right to dispose of their organs and other bodily parts if they so choose. By recognizing such a right we respect the bodily autonomy of individuals, that is, their capacity to make choices about how their body is to be treated by others. By recognizing such a right we also produce good consequences for others, that is, save lives, allow infertile couples to have children, further medical research, and so on. But the primary good achieved by such a right is the recognition of the individual as sovereign over his own body. A market transaction is one species of the larger class of voluntary transactions. Allowing people to sell things is one way of recognizing their sphere of control.

Finally, by allowing individuals to either barter or sell something, we increase their level of well-being. Since such transactions are voluntary, they are presumably only engaged in when the individual believes himself or herself better off without the good and with the cash (or an alternative good in the case of barter) than without the cash and with the good.

So markets can increase both autonomy and well-being.

Arguments Against a Market

There are often compelling reasons why we should not allow individuals to sell what they could give. We do not allow markets in votes, in babies, in judicial decisions, in college grades. In these cases we recognize countervailing considerations which are sufficient to overrule the considerations in favor of markets. So the question before us is whether there are such counterarguments in the case of markets for human organs. I propose to consider the arguments that have been adduced and show that they are not compelling.

Exploitation of the Poor

One of the most powerful arguments against a market in organs is the element of exploitation of the poor. Clearly, those who are most likely to wish to sell their organs are those whose financial situation is most desperate. Those who have alternative sources of income are not likely to choose an option which entails some health risk, some disfigurement, some pain and discomfort. The risks of such sales will certainly fall disproportionately by income class.

But what exactly is supposed to follow from these facts? Is it that, because of this, the choices of the poor are not, in fact, fully voluntary? This seems to me false. Or if it is true, it has a much wider implication than that organs should not be sold. It suggests that poor people should not be allowed to enter the army, to engage in hazardous occupations such as high-steel construction, to become paid subjects for medical experimentation. There are certainly objections of justice to the current highly unequal income distribution. But it seems to me paternalistic in the extreme, given that injustice, to deny poor people choices which they perceive as increasing their well-being.

Here it is important to have some idea of the size of the risk we are talking about. One study has estimated that the increased risk of death to a 35-year-old from giving up one kidney is roughly the same as that associated with driving a car to work 16 miles a day (2). Imagine saying to a poor person either that her choice to commute such a distance is not voluntary, or that if it is, she still ought not to be allowed to commute such a distance, although we will allow middle-class persons to do so.

To make this point more vivid, what would your reaction be to the following proposal made by one author in response to this objection? Prohibit purchases from individuals whose average income is less than 80% of median family income. This has the effect of removing persons in the lower 40% of the income distribution from the market (3). Would you now be more, or less, inclined to favor organ sales?

Note also in the context of arguments about justice that the poor are disproportionately represented among those who need transplants. Thus, assuming—as is currently the case—that the government subsidizes most organ transplants, they stand to gain as a class more than the rich.

Another objection based on the fact of income inequality is that because of unequal bargaining power the price paid to the poor will not be a fair one. They will not get the full market value of their organs. If there were evidence that this was true, the solution would be to regulate the market, not forbid the sale. One could establish minimum prices analogous to minimum wage laws.

Distributional Consequences

If organs are for sale to the highest bidder, the rich will get them and the poor will not.

First, this seems an objection not to the sale of organs but to the general system of medical care based on ability to pay. There are currently at least 50 different types of artificial body parts which are distributed according to ability to pay. Why is it better for the rich to have better access to artificial than to human kidneys?

Second, currently, few individuals pay for transplants out of their own funds. Most transplants are paid for by public and private insurance. So the issue again is access to health insurance, not access to organs.

Note also that the main costs associated with transplants are likely to remain the fees of doctors and hospitals and the costs of drugs, all determined by markets. Why is it legitimate for these to be the results of markets and not the organs themselves?

But if one finds that the distributional implications are unsatisfactory, regulations or restriction on sales are called for. We could adopt a scheme, for example, in which it would be illegal for private individuals to sell organs to other private individuals. They could only sell them to the state. The state then could adopt whatever scheme of distribution would ensure justice in transfer—perhaps a lottery among the equally medically needy, or a first-come, first-served principle.

Irreversibility

One objection to the sale of organs, as opposed to renewable tissues such as blood or semen, is that the decision is irreversible. Individuals may come to regret the fact that they have sold a kidney—particularly if they develop kidney problems with the remaining organ. But we currently allow individuals to make many permanent changes in their body, including breast diminishment and sterilization. If we feel the problem is more severe we can establish waiting periods, counselling, and so forth.

More Choices Not Always Better

The argument that more choices are not always better says that allowing new options does not leave the old options unaltered. Applied to the sale of organs, the claim is that once a market price is established for organs, individuals who choose not to sell do so in the knowledge that they have made a choice which leaves their family worse off economically than they might have been. Individuals are choosing to decline an option which they formerly did not have. They may be psychically worse off than if they never had such a choice. I agree that this is a cost. I do not see, however, that it is anywhere near the psychic costs that are incurred by individuals and their families who face blindness and death as a result of an inadequate supply of organs.

Another psychic cost is more significant, as Hansman argues (3). If one assumes that because of tissue matches, the most efficient donations are

from family members, it is likely that introducing markets is liable to strain family relations. Family members are likely to be resentful of being asked to contribute without compensation when a stranger would receive substantial payment. It seems, however, that the rapid development of immunosuppressive drugs may considerably weaken the first premise of this argument.

Commodification

Finally we come to a large class of arguments which object to the commodification of organs. These arguments are rather diverse in character—many are discussed by Radin (4)—and one has to examine them carefully to see how they differ and whether any of them have sufficient force to overcome the presumption in favor of allowing sales of organs.

Altered Nature of the Transaction

Peter Singer, in a well-known argument against the sale of blood which would carry over to the sale of organs, claims that the nature of giving changes when blood is allowed to be sold as well as donated:

If blood is a commodity with a price, to give blood means merely to save someone money. Blood has a cash value of a certain number of dollars, and the importance of the gift will vary with the wealth of the recipient. If blood cannot be bought, however, the gift's value depends upon the need of the recipient (5).

There are actually two arguments here. The first is that the sale of blood means that the significance of the transfer will vary with the wealth rather than the need of the recipient. Unfortunately this argument is much too powerful, since it is an argument against the sale of anything. Why distinguish blood from food?

The second argument has more weight. It is that if one adds to the existing practice of donation the use of a market, the situation for donors is altered. Whereas before they were able to give something that could not also be purchased, now they can only give something that has a price as well. The nature of their gift is changed. Although I concede that this is true, I do not see it as a compelling objection to allowing such sales. Donors do not have the right to have their gift retain its special character, and if the price of so doing is that potential recipients of life-saving resources are excluded from receiving them (because the supply of donations is limited), the consequences alone would argue for not forbidding such sales.

Alienation

Charles Fried argues that:

When a man sells his body he does not sell what is his, he sells himself. What is disturbing, therefore, about selling human tissue is that the seller treats his

body as a foreign object . . . the shame of selling one's body is just that one splits apart an entity one knows should not be so split (6).

Notice first that this argument (similar to one given by Kant) applies to the sale of blood and semen as well as organs. So if this argument is good, it shows that our current policies are illegitimate. (Although Fried seems to take it back in a footnote [6, p. 143] saying that the selling of blood is "personally bad . . . though not in any sense wrong.")

But the main objection to this argument is that it implies not only that the sale of blood or hair is bad, but also that the donation of such bodily parts is bad as well. For if selling organs splits apart an entity one knows should not be so split, so does donating it. One treats one's body just as much as a foreign object if one gives away a kidney as if one sells it.

The danger we want to avoid at almost all cost is that people start to be treated as property by others. But this is avoided by leaving all decisions about their organs, tissues, and so on to the persons themselves, and insuring that their decisions are voluntary.

Driving Out Altruism

The argument about driving out altruism is that allowing a market in some item will make it less likely that those who were inclined to give on altruistic grounds will continue to do so. The data on blood are ambiguous on this point—some tending to show such an effect, some not. It is clear, however, that the presence of markets does not generally drive out altruistic motives. Most hospital workers are paid, but there are still volunteer workers. There are markets for used clothing, but many people give their used clothing to the needy. Lawyers are paid for their services, but many contribute a portion of their time pro bono. Finally, even if it were true that a market in organs would somewhat reduce the number of people who donate organs, if the total supply is increased, one has to weigh the loss of altruism against the gain in human lives. I see no reason to suppose that the balance will be negative. After all, we allow a commercial market for caregivers for our elderly parents—surely an arena in which not only generalized altruism but debts of gratitude play an important role.

Conclusions

It seems to me that if we take into account all the welfare losses that will accrue because of the introduction of markets for organs, it will still be the case that if the supply of such organs is significantly increased, the two major gains in welfare (improved health and decreased mortality, and increased income for sellers) will significantly outweigh the losses. If there are no non-consequentialist considerations (such as denials of rights or considerations

of justice) which might trump such consequentialist considerations, the consequences ought to be determining.

My conclusion is that, absent other and stronger arguments than those considered, given that both rights and welfare argue in favor of a market for living organ donations, there is no reason not to allow them. In addition, whatever the force of these objections, most of them are considerably weaker when applied to the sale of future rights in cadaver organs. So such a scheme is, I believe, certainly warranted.

References

1. Caplan A. Beg, borrow, or steal: the ethics of solid organ procurement. In: Mathieu D, ed. *Organ substitution technology*. Boulder: Westview Press, 1989, 60.
2. Hamburger J, Crosnier J. Moral and ethical problems in transplantation. In: Johnson D, ed. *Blood policy: issues and alternatives*. Washington: American Enterprise Institute, 1968.
3. Hansmann H. The economics and ethics of markets for human organs. *J Health Politics Policy Law* 1989; 14(1):74.
4. Radin M. Market-inalienability. *Harvard Law Rev* 1987; 100.
5. Singer P. Altruism and commerce: a defense of titmuss against arrow. *Phil Publ Affairs* 1973; 2:314.
6. Fried C. *Right and wrong*. Cambridge: Harvard University Press, 1978, 142.