A Defense of Kidney Sales

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Introduction

The shortage of transplantable kidneys is a problem. A familiar one, evident for decades and worsening. As Arthur Caplan observed in 1988, "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" (1988: 60).[1] Unfortunately, Caplan's observation is still apt today. Progress in transplantation technology has made many things possible. But these developments do little without the requisite number of transplantable kidneys. As a result of the shortage every year, thousands of people die preventable deaths. This is a problem. It is, however, eminently solvable: End the prohibition on sales and introduce a regulated kidney market. That is the conclusion defended in this dissertation.

Not long ago mere discussion of kidney sales was met with resistance. When in 1998 Janet Radcliffe Richards and colleagues published, "The Case for Allowing Kidney Sales" in *The Lancet*, the response was one of indignation (1998). One reply printed in the same journal observed that, "The lessons of the defeat of fascism in Nazi Germany have not been learnt" and concluded with the reminder that, "there is such a thing as crimes against humanity" (Velasco 1998: 483). While the proposal to allow kidney sales continues to face fierce opposition, the level of discourse has improved. In the last decade the moral status of kidney sales has been discussed seriously in scholarly journals and books, and has been the subject of articles in widely read newspapers like *The Washington Post* and *The New York Times*. That market proponents are no longer compared to Nazis is some progress. Alas, toward the practical goal of introducing a market we are no closer. There is reasoned debate, but it is largely without effect.

A number of considerations explain the lack of practical progress. It matters that the case against sales has a forty year head start. Ethical worries have been pressed since the first successful living kidney transplant in 1954. In donation, doctors turn healthy people into patients. This fact alone was enough for some to oppose kidney transplantation. The prospect of introducing a financial element was unthinkable. As soon as developments in medicine made the unthinkable possible, the medical community, in the United States and internationally, was swift to assert its opposition. That sales are immoral has been enshrined in professional codes of ethics, reaffirmed in position pieces, and is now thoroughly ingrained in the ethos of the transplant community. Because for so long all of the voices speaking to the issue were concerted in their opposition, the prohibition is now the default position. Market proponents must not only make the case for allowing sales, but also account for decades of codified professional and legal resistance.

Another challenge to policy change arises from the plurality of purported values at stake. The dispute over sales is often cast as one between champions of the free market and personal autonomy on the one hand, and those defending justice and equality on the other. In a typical expression we are told "Proponents emphasize the concept of autonomy—the right of persons to sell their body parts, free of heavy-handed paternalism. Opponents invoke standards of fairness and justice; the poor will sell their kidneys to the rich, engendering systematic exploitation" (Rothman and Rothman 2006: 1524). There is some truth to this expression. Many of the most prominent defenses of kidney sales are motivated by considerations of autonomy. And many of the most commonly cited reasons to oppose sales appeal to inequality and injustice. Because participants rank the relevant values differently, even when an objection lands, it changes few

[1] As quoted in Gerald Dworkin (1993: 155).

minds. Given this difference in emphasis, it is unsurprising that virtually no one has changed their views on the matter.[2]

That the market proposal remains merely a proposal is further explained by the paucity of relevant evidence. Many crucial matters – whether if vendors would be harmed, their consent compromised, or incentives would increase supply – are dependent on uncertain empirical facts. And the meager evidence that is available enjoys only a tenuous connection to the market proposals under debate. It is often drawn on selectively, and interpreted with considerable latitude. The resulting arguments are highly speculative and unlikely to move anyone not already convinced of their conclusions.

The lack of evidence is exacerbated by another issue. The prospect of kidney sales is emotionally charged. The influence of such emotions is not easily understated. In some cases it is self-conscious. Leon Kass is happy to rest his opposition to sales on mere repugnance (1992, 1997). Usually, however, the influence of intuition is more subtle. Most think important policy matters should be supported by reason and evidence, not bare feelings. Yet, even when on guard, presuppositions can shape the debate in unwelcome ways. For example, it is widely assumed, by those on both sides, that the only people willing to vend would be poor and desperate. And that *seems* right. It is hard to imagine why one would submit to such an invasive procedure, but out of desperation. This assumption, it should be emphasized, animates much opposition to sales. The intuition underwriting it, however, is not supported by the evidence. A recent survey of Swiss medical students found that about a fourth "expressed willingness to sell a kidney"; about a fifth would consider vending in "a particularly difficult financial situation"; 7% would vend to "secure their future"; and more than 2% would vend "to buy luxury goods" (Rid et al. 2009: 560).[3] These findings are corroborated by a study in Philadelphia indicating that, among those earning more than $100,000 annually, more than 30% revealed willingness to vend for $100,000 (Halpern et al. 2010: 362).

It is, of course, concerning that seemingly obvious assumptions may be false. But a second observation is in order. Given that, under the charitable assumptions, annual demand would be met if only .01% of the population were willing to vend, the Rid et al. study suggests that, even if only luxury vendors were accepted, there would be stiff competition. The supply far outstrips demand. Yet this study has been regularly cited by market opponents as evidence that *too few* would be willing to vend (Malmqvist 2014, Caplan 2014, Capron 2014, Koplin 2014). It is a testament to the subtle influence of intuition that so many have found it so easy to find in the data the conclusion they were looking for, even when they support precisely the opposite.

The foregoing considerations are offered so as to make vivid some important features of the debate to which I seek to contribute. The argument of this dissertation is practical. Not only do I want to demonstrate that the market proposal is justified, I want to do so in a way that changes minds. And for that, sound arguments are sadly insufficient. Perhaps Gerald Dworkin has shown that we are entitled to dispose of our bodies as we please and the argument of "Markets and Morals: The Case for Organ Sales," indeed justifies sales (1993). Perhaps Janet Radcliffe Richards, in "Nephrarious Goings On," has demonstrated that no good anti-market objections succeed (1996). And perhaps James Stacy Taylor's case for the market in *Stakes and Kidneys* is decisive (2005). Perhaps, but many influential participants in the debate remain unpersuaded.

[2] A notable exception is Veatch (2003).

[3] More recent research from Canada found that those with higher incomes were more willing to accept an incentive for themselves (Barnieh et al. 2012: 1960).

The shortage of transplantable kidneys remains a problem. I intend, then, to offer compelling reasons and evidence, and to do so in a way that moves those who have so far been unmoved.

This ambitious aim is reflected in the form and content of the dissertation. Most obviously, I have sought to rely exclusively on the uncontroversial value of life.[4] I defend the market proposal in terms that all will agree are compelling. I argue that both vendors and recipients will benefit, and that this comes at no comparable moral cost. Moreover, the market proposal has wide-ranging implications, raising issues in an array of disciplines. The case for the market must be made convincing to a diverse group, members of which are sensitive to a variety of concerns. Accordingly, though my central conclusion is a moral one, in its defense I draw on work in medicine, law, anthropology, and economics. The case I make is comprehensive, supported by empirical evidence at every stage.

The task of defending regulated kidney sales is complex, requiring extended arguments, nice distinctions, and attention to empirical minutia. Accordingly, I do not expect to persuade those unwilling to invest the time and attention necessary to appreciate the issues under discussion. The arguments I offer are persuasive, not because they are effortlessly understood, but because, when understood, they supply overwhelming reason – grounded in values all affirm – to favor regulated sales.

There is a further aspect of my defense of kidney sales that has been influenced by my practical aspiration. This is the matter of market regulation. Here two questions must be distinguished. The first asks what must be true of a market for it to operate ethically. This question is posed at a high level of generality. It is answered without regard to the sociopolitical milieu, and is unencumbered by empirical uncertainty. Two sentences suffice. Vendors should be carefully screened, informed, consenting, and their compensation must be fair. The rule of law should protect against fraud and abuse.[5] I take it to be necessary that a market satisfies this description if it is to operate ethically. But this answer falls short. There is much disagreement about what protections must be in place to ensure the description is met. More must be said. There is a second reason to think this answer inadequate: It underestimates what is required to convince many participants in the debate, and large segments of the population, that the prohibition on sales must be lifted. This cannot be ignored. Alvin Roth has convincingly argued that repugnance imposes limits on markets "every bit as real as the constraints imposed by technology or by the requirements of incentives and efficiency" (2007: 38). Kidney sales are a paradigm case. Knowing that a market *could* operate ethically is of little use if that market *won't* operate at all. To overlook these attitudes when considering market regulation would be a serious mistake. And this, I suggest, pushes us to ask a different question: What must be true of a market proposal if it is to be feasible?

I take as a starting point the proposal offered more than twenty years ago by Charles Erin and John Harris (1994). On this proposal, vendors would be carefully screened, informed, and consenting, as with donation. But more is required. The market would also be monopsonistic, with a single agency (government or private) as the sole buyer. The price would be fixed and significant; evidence suggests that a compensation package worth approximately $100,000 is economically feasible (Matas and Schnitzler 2004). Kidney allocation may continue based on

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[4] One need not accept vitalism, "the view that life itself is the only intrinsic good" (Feldman 1992: 174), or even hold that life is one among many intrinsic goods, to find my argument compelling. Whatever one regards as intrinsically valuable, life is a prerequisite, and that is sufficient.

[5] Benjamin Hippen (2005: 610-614) offers a nice articulation of these general features of an ethical market.

medical need rather than ability to pay. And the market would be geopolitically bounded. Vendors and recipients would come from the same catchment area.[6]

A few preliminary remarks are in order. First, the Erin and Harris proposal is only a starting point, open to revision. Experimental trials should be undertaken to determine how best to implemental the proposal in the short-term. Many important details have yet to be worked out.[7] A second, and related consideration, is that the Erin and Harris proposal is provisional. It is offered to meet our current needs. If sales are allowed, and the market operates as expected, then many attitudes may change, and many fears revealed unfounded. Attitudes that now must be regarded as real constraints may, overtime, weaken or disappear entirely. The move to a less restrictive arrangement may then become available. Third, as will become apparent, the Erin and Harris proposal makes possible quick and decisive rejoinders to many objections. A cautious proposal is more likely to draw opponents into serious conversation about *how* to regulate sales, and away from *whether* to allow them.

I offer a final initial consideration in support of my defense of the Erin and Harris proposal. Theirs is among the more restrictive of the proposals on offer. Given the nature of the opposition to sales, this is a virtue. I concede, there may be reasons, provided by considerations of economic efficiency or the value of autonomy, to prefer a market with lower compensation, or use of the price mechanism. Similar considerations may recommend a global market, without boundaries. And there may be reasons to depart from the current practice of allocating kidneys on the basis of need, or reasons to change how 'need' is measured. Put simply, there may be reason to favor a less restrictive arrangement, and a more radical change. But there is greater reason for restraint. The more revisionary the proposal, the less likely its adoption. And as things stand, the Erin and Harris proposal is revisionary enough. Expedience and good sense favor a non-ideal market arrangement over the indefensible status quo. And the history of the debate, and thirty years of prohibition, suggest the choice we face, at present, is rather like the dichotomy I have presented. In light of these facts, I submit, the best market proposal is the best market proposal that is likely to be adopted.

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[6] Each of these features are offered as means to prevent various harms. Justification for each will shortly be provided. Although, as the following discussion indicates, the precise design of the market need not be settled now, and this proposed design is open to revision.

[7] Many more detailed proposals have been presented, and the suggestions offered therein may be usefully incorporated into the design of trials. See, for example, Cronin and Elias (2008), Taylor and Simmerling (2008), Omar, Tufveson, and Welin (2010), and Working Group on Incentives for Living Donation (2012).

Chapter 1

Kidney Sales and the Value of Life

It is a wonder of nature that most of us have two kidneys when one will do. And it is a wonder of science that transplantation is possible and safe. Given these facts, the problem posed by the growing need for healthy kidneys is eminently solvable. Yet, the statistics are grim: as of November 2015, according to the Organ Procurement and Transplantation Network (OPTN), the waiting list for a kidney in the United States includes more than 100,000 people.[8] In this year alone more than 5,000 people will die, and 3,600 more will become too ill to remain on the list. Most will never receive a transplant, and all will suffer significantly diminished quality of life while on dialysis.[9] These sad facts are sadly predictable. The National Organ Transplant Act of 1984 prohibits the exchange of human organs for "valuable consideration," and so effectively imposes a price cap on kidneys of $0.[10] While many may happily give a pint of blood, few will surrender a kidney in like fashion. The unsurprising consequence is this: each year the demand for transplantable kidneys increases, and each year, by increasingly large margins, the supply falls short. Moral support for the prohibition on organ sales is longstanding, and ingrained in cultural and religious institutions, as well as the ethics of medicine itself (Caplan 2004). But as it becomes increasingly plausible that each year thousands of people are suffering and dying avoidable deaths, we are invited to reassess the prohibition with an new appreciation of its moral costs. Is the ban on kidney sales morally justified?

One response to the problems presented by the shortage recommends introducing some form of kidney market.[11] Though promising, this solution faces significant philosophical challenges. In this dissertation, I argue that the most compelling objections to the market proposal fail.

I proceed on the widely held assumption that kidney donation is morally acceptable. Though the practice is not uncontroversial, contemporary discussion of the issue focuses on the circumstances under which it is permissible, rather than whether it is permissible at all.[12] If one concedes that giving some thing freely is permissible, but denies that the very same thing can be sold, then one must justify this different assessment. The demand for justification is especially high when, as with the ban on kidney markets, prohibiting sales leads to significant harms. The challenge for market opponents is, accordingly, this: If they deem kidney sales *necessarily* objectionable, they must explain how the mere addition of payment renders intolerable what is otherwise an admirable lifesaving act. If they deem sales *contingently* objectionable, they must explain what consequences of the market are both unavoidable and sufficiently bad such that even experimenting with market incentives is unacceptable.

This challenge is made vivid in what I will call the *Value of Life Argument*:

(1) Many people are suffering and dying for lack of a healthy kidney;
(2) this death and suffering is bad;

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[8] http://optn.transplant.hrsa.gov. Accessed November 18, 2015.
[9] Evidence shows a marked decline in quality of life for those on dialysis. See, for example, Bakewell, Higgins, and Edmunds (2002).
[10] National Organ Transplant Act, U.S.C. Pub. L. No. 98-507, sec 301 §274e(a).
[11] Recent noteworthy books defending kidney sales include Taylor (2005), Cherry (2005), Radcliffe Richards (2012), S. Wilkinson (2003), and T. Wilkinson (2011).
[12] For recent discussion, see Spital (2004), Spital and Taylor (2007), den Hartogh (2013), and Reese et al. (2006).

(3) if we can act to address this problem without bringing about a comparable or worse harm or serious rights violation, we should be permitted to;[13]
(4) a carefully regulated market would both (i) increase the supply of transplantable kidneys, thus reducing the death and suffering caused by the current shortage and (ii) improve the welfare of vendors;
(5) we have compelling reason to think that such a market can be arranged so as to secure these benefits without causing comparable or worse harm;
(6) therefore, we should provisionally introduce a regulated kidney market.

Although the Value of Life argument takes welfare considerations as central in justifying the market, my proposal should also be appealing to those who prize liberty. A regulated market is not only likely to improve welfare, but also promote personal autonomy. James Stacy Taylor (2005, 2009) has aptly argued this point. I take it to be an advantage of the Value of Life argument that it is consistent with the value of personal autonomy, but does not depend on that value for its force.

I am especially interested in the conditions under which the state justifiably interferes in the market, and so address objections to the Value of Life argument that are accessible through public reason.[14] To clarify the distinction, consider an example. It may be that certain interpretations of Kant hold that kidney sales violate vendors' dignity as rational agents and so cause a kind of moral harm (Cohen 2002). Insofar as this objection depends for its force on appeal to a comprehensive doctrine that reasonable citizens may reject – Kantianism – it cannot provide the kind of justification required for a coercive state policy.[15] Given my practical interest, I devote my attention to challenges to the Value of Life argument that draw on values considered uncontroversial in a modern liberal democracy.

Even with this qualification the Value of Life argument faces considerable opposition. The familiar worry that vendors would be harmed by their kidney sale has recently received an empirically informed defense by Julian Koplin (2014). His conclusion, which I dispute in this chapter, takes harm to vendors to persist even in a well-regulated market. There are many other serious objections, which I address in later chapters. A number of challenges appeal to the contested role of altruism in the acquisition of body parts and products. These objections take altruism to be valuable (either intrinsically or instrumentally) and argue that it will be unacceptably undermined by the introduction of a market.[16] Another kind of objection appeals to consent. Some worry that the voluntariness of vendors' consent may be compromised if their range of options is limited, or if the compensation on offer is 'irresistible'.[17] A more troubling

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[13] This premise is similar to but less demanding than Peter Singer's (1972) 'comparable moral harm' principle. I seek to show that sales are *permissible*, not that they are *obligatory*.

[14] This appeal to public reason is a reference to John Rawls' account. The restricted version of the Value of Life argument delivers a 'political conclusion' in the sense that it can reasonably be endorsed by citizens "in light of their own common human reason" (2005: 139-140).

[15] This point is made in response to Cohen (2002) by Gill and Sade (2002).

[16] The seminal contribution in this area is that of Titmuss (1971), but recent formulations draw heavily on work in behavioral economics. For a nice review of the relevant literature, see Frey and Jegen (2001).

[17] For a few formulations, see Caplan (2004), Annas (1984), Morris and Sells (1998), and Abouna et al. (1991).

possibility is that the option to vend may leave the poor vulnerable to coercion.[18] Another kind of objection takes the market to cause what might be called 'externalities' or harms to third parties. For example, some argue that the market would expose the poor to harmful social and legal pressure to vend (Rippon 2014a), or unfairly economically penalize non-vendors (Satz 2008). The claim that kidney sales amount to objectionable commodification is also common. These critics reason from a conception of the market's moral limits to opposition to kidney sales.[19]

Given the number and variety of opponents, one can easily come away with the impression that the market proposal is a non-starter.[20] This would be a mistake. The market proposal is less ethically troubling, and potentially more beneficial than is usually thought. Many of the most forceful objections to sales are actually objections to sales under objectionable circumstances. Such challenges, I maintain, can readily be met with sensible regulation.

This dissertation's primary purpose is to defend the Value of Life argument. To this end I marshal extensive empirical evidence about the probable consequences of kidney sales. I take this evidence, and the best arguments on offer, to decisively favor the introduction of a market. But the dissertation also serves another purpose. The considerations assembled in support of the central argument serve as a challenge to those who support the prohibition. The range of considerations relevant to assessing the permissibility of the market is vast. Many of the values at stake resist easy comparison. And many important matters depend critically on uncertain empirical facts. For these reasons it can be difficult to formulate a clear picture of the probable consequences of the prohibition. In defending the restricted version of the Value of Life argument, however, I catalogue a set of uncontroversial harms attributable to the prohibition. This makes the task of forming an all-things-considered judgment about the prohibition easier, at least insofar as it clarifies where the balance of publically accessible reasons lies. Once we have a reasonably clear understanding of the prohibition's costs, the burden is shifted to those who continue to support it. Accordingly, it is incumbent on those in favor of prohibition to identify the countervailing moral considerations that warrant sustaining these significant harms.

My goal in the present chapter, however, is constrained. I aim to make the Value of Life argument plausible. Preliminary remarks survey the advantages that accompany the introduction of a market, and serve to motive the market proposal as a distinctly appealing solution. In part one I turn to perhaps the most common objection it faces, namely that those selling their organs would be harmed. Koplin's forceful articulation of this challenge is of obvious importance as it amounts to a denial of premise (4) of the Value of Life argument. In part two I show how each of the harms Koplin takes to be unavoidable can in fact be addressed through sensible regulation. In part three I offer a more general critique of Koplin's opposition. He, like many market opponents, misunderstands the welfare-based case for allowing sales, and as a consequence underestimates its cogency. In correcting this error, I lend additional support to the Value of Life argument. In short, the chapter argues that Koplin's objection fails, and that welfare considerations continue to recommend the introduction of a regulated market.

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[18] This line of reasoning is developed in Greasley (2014), Malmqvist (2014), and Hughes (2009).
[19] For two recent and noteworthy books on the moral limits of the market, see Sandel (2012), and Satz (2010). Other important formulations of the commodification objection include Walzer (1983), Anderson (1993), and Radin (1996).
[20] Recent contributors coming to this conclusion include Harmon and Delmonico (2006), Davis and Crowe (2009), and Capron, Danovitch, and Delmonico (2014).

PRELIMINARIES

Premise (1) of the Value of Life argument is sufficiently supported by the grim statistics about the shortage of kidneys rehearsed in the introduction. And because I take it as obvious that this suffering is bad, and obvious that we should be permitted to help if we can without making things worse, I will say little directly to support premises (2) and (3), which express these facts. The discussion of this section bears largely on the second half of the argument. In drawing attention to the distinctive benefits possibly achieved with a market, my work here offers support, even if only tentative and defeasible, for each of the last three premises. A carefully regulated market, I contend, is the most promising approach to solving the problem posed by the kidney shortage.

Many opposing markets advocate incremental adjustments to our current approach to procuring organs. These include improving communication about donation through public education and marketing, facilitating living individuals' choices to donate, facilitating family's choices to donate their deceased loved one's kidneys, and expanding the criteria for suitable donor organs.[21] There are more specific proposals as well: Some have devised ways of overcoming problems of blood type incompatibility (Park et al. 2003); others have developed methods of transplant that mitigate other concerns about incompatibility (Glotz et al. 2002); there is increasing acceptance of non-directed donation (Matas et al. 2000); and "paired kidney exchange" offers a further means of facilitating transplants between those who would otherwise be incompatible (Segev et al. 2005, Chkhotua 2012). David Kaserman (2006) has argued that we may be able to meet the current demand if we pursue, successfully, the measures mentioned above, achieve a 100 percent cadaveric kidney donation rate, and become willing to accept kidneys from "marginal" donors: those with non-ideal health.

Addressing the problem through incremental change, however, is inadequate. I offer three reasons why, even when assuming the accuracy of Kaserman's most optimistic forecast, the market proposal remains well-motivated.

First, kidneys from living donors are of better quality than those from deceased donors, and function for nearly twice as long (Davis and Delmonico 2005). Thus, even if through incremental changes to the status quo we were able to supply enough cadaveric organs to meet demand, we would still have cause to explore market solutions: Recipients have legitimate reasons to prefer live organs, and the market is the only proposal that has the potential of significantly increasing the number of live transplants.

The second reason incremental change is inadequate is that the optimistic projection suggesting that current demand can be met is based on the number of people on the waiting list. But this is not a reliable indicator of demand, as it does not represent all of those who would medically benefit from a transplant. Research suggests that in the United States many populations, especially minorities, non-English speakers, and the poorly educated face barriers to accessing the waiting list (Gaston et al. 2003). Further, many who would substantially benefit from an organ are, by current measures, not permitted access to the list; it was estimated that in 2008 almost 135,000 people sufficiently healthy to be expected to live at least five more years were never entered on a waiting list (Schold et al. 2008). In light of these facts, we have reason to believe that many more people would benefit medically from a transplant than the waiting list suggests.

The third reason to favor a market solution over incremental changes to the status quo has to do with the potential benefits accruing to vendors. It has been estimated that a transplant from a

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[21] For a review of these options, see Childress and Liverman (2006).

single living unrelated donor saves over $94,000 (US dollars, 2002) relative to the cost of dialysis (Matas and Schnitzler 2004: 218). This total savings per kidney increases to close to $250,000 (US dollars, 2002) when the expected increase in quality adjusted life years is taken into account. Sums of this magnitude may be, for many, transformative. If these figures are remotely close to what vendors would actually receive on a market, then we have compelling reason to think significant benefits may accrue to them. These potential benefits are considerable, and give us reason to prefer a market solution to incremental improvements on the status quo.

Every means of increasing the supply of transplantable kidneys should be explored, as every additional kidney can save a life. But modest proposals alone are inadequate: live kidneys are healthier, and lead to fewer surgeries and better health outcomes; it is unlikely that non-market solutions will ever meet the real demand; and, finally, there is reason to think that vendors, and not just recipients, will benefit from participating in the market.

Part One: Koplin's Case Against the Market

Here I take up the familiar and important issue of vendor welfare. I am principally interested in Julian Koplin's contention that vendors will be significantly harmed even in well-regulated markets (2014). Koplin's work constitutes a distinctive contribution to the literature because it offers an empirically informed challenge to what many market advocates regard as a consideration in their favor, namely, that vendors would benefit from their participation. Moreover, if sound, Koplin's argument would constitute a major contribution to the debate over kidney sales. Even calls for experimental trials with incentives would be otiose were it shown that vendors would be significantly harmed regardless of regulation. After detailing Koplin's challenge in part one, I show, in part two, how the harms he claims will persist even in a well-regulated system may be addressed with sensible regulation. This work serves two purposes. It is offered as a refutation of Koplin's central thesis and as an advance in the dialectic. For, those who oppose trials with incentives are invited to explain how the specific suggestions proposed are inadequate. In part three, I argue that Koplin is mistaken in claiming to have established that "the utilitarian argument in favor of organ markets is rendered incomplete" (2014: 15). His reasoning to that conclusion is predicated on a misunderstanding of consequentialism.

Of course, concerns about vendors' welfare are nothing new. Considerable evidence from existing markets indicates that vendors experience a range of harms. A well-known study of vendors in Chennai, India finds that most regret their choice to vend, suffer negative health and employment consequences, and are unable to improve their economic situation (Goyal et al. 2002). Research in Pakistan suggests that sales harm vendors, and damage the trusting relationship between patients and physicians (Moazam, Zaman, and Jafarey 2009). The market in Iran has also been closely studied, and the results, consistent with other research, suggest that vendors suffer a number of serious harms (Zargooshi 2001). The existence of such harms is not disputed, but there is persistent disagreement about their significance. Market opponents take them as confirmation of their fears and a preview of what a market would offer. Market advocates suggest a different interpretation. Many of the harms described, they claim, are properly attributed to the lack of oversight in the market, unchecked unscrupulous operators, and the shady world of illegal business. On this interpretation, the documented harms make the case for regulation, not prohibition. Market advocates have been quick to note this (Taylor 2005, T. Wilkinson 2011, Radcliffe Richards 2012).

Koplin claims that market proponents' reasoning is flawed. While some of the harms adduced may be mitigated or eliminated through regulation, others may not be. Market advocates have,

Koplin argues, conflated two concerns. One is the harm caused by vending, and the other is the harm caused by being swindled on an unregulated market. As he summarizes his central thesis, "I argue that eliminating abusive black-market practices may not eliminate vendors' poor outcomes by demonstrating that some of the harms vendors experience may persist even under a well-regulated system" (2014: 8). Koplin's idea is to begin with what we know about the harms vendors suffer in existing markets, subtract from that what can be attributed to black market abuses, and to take the remainder as redounding to vending as such. Call this the *argument by subtraction*. It is by employing this reasoning that Koplin hopes to defend conclusions about the operation of a "well-regulated system" on the basis of evidence from largely unregulated markets.

Notice that Koplin is not making the obvious point that participants in *poorly* regulated markets are likely to be harmed. Rather, he explicitly claims to have identified harms that will persist even in a *well-regulated market*. And this is exactly the position he should defend if he is to justify his charge that the work of James Stacy Taylor and Janet Radcliffe Richards, and "promarket arguments regarding harm to vendors in general," conflate the harms of vending and those of the black market (2014: 8). To support the contention that vendors will be harmed "even under a well-regulated system" (2014: 8) Koplin must show such harms will persist in the context of the best proposals on offer.

To support his conclusion, Koplin identifies four harms vendors are likely to suffer. "Empirical research on kidney sellers' outcomes not only documents a range of harms to physical, psychological, social, and financial well-being," he contends, "but also provides reason to worry that a regulated system would reproduce many of these harms" (2014: 8). He argues that market advocates have failed to appreciate: (1) "That the risks of nephrectomy may be greater for the desperately poor than the relatively affluent; (2) that providing follow-up care does not guarantee vendors will receive it; (3) that many sellers face depression, anxiety, stigma, and social isolation as a consequence of the sale; (4) and that receiving the promised payment in full does little to protect against long-term difficulties of finding and maintaining employment" (2014: 8). He concludes "that vendors will usually experience a range of significant harms that ultimately leave them worse off than before the sale" (2014: 14). Thus, Koplin defends the

> *Bad on Balance Thesis*. The welfare costs of vending, even in a well-regulated market, exceed the benefits conferred by compensation.

Koplin claims that the Bad on Balance Thesis delivers an important conclusion:

> [T]he utilitarian argument in favor of organ markets is rendered incomplete. Instead of pointing to the potential benefits to kidney recipients and sellers alike, proponents of organ markets will have to measure, at the very least, the benefits to recipients against the harms to vendors, as well as the increased reliance on vendors if payments displace altruistic donation. (2014: 15)

I will call the claimed entailment of the Bad on Balance Thesis the *Utilitarian Results*.[22]

In short, Koplin makes three main moves: he deploys the argument by subtraction to parse out the harms of vending from the harms of the black market; then, to support the Bad on Balance Thesis he identifies four harms likely to persist under regulation; and finally, he argues that the Bad on Balance Thesis delivers the Utilitarian Results.

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[22] Following Koplin I use the term 'utilitarian' but no part of my argument depends on *maximizing* welfare.

PART TWO: THE CASE AGAINST KOPLIN

Koplin's defense of the Bad on Balance Thesis faces two problems. First, the argument by subtraction is unsound. Recall, Koplin seeks to show that vendors will be harmed in regulated markets by showing that not all harms to vendors in existing markets are attributable to black market abuses. This reasoning is reaffirmed later: "I argue that the available evidence on current kidney markets cumulatively suggests that kidney sellers typically experience negative effects across the spectrum of physical, psychological, social, and financial well-being, and that these effects may not be entirely reducible to black-market abuses" (2014: 9). Note the last clause. Koplin takes himself to have discovered something about kidney sales as such by subtracting from the harms inflicted on vendors in existing markets those harms attributable to the black market. This pattern of reasoning appears again in Koplin's concluding remarks: "In the face of this body of research, and in the absence of compelling reasons to believe that such outcomes are entirely attributable to black-market abuses," Koplin reasons, "the ubiquitous claim that regulated systems of kidney selling would improve vendors' well-being lacks evidential warrant" (2014: 14). We are invited to reason from the fact that not all harms vendors suffer in existing markets are attributable to the black market, to the conclusion that such harms would persist in a well-regulated system.

Were all regulated markets the same, and were improvement impossible, the argument by subtraction would have force. We could reasonably conclude that any harm not attributable to the black market redounds to vending as such. But, of course, regulated markets are not all the same. There are many ways to regulate a market, and this variation is normatively significant.[23] What we can reasonably expect from a market will depend crucially on the context. Social and cultural factors have a dramatic influence on vendors' experiences, as does the level of technological development, the economic milieu, and the strength of relevant regulatory institutions. It is not enough to undermine the case for regulated sales to show that some market, with some regulation, harms vendors. What must be shown is that no feasible regulated market can avoid such harm. And this conclusion is not supported by the argument by subtraction.

Koplin's defense of the Bad on Balance Thesis faces a second problem: the evidence he marshals in its support is insufficient. Many of the harms he claims will be reproduced in regulated markets are amenable to regulatory solution. In fact, many of the problems Koplin identifies have been anticipated in the literature.[24] Given his interest in the prospects of effective regulation, that Koplin offers no serious discussion of these proposals strikes me as an unfortunate omission. In what follows I consolidate some of the best ideas proposed, offer some new ones, and explain how they are responsive to Koplin's concerns.

Risk

Consider the claim that impoverished vendors will face greater health risks than their more

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[23] For recent work in the area of market design see Vulkan, Roth, and Neeman (2013). For a nice discussion of the normative significance of various forms of market regulation, see Cohen (2013, 2014b).

[24] For extended discussion of market regulation see Erin and Harris (1994), Taylor and Simmerling (2008), and Omar, Tufveson, and Welin (2010), Hippen (2005), Taylor (2005), Radcliffe Richards et al. (1998), Matas (2004), Working Group on Incentives for Living Donation (2012), and Cronin and Elias (2008).

affluent counterparts.[25] To support this, Koplin quotes research from Egypt, which found that, "Parting with a kidney is significantly more difficult when donors do not have clean water or sufficient nutrition and rely on labour-intensive work to generate income" (Budiani-Saberi and Mostafa 2011fn 3). He also cites Nancy Scheper-Hughes' work, which suggests that "living kidney donors from shantytowns, inner cities, or prisons face extraordinary threats to their health and personal security through violence, accidents, and infectious disease" (2002: 77). These facts, Koplin concludes, indicate that "The health outcomes of vendors might not equal those of donors, even if the implementation of selection criteria and follow-up care is successful" (2014: 10).

Notice immediately how Koplin's conclusion presupposes that whatever explains the difference in health outcomes between the rich and poor cannot itself be rendered as a selection criterion. The obvious response to Koplin's concern is to incorporate socioeconomic status into the selection process. If, as the data suggest, vendors' health outcomes are predicted in part by their economic conditions, then those conditions should be factored into screening.[26] Benjamin Hippen has argued for just this conclusion (2005, 2008, 2014). To the extent that poverty does correlate with health outcomes, the use of socioeconomic status as a selection criterion is eminently sensible. What Koplin has offered then, is not a reason to think that vendors would be harmed in regulated markets, but a reason to incorporate candidates' socioeconomic status into the selection criteria.

Koplin considers and rejects the suggestion that vendors could be screened by socioeconomic status, claiming it raises the "uncomfortable possibility" that the total number of organs procured will decrease (2014: 14).[27] It is unfortunate that at this critical juncture in his argument the evidence Koplin offers is so thin, for there is another uncomfortable possibility: that the prohibition he defends is the source of much needless suffering and death. He observes that most who have sold on the global kidney market have been poor, and argues that even if payments were increased few would be willing to vend. As corroborating evidence he points to "a recent survey of Swiss medical students [that] found that two-thirds of those who expressed willingness to sell a kidney would only do so to overcome a particularly difficult financial situation" (2014: 15).

It is puzzling that Koplin would cite this survey as its findings straightforwardly undermine his position. An often overlooked fact is that the demand for kidneys is naturally 'capped' by the number in need. For example, the annual demand for transplants in the United States could be met with live kidneys if only about 1 in 9000, or about .01% of the total population sold each year. Even considering only the subset of those who are between ages 18 and 65, and assuming no organs are procured from deceased donation, "the needs of all recipients could be met by 0.06% of the relevant population" (Hippen, 2005: 599). Now consider the findings of the survey: 27% of participants, almost all of which were middle to high socioeconomic status, "expressed willingness to sell a kidney" in a regulated market; almost 18% would consider vending only in "a particularly difficult financial situation, such as unemployment"; almost 7% would vend to "secure their future—for example, by investing in their education, even if they were not in a particularly difficult financial situation"; and more than 2% would vend "to buy luxury goods" (Rid et al. 2009: 560). Further, the two strongest predictors of willingness to vend were high

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[25] This claim, it should be noted, has implications for the selection of kidney *donors* as well.
[26] There is a correlation between socioeconomic status and susceptibility to kidney disease (Hossain et al. 2009).
[27] In the next chapter I address the question of supply in greater detail.

socioeconomic status and male gender.[28] Rather than demonstrating that only the desperately poor would vend, these findings suggest a glut of wealthy candidates. Those interested in vending may outnumber, by a factor greater than one hundred, those in need of a transplant. Thus, Simon Rippon may be right to claim as "a matter of empirical fact" that few "would consider selling a kidney to obtain frivolous luxuries" (2014b: 155). His mistake, and Koplin's too, is to conclude from this that 'few' is not more than adequate.[29]

To further support the 'uncomfortable possibility' that a market will result in fewer total kidneys procured, Koplin argues that the option to sell may decrease altruistic donation. He observes that "donation between family members can become seen as inappropriate when it is possible to buy an organ from a stranger" (2014: 15). He cites two studies of Iran's regulated market indicating that many who had a willing related donor available nonetheless preferred purchasing a kidney from an unrelated vendor.[30] It may be true that when organs can be purchased, family members donate less frequently.[31] But the matter of organs' origins is orthogonal to the question of supply. Notice, the reduction in altruistic donations Koplin imagines *presupposes* that the market has worked. For, the decreased pressure family members feel to donate is only made possible by the market's furnishing of an alternative source. It requires, as Koplin says, that it is 'possible to buy an organ from a stranger.' It is no surprise that the studies Koplin cites are both from Iran, where the regulated market has largely eliminated the waiting list. If Koplin's evidence shows anything, it is that altruistic donations may be supplanted by kidney sales. But displacement offers no evidence of a reduction.[32]

Koplin's claim that vendors in regulated markets will be subject to increased health risk is left unsupported. The obvious solution – already present in the literature – is to incorporate socioeconomic status into the selection criteria for potential vendors.

Care

Koplin argues that vendors will be harmed on account of their unwillingness to receive proper post-operative care. Currently, in most cases those who sell are engaged in illegal activity and are accordingly reluctant to present themselves as vendors. But even in contexts where sales were legal, some vendors have been unwilling to seek care. Koplin notes that this was a problem, for

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[28] These counter-intuitive findings about economic status and willingness to vend are less surprising when viewed in the context of related research. In his response to Koplin's paper, Hippen cites two studies finding that "those with the highest annual earnings were also the most willing to accept an incentive for themselves" (2014: 32). See Halpern et al. (2010), and Barnieh et al. (2012).

[29] Koplin is not the only market opponent to misinterpret the work of Rid et al. Arthur Caplan, also concerned about prospects of a market increasing supply, finds it "hard to imagine many people in wealthy countries eager to sell their organs" and cites the same study as if it corroborated his failure of imagination (2014: 412). So too, expressing a similar concern, does Alexander Capron (2014: 68 fn. 201).

[30] The studies are Ghods and Savaj (2006) and Kazemeyni and Aghighi (2012).

[31] One might reasonably wonder if currently some are not unduly influenced by family members' pressure to donate. If so, the resulting reduction in supply may be a welcome one. For more discussion of these family dynamics, see Scheper-Hughes (2007).

[32] This objection, and the issue of increasing the organ supply, will be considered in detail in chapter two.

example, in India's market before sales were prohibited, as well as in Iran's regulated market. He suggests vendors do not receive the care they need in part because vending is stigmatized in some cultures, and in part due to a general distrust of medical institutions. Accordingly, many who need the care, even if it is offered to them, will not receive it. "How regulated systems of organ selling would avoid these problems" he concludes, "is far from obvious" (2014: 11).

Of course, there is no expectation that our problems admit of an "obvious" solution, nor is that a reasonable standard. However, in this case a rather obvious solution does suggest itself. If one is concerned that vendors will miss critical follow-up care, one ought to offer compensation in installments, or make it otherwise contingent on vendors' return. The offer of money got them to the hospital for their sale. It ought to get them back for their care as well. As before, it should be noted that my response here is not original. This solution has already been suggested (Taylor and Simmerling 2008). But other measures to ensure adequate care can and should be pursued as well. We might seek to influence peoples' attitudes toward vending to lessen its stigma, and increase efforts to inform vendors of the importance of follow-up care.[33] These strike me as reasonable responses to Koplin's concerns. Moreover, as he concedes, the salience of these worries is apt to vary dramatically across cultures. And no evidence thus far offered suggests this would be a problem in most of the developed world. There will be different problems in different places which will require different solutions. Accordingly, the sweeping claim that vendors will not receive follow-up care is without warrant.

The flaw in Koplin's argumentative strategy is evident. His approach to defending the Bad on Balance Thesis is to identify some problem that may arise if sales are permitted, to try and fail to devise a solution to that problem, and then to conclude on the basis of this failure that no solution is available. The trouble with this approach is that one may mistake one's own failure of imagination for a special insight. And this appears to be just what has happened. The first two harms Koplin identifies appear amenable to regulation. Moreover, the regulatory solutions responsive to Koplin's concerns have long been published. Had he engaged with these suggestions, his position on the efficacy of regulation may have been more nuanced, and perhaps moved the debate forward.

Psychological and Social Harm

Koplin argues, with appeal to empirical and ethnographic evidence, that vendors will suffer extensive psychological and social harms. He cites, for example, a recent analysis of qualitative research finding that those who sell a kidney characteristically feel desperation, despair, and debasement (Tong et al. 2012). He also cites a number of ethnographic studies corroborating these claims. The evidence suggests that many vendors feel anxiety and hopelessness after their operation, as well as other negative emotions. Citing work from Pakistan by Moazam and colleagues (Moazam, Zaman, and Jafarey 2009), Koplin notes that vendors experience "regret and remorse, often grounded in perceptions of the intrinsic 'wrongness' of selling organs; constant fears related to living with only one kidney; and a sense of feeling incomplete—like 'half a man'—after the surgery" (2014: 11). He also cites work by Moniruzzaman (2010), indicating that vendors in Bangladesh typically "felt deep sadness, feared imminent death, and worried about how Allah would judge them for selling 'his gifts'" (2014: 11). Beyond these psychological

[33] One may recall the extensive and prolonged efforts organ procurement organizations exerted in crafting the 'gift of life' narrative that rendered organ donation culturally acceptable. For an insightful discussion, see Healy (2010).

harms, vending exacts a social toll as well. As Scheper-Hughes has documented, some vendors in Brazil, Moldova, and the Philippines have been excluded from their religious communities as a consequence of their sale (Scheper-Hughes 2008). That social stigma attaches to vendors is further supported by research conducted in Egypt and India. This work suggests that the psychological and social harms of vending extend to others in the community as well (Cohen 1999, Budiani-Saberi and Mostafa 2011).

I argue first that Koplin has failed to show that such harms will arise in a regulated market. And second, even if such harms persist under regulation, I maintain they cannot do the argumentative work Koplin assigns them.

I begin with an objection Koplin anticipates: "It could be argued that establishing a legal market might itself mitigate these psychological effects by bringing markets into the open, thereby fostering acceptance of kidney selling" (2014: 12). This suggestion is more powerful than Koplin realizes. Unlike the physical harm of a nephrectomy, the psychological and social harms at issue may vary significantly across cultures. They are mutable.[34] Whether one faces these harms, and there severity, is largely a matter of the prevailing attitudes in one's society. The legal status of vending, as Koplin notes, is one factor that may shape those attitudes. But social and cultural norms will also matter, and those vary widely. Moreover, attitudes can be changed. The framing of an issue can have a dramatic influence on how it is perceived.[35] Perhaps a legal market, combined with efforts to influence public opinion, may result in different views about kidney sales, and so predict very different outcomes for vendors' psychological and social well-being. Clearly, determining how so many diverse societies may respond to kidney sales, and then determining if prevailing attitudes can be influenced, is a complex empirical task.

In light of this complexity, Koplin's rejoinder is particularly dissatisfying. To meet the objection Koplin invokes as "especially noteworthy" Zargooshi's 2001 study of Iran's market, in which sales were legal (2014: 12). He then goes on to show that vendors there suffered psychological and social harm. We are invited to conclude from the Iranian experience that, after all, psychological and social harms are features of vending in any market. It is hard to see how these remarks are remotely responsive to the objection. Zargooshi's study, as others have noted, has a number of serious limitations.[36] The data are both very old—about 20 years—and drawn entirely from the economically depressed region of Kermanshah (Fry-Revere 2014). Again, how this is supposed to show that psychological and social harms will be reproduced even in well-regulated markets is left mysterious. Although there is much to learn from Iran's experience, it offers little insight into the experiences of vendors elsewhere.[37] No one who is not already convinced of his conclusion would find Koplin's extrapolation from Zargooshi's data compelling.

But there is a second stronger reason to deny that Koplin's concern about psychological harm recommends a ban on sales. Recall Koplin's discussion of vendors' attitudes. He observes that

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[34] Recent empirical work lends support. That attitudes can be changed is suggested by Lavee et al. (2013), which found that a concerted effort to overcome cultural opposition to organ donation, exerted by the Israeli government and medical leaders, resulted in significant increases in rates of donation.

[35] For discussion of the phenomenon at the level of individual choice see Tversky and Kahneman (1981). For discussion of the phenomenon as applied to social movements see Benford and Snow (2000).

[36] The limitations of Zargooshi's study are widely discussed. See, for example, Aramesh (2014), Fry-Revere (2014), and Cohen (2014a).

[37] For an informative discussion of what can be learned from Iran, see Hippen (2008).

some choose to sell despite thinking it 'intrinsically wrong' and others do so thinking their act amounts to selling 'Allah's gifts.' Because rational people don't do things they take to be intrinsically wrong or sell what they take to be Allah's gifts, unless they have a very good reason to do so, we should assume the alternatives were quite bad. One can only imagine how horrific the options must have been for vending, so understood, to be judged the best of one's options.

The worry then, is that the prohibition is likely to exact greater harms, psychological and otherwise, than those attributable to the market. One cannot, without attributing implausible and insulting motives to vendors, suppose the psychological toll of the prohibition is insignificant. And the more unappealing one finds the prospect of kidney sales the more one should be concerned about consigning the poor to what they perceive as even worse.[38] We cannot defend the prohibition as a means of avoiding psychological and social harm if the prohibition inflicts such harm in greater measure.

This objection is anticipated by Koplin: "It could be argued that even if vending a kidney is psychologically distressing, prohibiting the desperately poor from selling a kidney itself inflicts psychological harms by preventing people from improving their financial circumstances or that of their family" (2014: 12). But he is unmoved by it. He would prefer to assign the psychological harm of the prohibition to poverty. "It is not clear why these harms should be attributed to the prohibition of organ markets specifically," he explains, "rather than to factors that contribute more directly to vendors' poverty, such as the failure of existing social policy measures to improve the situation of the desperately needy" (2014: 12). Here Koplin responds to a claim about the existence of harms with a claim about the origin or cause of those harms. He does not dispute that some may be pained when prevented from vending, but instead re-describes that pain as a consequence of poverty. This response misses the point entirely, as the objection depends in no way for its cogency on the etiology of the harms identified.

It is, of course, implausible to hold that the harm of the prohibition is properly understood as the harm of poverty. One way to see why this reasoning is deficient is to look at some of the absurd conclusions it would license in other contexts. For example, many people depend for their livelihood on working long hours picking fruit. Because such work is unpleasant and poorly compensated, only those in poverty are likely to find it appealing. A policy banning such labor would put many out of work. On any natural interpretation of the scenario, those who lose their jobs on account of the policy have been harmed by it. Before they were employed and poor, but now they are unemployed and poorer. On Koplin's account, however, these former-fruit pickers cannot protest the policy that leaves them unemployed, but only the poverty that made such employment appealing in the first place. This reasoning is cruelly misguided, as few things more directly contribute to poverty than involuntary unemployment.

There is, however, a more serious problem with Koplin's response. He is mistaken to take the harm's source as relevant. Let us suppose he is right, and grant that the harms in question are properly attributable to poverty and not the prohibition. This concession gets Koplin nowhere, for it detracts in no way from the claim that our interest in avoiding harm gives us a reason to allow sales. It remains true that some harm may be avoided by permitting sales, and this is a fact no amount of re-description can change.

Economic Harm

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[38] This familiar point about the significance of vendors' judgment has been made aptly by Radcliffe Richards on numerous occasions (1996, 1998, 2012).

I now take up Koplin's final consideration, namely that vendors are likely to suffer economically as a result of their sale. He supports this contention by appeal to a number of studies (Zargooshi 2001, Goyal et al. 2002, Mendoza 2010, Budiani-Saberi and Mostafa 2011, Mendoza 2011). The picture that emerges is a sad one. Research regularly finds that those who chose to vend as a means to escape poverty rarely succeed. Koplin notes that many of those who suffered financially from vending received the full amount of compensation promised. Accordingly, we cannot attribute these economic harms to unreliable payment in the black market. He then argues from the fact that "studies have established that the overwhelming majority of kidney vendors chose to sell an organ in the hopes of escaping debt, yet only a small minority achieved this goal" (2014: 12), to the conclusion that vendors do not benefit financially.

This objection fails for now familiar reasons. Here, too, Koplin treats regulated markets as if they are all the same. Having shown that some vendors, when paid in full, did not benefit economically, Koplin concludes that vendors in well-regulated markets, when paid in full, will also not benefit economically. But it must matter whether the 'full payment' one receives is \$100,000 or \$1,410.[39] And it must matter if one is a day laborer undergoing open nephrectomy in Iran, or a carefully selected candidate for a laparoscopic procedure in the United States.[40] Further, if Koplin deems the promised payment inadequate, the next step is to require a higher payment, not prohibit sales.[41]

Taking Stock

Having surveyed Koplin's evidence and argument for the conclusion that vendors will be significantly harmed even in well-regulated markets, we are positioned to take stock. The weakness of the argument by subtraction is obvious. To suppose that one arrives at the design of a well-regulated market by subtracting the harms of the black market evinces a poverty of imagination. This problem is compounded by Koplin's failure to engage with the most promising suggestions for regulation already present in the literature. Further, when Koplin does consider possible regulations, the evidence he offers is inadequate. As a result, the only conclusion supported by his work is the uninteresting one that vendors in poorly regulated markets may be significantly harmed. On reflection, these results are unsurprising. What more could be expected from an attempt to substantiate a sweeping generalization about the operation of kidney markets as such, on the basis of limited evidence principally gathered from unregulated markets in the developing world? One need not attribute any special significance to the distinction between regulated and black markets to deliver this conclusion. Rather, mere appreciation of the lack of evidence is sufficient to render dim the prospects of establishing Koplin's ambitious thesis.

I claimed the arguments here serve two purposes. There is a first-order dispute about vendors' well-being. I have argued that Koplin fails to establish his central thesis. A further purpose of this discussion, relevant to the larger debate over kidney sales, is to advance the dialectic. For, there is

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[39] Vendors in Chennai were promised an average of \$1410, though they received only \$1070 (Goyal et al. 2002). By contrast, as earlier noted estimates suggest payments of approximately \$100,000 may be cost effective in the United States.

[40] Recovery times for laparoscopic nephrectomy are appreciably shorter than those of the open procedure (Nanidis et al. 2008).

[41] It is worth note that Koplin's concerns about the likelihood of securing meaningful economic benefits in vending, especially for laborers in developing parts of the world, have been anticipated in the literature, for example, Taylor and Simmerling (2008).

a second-order dispute over where the burden of proof lies. Many oppose even experimental trials with incentives and offer as justification a line of reasoning that replicates, in no small measure, the deficient structure of Koplin's argument by subtraction. A representative expression has it that "'Pilot studies' aren't needed" because, "natural experiments" have settled the matter (Capron, Danovitch, and Delmonico 2014: 23). The foregoing shows this rationale to be unconvincing. Given the salient differences between those markets about which we have evidence, and the structure of a well regulated market, such facile comparisons are misguided. Of course, many will remain unconvinced of the need for trials. If their opposition is strictly ideological they are invited to acknowledge that. But if they are sincerely interested in the possibility of a well functioning regulated market, their resistance must move beyond rehearsing sad statistics. Their opposition must instead be responsive to the best proposals for market regulation on offer.

It may be objected that I have not conclusively proven the regulatory suggestions to be effective solutions. Yet, to insist that trials are unjustified on the grounds that we lack decisive confirmation of their sure success is, at best, to misunderstand the purpose of experimental trials, and, at worst, a disingenuous rhetorical conceit. This brings out an important asymmetry between the burden of proof placed on those advocating experimental trials and those who oppose them. To defend the latter position one must offer evidence that we ought not seek more evidence. Those who protest that such trials "would not be free of risk" must be disabused of the notion that any course of action, including the prohibition on sales, is free of risk (Rothman and Rothman 2006: 1526). And the strained speculation, currently on offer, that trials in the United States will ineluctably foment unregulated sales around the world replaces measured risk assessment with gratuitous slippery-slope thinking (Capron 2014). Metaphors invoking Trojan horses and crossing the Rubicon are colorful; they are not cogent.[42] And flippant comparisons of kidney sales and slavery are breathtaking in their thoughtlessness, and evince a failure to appreciate the gravity of both slavery and those suffering due to the kidney shortage (Delmonico et al. 2015: 1954). The epistemically modest position favoring trials requires only recognition that incentives may be effective, that the potential gains are significant, and that the doom and gloom peddled by the staunchest opponents is unwarranted.

PART THREE: CLARIFYING THE UTILITARIAN CASE

Let's suppose the arguments of part two fail, and that Koplin has established the Bad on Balance Thesis. Would this deliver the Utilitarian Results? I claim not. Koplin's reasoning to this conclusion is predicated on a misunderstanding of utilitarianism. His error is not unique. Many who address the utilitarian argument for sales attend only to a subset of the consequences relevant to that argument's assessment. In correcting this error, I suggest, it becomes clearer that welfare based considerations lend further support to allowing sales.

Notice that the Bad on Balance Thesis makes a claim about the costs and benefits of an act. It construes the significance of a kidney sale as a function of the difference between vendors' welfare before and after the sale. What is measured is the net contribution *of the transaction* to the vendor's welfare. The assessment is in this way 'local'. Because Koplin focuses only on the transaction, his account is insensitive to the quality of the options within the set from which potential vendors choose. Yet, if we are concerned about potential vendors' welfare, our assessment of the

[42] See, respectively, Danovitch and Leichtman (2006) and Capron, Danovitch, and Delmonico (2014).

prohibition must compare the expectable outcome of vending with the alternative. To make this vivid, consider

> *Cancer*. Your wife needs treatment that can only be financed if you sell a kidney. The only buyer, aware of your plight, is willing to pay enough for the treatment but not enough for full compensation.

The options here are the on-balance harm of the kidney sale (keep your wife), and the sure death of your wife (keep your kidney). Morally decent people face an easy choice. Whatever considerations tell against you vending, none are supplied by an interest in your overall welfare. For, even if vending is bad on balance, saving your wife more than compensates. And it requires sadly little imagination to generate cases in which one's best option is on-balance harmful. Thus, even when limiting our scope to potential vendors' welfare interests, and stipulating that sales are on-balance harmful, it remains an open question whether sales should be permitted on utilitarian grounds.

The Utilitarian Results are not delivered by the Bad on Balance Thesis, but instead requires defense of the

> *Non-Optimific Thesis*. Kidney sales exact greater costs on vendors than those costs that would result from taking what they judge to be their next best option.

The Non-Optimific Thesis requires a comparison, not between a transaction's costs and benefits, but between a person's welfare across possible courses of action. Here the benefit to the vendor is a function of the difference between the expected welfare after vending, and the expected welfare after taking a non-vending option. This calculation is 'global'.

To defend the Non-Optimific Thesis, one must show that vending is bad for potential vendors *given the options they face*. Further, because utilitarianism is aggregative, even if we focus only on vendors' welfare, to deliver the Utilitarian Results one must show that potential vendors' choices will be bad *enough*. A *sufficient* number of potential vendors must be expected to make non-optimific choices that are *sufficiently* worse than their second best choices, such that the group's aggregate welfare is best served by forcing all to their second best options. Koplin does not even attempt to defend this claim.

One may object. Does Koplin not provide evidence for the Non-Optimific Thesis, even if it is not specifically offered in its support? As Koplin observes "Almost every study that has asked the question has found that the majority of vendors regret selling a kidney and/or would not recommend doing so to others" (2014: 14). If vendors reliably regret their choice, does this not supply reason to think their judgment on this matter is reliably poor? Is it not significant that few would recommend vending to others? If we are to take vendors' judgment seriously, we should perhaps take their regret as an indication that vending was not the best option. It seems, then, to reason from the evidence already supplied to the Non-Optimific Thesis requires little additional argument; we already have reason to think vendors' choices are non-optimific, reason supplied by vendor regret.

This is not evidence for the Non-Optimific Thesis. For, that requires a comparative judgment, and the foregoing supplies only evidence about one option, vending. To see why this is inadequate, consider

> *Boxes*. You are presented with two boxes of unknown contents, A and B, and are forced to select one.

Suppose you select box B, which is found to contain a damp Kleenex. You may study this Kleenex as carefully as you like, but nothing you learn will supply the information necessary to make a judgment of its merits as compared to the still unknown contents of box A. That box may contain $5 or a blanket infected with smallpox. Who knows?

In order to support the Non-Optimific Thesis, and so deliver the Utilitarian Results, we must know the contents of the non-vending alternatives. What happens to those who would vend if that option is closed? Unfortunately, nothing in the literature cited by Koplin supplies this information. At best, we learn what motivated vendors. Tong and colleagues, synthesizing available evidence, find that "Selling a kidney was perceived as the only means for survival, to repay debts they owed, or to assist a family member in financial need" (2012: 1142). While this gives some indication of the desperation that made vending appealing, it offers no information about what measures would be taken were vending foreclosed. Perhaps desperation makes prostitution more appealing. Perhaps it leads one to see one's children as economic resources, or to think criminal activity choiceworthy. Perhaps one is drawn to take up dangerous labor. And perhaps, those who take these options do not escape from debt, later regret their choices, and would not recommend them to others. That is to say, all of the consideration thought to suggest that vending is non-optimific may arise with equal or greater force when the non-vending option is taken.

Of course, some options may be inherently more likely to deliver non-optimific results than others. Between chess and Russian roulette, we should play chess. This choice is easy because we know what both options involve. But we still do not know the content of the non-vending alternative.

It might be suggested that desperation supplies reason to think vendors' choices are non-optimific. As Erik Malmqvist observes: "It seems easier to overestimate the value of a sum of money desperately needed and easier to disregard long-term risks when one's everyday existence is focused on meeting immediate needs" (2014: 116). This is unpersuasive. The desperation claimed to impair potential vendors' judgment is not eliminated with the option to vend. It persists, and will influence vendors' judgment of their next option as well.

There is one important respect in which the case of vending is unlike *Boxes*. For, in *Boxes* the contents of both options are unknown. By contrast, those who choose vending over the alternatives have some information about their choices. So, there *is* something we know about the non-vending option, namely, that it will be regarded by those forced to take it as less desirable than vending. This difference, I suggest, makes defense of the Non-Optimific Thesis even harder to sustain. One must be prepared to tell those potential vendors, who have partial knowledge of both boxes' contents, that their judgment is mistaken, and that they should be made to comply with that of another, one who neither has knowledge of both boxes' contents, nor has to live with their choice. I do not see how such an intervention could be justified.

And notice, the fact of partial knowledge does nothing to improve the evidentiary status of vendor regret. Consider

> *Peeking*. You are presented with two boxes, A and B, and are forced to select one. Peering in through small holes you see some of their contents.

Suppose in box B you spy a blanket in a beautiful shade of blue—your favorite color. There is another blanket in box A, but that one is a sad gray. Naturally, you prefer box B. Upon opening, you may discover a damp Kleenex or $5 or a new car. No matter, regardless of what you learn, nothing could supply the evidence needed to make a comparative judgment of the boxes'

contents. Perhaps box A has identical contents, apart for its less desirable blanket. Or a rattlesnake. Who knows?

Conclusion

I have sought to show in this chapter that the Value of Life argument is plausible. In motivating the market proposal I emphasized the unique advantages enjoyed by allowing kidney sales. Koplin's recent contribution to the literature is a serious and empirically informed challenge to the Value of Life argument, but, as I have argued, it fails. His assessment of the likely harms to vendors in regulated organ markets is doubly deficient. First, his central claim, that vendors are likely to be harmed even in regulated markets, is unsupported. The argument by subtraction fails to take into account the many meaningful ways a market may be regulated. And, as a result, the four sources of harm Koplin takes to be intractable are, on inspection, amenable to regulatory solution. Second, Koplin takes the evidence to deliver the Utilitarian Results. This claim is not supported, and appears to rest on a misunderstanding of utilitarianism.

It is an unfortunate fact about the world that some people's lives may be improved by acts that are not on balance beneficial. Let's not make things worse. Before substituting our own judgment for that of those who bear the consequences of our choices, we ought to think more carefully about the limited options of the desperately poor. Rather than saving them from themselves by forcibly eliminating choices that strike us as unattractive, we ought instead aspire to improve the conditions from which they choose such that vending ceases to be the sadly winning option that it is. Until then we should, with regulation, make kidney sales as safe as possible.

Chapter 2

Altruism and the Ethical Acquisition of Kidneys

That kidneys should be given altruistically, without payment or the expectation of compensation, is the dominant view in the transplant community.[43] Call this the 'altruism requirement'. Representative expressions of this commitment draw heavily on the 'gift of life' metaphor. Donors are pictured as heroes, and their gifts thought the best. It is widely accepted, and often repeated, that these gifts are only appropriate when "freely given in a spirit of altruism" and with the sole aim of helping another.[44] Such is the ethos of transplantation. Against this backdrop, the number of altruism based objections to kidney sales is unsurprising.

What *is* surprising is that all are without merit. The altruism requirement is morally unjustified. No good argument shows that one undergoing elective nephrectomy must do so intending to help another. And even if such an argument were produced, it would not categorically exclude vending. Many sales would be permitted. Many donations would be prohibited. The work of this chapter defends these claims, and in so doing defends the Value of Life argument.

The altruism requirement features in the debate over kidney sales in two importantly different ways. One set of arguments claims that altruism has intrinsic value of such import that kidney sales are foreclosed. It is this intrinsic value that is held to justify the altruism requirement. Objections to kidney sales grounded on the intrinsic value of altruism are important, not because they are cogent – they are not – but because they are pervasive and persistent. In part one I show these objections to be unpersuasive.

The second set of arguments takes altruism to be of instrumental value. Two warrant brief discussion. Some claim altruism ensures the health of both the donor and the transplant. Some claim it is proxy for voluntary consent. A third defense of the altruism requirement is far more compelling, and gives rise to one of the most powerful objections to the Value of Life argument. This, the 'crowding objection,' is doubly important. It is important because, if correct, it could quickly turn the Value of Life argument into one in support of the prohibition on kidney sales. And it is important because, correct or not, it plays a crucial role in many contemporary anti-market arguments. An increasingly common form of opposition concedes that sales are in principle morally permissible, and acknowledges the importance of increasing the supply, but then goes on to conclude that a market cannot be both ethical and productive. Opponents begin with some reasonable moral concern, then claim that regulation adequate to address this concern would exclude as ineligible those most likely to participate. And here the crowding objection is deployed. We are reminded of the corrosive influence financial incentives can have on intrinsic motivation, and led to conclude that a suitably regulated market would result in a net decrease in transplantable kidneys. In part two, I show these objections to be unpersuasive.

Before turning to the substance of these arguments I offer some preliminary remarks that serve to situate the discussion.

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[43] There is widespread professional opposition to payment. William Plant (2005) discusses the extent of this opposition, noting that The Transplant Society, The World Health Organization, The World Medical Association, as well as a host of national organizations remain officially opposed to compensation.

[44] This wording is representative, and found in Cameron and Hoffenberg (1999: 726). Nearly identical expressions are found elsewhere.

Preliminaries

Despite the attention it receives, altruism is rarely well defined, and its purported moral significance rarely defended or articulated.[45] This matters. If potentially life-saving transplants are precluded by the altruism requirement, we must be clear about the concept, and confident that it justifies foregoing the welfare benefits that would otherwise accrue. It is then a non-trivial mistake to hold that altruism "is valued by (almost) everyone and its core meaning universally agreed. Altruism, in its broadest sense, means promoting the interests of the other" (Scott and Seglow 2007: 1). It is one mistake to presume that altruism has a 'core' meaning, and a second to claim it is agreed upon. This is confirmed by the subsequent sentence, which characterizes altruism so vaguely that nepotism and other indirectly self-serving actions qualify.

The need for a clearer conception of altruism has been heightened by advancements in medical technology and market design. In the first decades of kidney transplantation problems of incompatibility ensured that most donors were biologically related. Now, transplants between unrelated people are a regular occurrence, and are accepted as morally permissible. Also accepted is the increasingly common practice of paired kidney exchange, which eliminates problems of biological incompatibility between donors and recipients by matching them with complementary incompatible pairs.[46] A further category is that of the non-directed donor who is willing to give to whomever is in need. It is ironic that this apparent unadulterated altruism was initially greeted with suspicion; donors' willingness to give was perceived as evidence of pathology (Spital 2000). Subsequent research has shown these concerns to be misplaced (Henderson et al. 2003). Non-directed donation is now widely accepted.[47] Moreover, such donors play an increasingly valuable role in initiating extended chain donations (Rees et al. 2009). These new possibilities introduce new complications. For, if the altruism requirement is a legitimate one, then it must be compatible with these new permissible forms of donation.

Having highlighted the need for clarity, I suggest the burden falls squarely on the shoulders of those who find the altruism requirement significant. And this coheres with my argumentative strategy in what follows. I will not presume any particular account of altruism. My case against the requirement does not depend on how the concept is understood. In this respect I intend to be maximally concessive. Appeals to altruism fail to undermine the Value of Life argument, not because of any arbitrary condition placed on the concept, or any excessively stringent or

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[45] Of note are a pair of recent exceptions that attempt to clarify the concept. Saunders (2012) concludes that most donors act out of solidarity, not altruism, and that this is morally innocuous. Similarly, Moorlock, Ives, and Draper (2014) conclude, after assessing both practical and philosophical conceptions of altruism, that none cohere with accepted practice, and that, while desirable, altruism should not be required.

[46] For more on kidney exchange, see Roth, Sönmez, and Ünver (2005), Roth et al. (2006), and Sönmez and Ünver (2013).

[47] Widely, but not universally accepted: Govert den Hartogh argues that non-directed donors lack the 'standing' necessary to override the requirement to do no harm explaining, "You cannot at will take up special responsibilities for any person by appealing to a 'relation' that person isn't even aware of" (2013: 51). I see no reason to think any relation must obtain to render donation morally permissible. But even if some relation were required, the claim that it must be mutually recognized is implausible. One may, for example, before becoming pregnant, quit smoking out of concern for the well-being of one's non-existent future children.

capacious interpretation imposed by me. They fail because, when errors in fact and thinking are corrected, on any plausible definition, altruism supplies no reason to maintain the prohibition on sales.

It should also be noted that the role of altruism in the debate over kidney sales is more circumscribed than much discussion suggests. It is commonly claimed that human body parts and products are priceless, and so not to be bought or sold. The central idea is captured by Kant: "everything has either a *price* or a *dignity*. What has a price can be replaced by something else as its *equivalent*; what on the other hand is raised above all price and therefore admits of no equivalent has a dignity" (1996: 4:434). Similar contemporary expressions are easy to come by. A kidney market, we are told, would involve, "the pricing of a priceless gift" (Annas 1984: 23). Market opponents insist that, "to sell human beings or their integral body parts is to violate their dignity" (Cohen 2002: 59). And it is claimed, "An organ is priceless, and payment for any organ would be so incommensurate to its worth to the recipient that it would somehow cheapen it" (Baruch 2005: 438). Whatever the merits of these claims, as a factual matter, after the initial transfer from the donor, kidneys become valuable commodities exchanged in a series of complex market transactions.[48] As Julia Mahoney writes, "However appealing the idea that generous impulses propel transplantable organs from original possessor to ultimate recipient, the reality is that organs are continually exchanged for valuable consideration" (2009: 23). And from these lucrative transactions many individuals and institutions benefit financially.[49] The debate about the role of altruism in kidney sales is then rather limited. The question is not whether kidneys should be regarded as priceless, but at what point in the supply chain their monetary value should be recognized.

PART ONE: ALTRUISM AS INTRINSICALLY VALUABLE

Here I take up objections to the Value of Life argument that appeal to the purported intrinsic value of altruism. The first proposes that altruism plays a distinctive role in medical ethics, rendering what would otherwise be objectionable – the harming of a healthy individual for the purpose of aiding another – permissible. The second holds that altruism in general is valuable, and seeks to proscribe sales as objectionably corrosive to this value.

§1. *Altruism and Medical Ethics*

One way in which the value of altruism may be defended is to claim that it follows from a prior overriding moral commitment. This is the tack taken by prominent medical ethicist Arthur Caplan, who argues that a market would violate a longstanding tenet of medical ethics, namely, the 'Do no Harm' principle. This reasoning, I will show, depends on a failure to distinguish between the motive on which a person acts and the act performed. And as we will see, this kind of mistake is pervasive. Many who appeal to altruism to oppose kidney sales are insufficiently

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[48] For an extended analysis of commodification of body parts under U.S. law, see Mahoney (2000). Given the extent to which body parts are currently commodified, she argues, it is "virtually impossible to imagine how human biological materials would be distributed if commerce in such materials were prohibited" (2000: 165).

[49] That economic incentives, rather than ethical arguments, better explain much of the medical community's resistance to kidney sales has been long suspected by some economists. See Barnett, Beard, and Kaserman (1993) and Kaserman and Barnett (2002).

attentive to the difference between *what* is done and *why*. Thus, my aim in attending to Caplan's objection is not only to show that it fails, but also to clarify a pervasive confusion.

Caplan (2004) argues that a market in kidneys would be, in principle, unethical. To be charitable, I quote extensively from a passage containing a full expression of Caplan's argument:

> Medicine has long held that the core ethical norm of the profession is the principle 'Do no Harm'. Taking organs from living persons is in direct violation of this moral norm. The only way in which it seems morally defensible to remove an organ from someone is on the grounds that the donor chooses to undergo the harm solely to help another and that there is sufficient medical benefit to the recipient.
>
> The creation of a market puts medicine in the position of removing body parts from persons solely to abet their interest in securing compensation for themselves. […] A key moral problem with markets in kidneys and other body parts is what it does to the ethics of the medical profession. In a market, even a regulated one, doctors use their skills to help people harm themselves for money and solely for money. (2004: 1933-1934)

The first condition on which Caplan insists is that the choice to give is made 'solely to help another'. This is the altruism requirement. The second condition is that there is 'sufficient medical benefit'. It is only because donation meets these two conditions, and so overcomes the 'Do no Harm' principle, that it is permissible. It would be perfectly acceptable, for example, for a mother to donate her kidney to her ailing son; her choice meets both conditions.

Caplan's objection is predicated on the false assumption that the distinction between the acts of giving and selling corresponds to the distinction between motives of altruism and selfishness. That is, Caplan assumes that uncompensated donors always act altruistically and compensated vendors always act selfishly. This is mistaken. We can easily modify the above scenario such that the mother's child is not suffering from renal failure, but instead has been diagnosed with leukemia. Her kidney is unlikely to send her son's cancer into remission, but the proceeds from its sale might afford him a badly needed course of chemotherapy.[50] In this case both of Caplan's criteria are met; the mother is acting 'solely to help another' and 'there is sufficient medical benefit.' Clearly, then, a commercial exchange can be conducted for altruistic purposes consistent with the 'Do no Harm' principle. It should be obvious that more ordinary expenditures, for things like healthcare, education, and housing, when purchased by a parent for a child, are similarly altruistic, and so are not excluded by the altruism requirement.

Further, unpaid donation, which is typically thought to be undertaken 'solely to help another', may be motivated by selfish purposes. Just as someone might, for example, present herself as having certain religious commitments in order to win the good favor of a wealthy relative, one might also agree to donation in hopes of securing favorable treatment. An elderly grandparent may be more likely to leave you a substantial sum in her will if you donate a kidney to your uncle. There are other motives as well: prospective non-directed donors have admitted that they were motivated to donate by a desire to make a statement against their family (Henderson et al. 2003, 207).

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[50] My example is fictional, but real life makes the point. In one well-known case a Turkish citizen sold his kidney to finance medical treatment for his daughter (Trucco 1989).

Caplan takes the altruism requirement to follow from the 'Do no Harm' principle. But even if one accepts this principle, it does not justify a prohibition on the market; payment is consistent with altruism, and so consistent with the altruism requirement.

My interest in the above argument is not merely to show that Caplan's objection to kidney sales is unpersuasive. I further suggest that, in diagnosing his error, we find a significant challenge for those who seek to oppose sales by appeal to the altruism requirement. Throughout the literature there is a pervasive tendency to equate donation with altruism. Donors give the gift of life. Donors are heroes. Vendors have motives too, supplied by their role as self-interested rational agents acting in a market. Given that much of the debate about kidney sales has been cast in these terms – aligning donation with altruism, and sales with egoism – it is unsurprising that so many collapse the distinction. Yet, it is evident that no conceptual link between the act of donation and the motive of altruism obtains.[51] Defenders of the altruism requirement thus confront a difficult task. They must show, not only that the altruism requirement is justifiable, but also how a concern that people act on certain motives can supply reason to prohibit certain acts.

§2. *Altruism as a Good to be Promoted*

An alternative approach to defending the altruism requirement, one which requires no conceptual link between acts and motives, instead posits a contingent but significant connection. The argument, in outline, is this: (1) Altruism is an intrinsically good thing, and (2) kidney donation promotes it while kidney vending does not. So, (3) the intrinsic value of altruism supplies reason to oppose kidney sales. This is the central idea behind many altruism based objections.[52] It is mistaken.

Nothing of import hangs on the claim of (1). All can grant that altruism is good. Of course, not an unqualified good. On any understanding of altruism that takes consequences to be at all relevant, one may do horrible things that count as altruistic.[53] I may be mistaken in fact. Perhaps I urge others to join the abusive cult to which I am in thrall. I may harm third parties as a means. Perhaps I commit a crime willing to accept the punishment, knowing its proceeds will help another. I may operate on objectionable values. Perhaps I am willing to donate a kidney but only if the recipient is white.[54] In these and other cases, if we like, we can say the altruistic feature of the act is a *pro tanto* good, even if the consequences are not. Obviously, then, more needs to be shown if the intrinsic value of altruism is to tell against kidney sales.

The claim of (2), by contrast, is substantive. It alleges a contingent connection between acts and motives that Caplan failed to establish as conceptual. Its ambitious assertion is that there would be less altruism in the world were sales allowed. It is not the more limited claim that there

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[51] It is necessary for the performance of some acts, e.g., promising, forgiving, and apologizing, that one act on a particular motive. This is not the case with the acts of donation or sales.
[52] This construal of the reasoning behind many altruism based objections appears often in the literature. See, for example, McLachlan (1998), and S. Wilkinson (2003).
[53] Once the act/motive distinction is grasped, this point follows readily, and has been observed by others, see McLachlan (1998), De Wispelaere (2002), and S. Wilkinson (2003).
[54] This is not fanciful. Such racially conditioned donation occurred in the United Kingdom in 1998, and much discussion about its permissibility has resulted. See especially, T. Wilkinson (2003, 2007), Neidich et al. (2012), and Moorlock, Ives, and Draper (2014).

would be fewer altruistic *donors*, but that there would be less *altruism*.[55] Many have insisted, both in the context of blood and organs, that donation promotes altruism, and commerce the opposite. This is a central thesis in Richard Titmuss' oft-cited *The Gift Relationship*, in which it is argued that commerce in blood "represses the expression of altruism [and] erodes the sense of community" (1971: 245). Peter Singer reaffirms this claim, asserting that "The laws of the marketplace discourage altruism and fellow-feeling" (1973: 314). Over the decades many others have repeated the thought: Thomas Murray pronounces, "Gifts to strangers affirm the solidarity of the community over and above the depersonalizing, alienating forces of mass society and market relations" (1987: 35). John Keown claims "A major argument for exclusive reliance on unpaid donation is that, unlike paid donation, it promotes altruism and social solidarity" (1997: 96). Much the same is held by Miran Epstein and Gabriel Danovitch; "Success of the market comes at the expense of the altruistic sphere, and a bigger market is likely to intensify the pressure on the latter even further" (2009: 357). The claim is so widely accepted, and so often repeated, many regard it as obvious, if not self-evident, that the introduction of a market would reduce the amount of altruism. Representative of this sentiment is Singer, who, having consulted his own intuitions on the influence of commerce, asks, rhetorically, "Do we really need any further 'theoretical analysis'?" (1973: 165). We do. Despite its currency, the claim that commerce is inimical to altruism is unsupported.

One reason to doubt the sweeping claim of (2) is the paucity of empirical evidence offered by its defenders.[56] Of course, many presume that Titmuss's work supplies such evidence. It does not. There are two relevant points. First, with respect to the limited claim that the introduction of a market would decrease altruistic blood donation, Titmuss's evidence falls short. It has been noted by, among others, Kenneth Arrow (1972: 350), that the evidence supplied in Titmuss's study cannot possibly do the work to which it is put. Benjamin Hippen and Sally Satel express the point nicely:

> [I]t is unclear how Titmuss could be so certain of a dynamic process at play—that is, the suppression of altruistic intent—when his observations were merely static comparisons of two systems. Titmuss lacked any meaningful comparison between conditions before and after commercialization to undergird his robust cause-and-effect claims regarding the introduction of incentives and subsequent altruistic behavior. (2008: 101)

As a result, even if his data were impeccable, they still would not support his central thesis regarding the corrosive effects of commerce on altruistic donation.[57] Second, even if it were demonstrated that a market in blood or organs caused a decrease in donation of blood or organs, this would not support the sweeping sociological claim that altruism in general would decrease.

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[55] Though, as will soon become apparent, the purported decrease in altruism is usually claimed to follow from a decrease in altruistic donations.

[56] There is a great body of work in behavioral economics suggesting that in some contexts incentives suppress rather than increase the targeted behavior. I will consider this literature more closely in part two of this chapter. It should be noted here, however, that work examines the influence of incentives on particular behaviors. It does not support the ambitious assertion of claim (2).

[57] The concession about Titmuss's data is a significant one. He himself acknowledged the use of "guesswork" to fill in many gaps in the data (1971: 95). For extended discussion of concerns about Titmuss's data, and his interpretation of it, see Hippen and Satel (2008).

For, there are many ways altruism may be manifest, and showing a decrease in donations of blood or organs does not show a decrease of altruism in general. Particularly in the absence of an adequate conception of altruism, it is hard to imagine how such a claim could be empirically supported. The lack of empirical evidence that kidney donation promotes altruism while kidney vending does not, should undermine our confidence in claim (2). But there is greater cause for doubt.

The most often cited reason to think that the introduction of incentives would reduce the amount of altruism points to an expected reduction in donation. These acts of altruism would be supplanted by sales. And in the absence of compensatory acts, we should expect a net decrease in altruism. An initial problem with this line of reasoning emerged in my treatment of Caplan's objection. Because altruism is a feature of one's motives, and sales an act, one cannot immediately conclude that, when the acts change, so too do the motives. And, as already suggested, we can, with little effort, imagine some vending to provide medical care, education, and other goods to their loved ones.

That we should reject the overly simple reasoning usually thought to support claim (2) can be shown more clearly. Many defending that claim commit what I will call the 'individuation error'. This error arises when there is an incongruity between the act that features in an agent's motive, and the act on the basis of which that agent's motive is assessed. If what makes an act altruistic is that it is performed with a certain motivation, then it matters critically that the acts on the basis of which we assess agents' motives are individuated in ways that capture all of the relevant considerations. As a result of the individuation error, many acts that may be altruistic are thought not.

Consider Zell Kravinsky, who after giving $45 million to charity, gave his spare kidney to a stranger (Strom 2003). Before his nephrectomy, Zell was examined by health professionals to ensure his suitability as a donor. Their concern was his welfare. Were we to focus only on this, we might conclude that Zell was acting out of self-interest. But that is obviously a mistake. We fail to understand Zell's motive if we think it is discernable when only a part of the larger act is considered. Such is the fallacy of division. To make a judgment that one acts altruistically, one must consider the act properly described. When Zell's examination is put into the context of his choice to donate, its altruistic motive becomes apparent. The same individuation error arises when one characterizes a vendor's act as selfish on the basis of the compensation offered. For, the act of selling features is but one act in a larger complex of acts. And, in the case of sales, we have decisive reason to look beyond the transaction when discerning motives.

The error is clear in Caplan's thinking: "In a market—even a regulated one—doctors and nurses still would be using their skills to help living people harm themselves solely for money" (2014: 412). The compensation in question is money, and money is essentially instrumentally valuable. To characterize vendors' motives in this way is not only silly, but also insulting to those who, in the face of what we can only imagine were miserable conditions, acted at great cost to themselves. Caplan is in no way unique in this respect. The individuation error is evident throughout the literature. Francis Delmonico and colleagues, construe vendors as "compelled to risk death for the sole purpose of obtaining monetary payment for a body part" (2002: 2004). Again, to suppose that anyone would do anything *solely* for money is to misunderstand how money is valued. Ben Saunders claims the altruism requirement would supply reason "to resist certain measures (such as payment for donors)" (2012: 379). Yet, without knowing what such payment would be used for, there is no basis for such a claim. And David Rothman and Shelia Rothman, speculating about the social impact of a market warn that, "Evidence of the sale would thus be written on the body and speak to moral character. It would point not to heroism and

generosity of spirit (intrinsic reward) but to desperation and avariciousness (extrinsic reward)" (2006: 1526). Not only do the Rothmans here commit the individuation error, they proceed on the basis of this confusion to impugn the character of those who have sold. Almost without exception, the description of vendors' acts, on the basis of which assessments of motive are formulated, terminate at the anticipated payment. What that money is intended for is omitted. This error is pernicious.

The foregoing considerations are proposed to show that the principal reason identified as justification for claim (2) is deficient. Defenders of the altruism requirement presume that vendors are not acting altruistically because they construe their choice to vend as being motivated by a desire for money. And this, surely, is not the whole story.

Some may object that there *is* in fact a difference between the altruistic kidney donor and the vendor financing a further altruistic project, captured by the distinction between 'direct' and 'indirect' altruism.[58] For example, P. J. Morris and R. A. Sells maintain that, "The only circumstance where a kidney may be removed ethically from a living donor is when it is a gift to the recipient" (1998: 229). Note the requirement that the recipient of the organ be the beneficiary of the altruism. As James Stacy Taylor characterizes the distinction, direct altruism requires that "the altruistic motive that leads a person to provide a body part for transplant must have as its object the performance of an altruistic act for its recipient" (2005: 167). Appealing to this distinction one may claim there is reason to characterize vendors' actions differently than those of donors, and so reason to think there will be less direct altruism as a result of the introduction of a market.

The distinction between direct and indirect is both *ad hoc* and devoid of normative significance. It would implausibly entail that there is a moral difference between donor-recipient pairs who happen to be biologically compatible, and those who must instead participate in paired kidney exchanges. This absurd implication should be sufficient to reject the distinction. It may also be observed that to employ the direct/indirect distinction one must incorporate acts – characterized independently of motives – into their account of altruism. I have already argued that this involves a kind of category mistake. There is, I suggest, no sense in which one's altruistic motives are more or less direct. Rather than capturing a morally important difference, this distinction appears gerrymandered to deliver a predetermined conclusion. It fails.

I have argued that the reasons supplied in support of claim (2) are unpersuasive. Not only is the empirical evidence inadequate, the arguments commonly employed from the armchair involve the individuation error, and so are uncompelling. There is a final reason to doubt that sales will diminish absolute levels of altruism. The force of this reason depends in part on the claim that a market will in fact increase the supply of transplantable kidneys, a claim I defend in part two of this chapter. So here I state the consideration in conditional form: If markets increase the supply of transplantable kidneys, and lives are improved and extended as a result, then any altruistic acts thereby made possible are attributable to the market. This suggests a modified argument from the intrinsic value of altruism, but one *recommending* sales: (1) Altruism is a good thing, and (2*) by saving lives kidney markets will make more altruistic acts possible. So, (3*) the value of altruism supplies reason to support kidney sales. I conclude there is no reason to believe that donation promotes altruism while vending does not.

The foregoing has not challenged the legitimacy of the altruism requirement, but instead sought to show that, even if it were accepted, the question of sales remains open. Some sales would meet that condition, and some donations would not. Turning to claim (3), which holds

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[58] For more discussion of 'indirect' and 'direct' altruism, see Dossetor (1992).

that the value of altruism provides reason to prohibit sales, I now supply considerations to think the requirement is unjustifiable.

I begin by considering how the values in play compare. As the analysis of claim (1) suggests, altruism is not the unqualified good some suppose. But even stipulating that the relevant altruistic acts are also beneficial, it is hard to see how one, thinking clearly about what is valuable, could prefer the premature death and suffering of thousands to a world with fewer acts of altruism. As Stephen Wilkinson frames the choice, it is "between an 'anti-commerce' policy which *might* have some long-term social benefits but which *certainly* condemns thousands to die and a 'pro-commerce' policy which would *certainly* save thousands and *might* lead to the loss of some rather intangible social benefits" (2003: 116). It is hard to conceive of anyone not in the grip of an ideology sincerely holding this belief.

That claim (3) is implausible can be shown more vividly. If altruism were of such value that its promotion justified the human toll exacted by the prohibition, we might wonder if we struck the right balance of altruism and lives saved. Ben Saunders (2012), drawing on the work of Nick Bostrom and Toby Ord, suggests we explore this possibility by use of the reversal test.[59] By eliminating cadaveric organs and making donation more onerous, we may increase both the number of altruistic donors and the intensity of their altruism. Or, more simply, we may require that donors also make a $5 charitable contribution, in addition to asking that they undergo a medically unnecessary surgery and surrender one of their organs without compensation. That these suggestions are absurd supplies further reason to doubt that the intrinsic value of altruism provides reason to oppose sales. It seems we don't, on reflection, think altruism so valuable.

Although Saunders's appeal to the reversal test helpfully makes vivid the comparative strengths of the values at stake, his own position on the altruism requirement appears vulnerable to similar considerations. For, while he allows that donors may act on motives of solidarity, he denies that incentives should be allowed if they reduce altruism:

> Altruism is good, certainly, but so are organs and, even if we cannot increase levels of the former, we ought nonetheless to seek to increase the supply of the latter. Provided that measures to increase organ donation do not *reduce* altruism, we still have sufficient reason to endorse them. (2012: 378)

Though not identical, this reasoning is similar to an endorsement of claim (3). This is puzzling as it is undermined by Saunders' own invocation of the reversal test two paragraphs later. If we refuse to take measures that reduce altruism, even if they increase the supply of transplantable kidneys, we should ask again about the balance of altruism and lives saved.

Reflection on the moral importance of human well-being as compared to the purported intrinsic value of altruism supplies reason to favor the promotion of the former even if we expect the latter to diminish. This should be accepted even by those who regard altruism as of great intrinsic value. Thus, one may be convinced by the foregoing that the altruism requirement may be *overridden* when sufficiently valuable goods may be promoted by doing so. There is, however, something stronger to be said. I concede that we may prefer that donors and vendors act altruistically. This trivial point follows from the claim that altruism has some value. In this sense, to say that someone *should* act altruistically is not to state a condition of permissibility, but to note a preference motivated by an expected benefit. Altruism is a kind of bonus. So too, and in the same sense, we should prefer that surgeons and bank tellers and fish-mongers act altruistically.

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[59] For more on the reversal test, and status quo bias in applied ethics, see Bostrom and Ord (2006).

Altruism is a kind of bonus. And, just as we do not only reluctantly allow surgeons and bank tellers and fish-mongers to work absent altruistic motives, nor should we only reluctantly allow donors or vendors to act absent such motives. One may recognize altruism as valuable, yet deny that it presents a hurdle to be overcome or a precondition to be met. Likewise, for those parting with a kidney, and those who remove it.

The argument of this section was intended to show that the purported intrinsic value of altruism supplies no compelling reason to oppose kidney sales. The pervasive tendency to identify the act of donation with the motive of altruism, and that of sales with egoism, is without warrant. Further, not only is the intrinsic value of altruism wildly overstated, the claim that a market would diminish its absolute level is unsupported by the evidence. And, in any case, it is hard to see why we should accept the altruism requirement in the first place. Despite the oft-repeated claim that altruism is at the 'core' of transplant ethics, none of the arguments on offer constitute a plausible rationale. To refuse a kidney from an informed and consenting ethical egoist, on account of the intrinsic value of altruism, would constitute a serious moral error and reflect a distorted perception of the values at stake.

PART TWO: ALTRUISM AS INSTRUMENTALLY VALUABLE

What of the instrumental value of altruism? I first consider two suggestions; that altruism is instrumentally valuable in securing healthy transplants and ensuring valid consent. These warrant limited discussion. The remainder of the chapter takes up what is perhaps the most powerful challenge to the Value of Life argument. This, the crowding objection, holds that the introduction of incentives will lead to a reduction in the supply of transplantable kidneys.

§1. *Altruism, Health and Consent*

Consider the connection between altruism and the health of the organ supplied and the health of its supplier. One might think altruism is instrumentally valuable as a means of ensuring that those undergoing elective nephrectomy provide truthful medical histories. In a typical expression of this concern we are told, "Safe donation, both for the donor and the recipient, requires honesty and openness about the potential donor's health, high-risk activities, and family history" (Danovitch and Leichtman 2006: 1133). Because directed donors are invested in the health of the recipient, they are likely to be concerned that the organ their loved one receives is a healthy one. Without a financial interest, they have no reason to misrepresent their medical history. By contrast, it is easy to conjure the image of a vendor who, out of desperation, is willing to say whatever is required to secure the funds needed, without regard for the outcome for the recipient. Their desperation may also cause them to risk their own health.

There are many reasons why this concern is uncompelling. We might start with a suggestion offered (rhetorically) by Danovitch and Leichtman: "Would specially trained investigators need to be included in the transplant team to ensure the accuracy of the paid donor's history and to ensure public safety?" (2006: 1133). This is approximately correct.[60] Just as donors are screened, so too would be potential vendors. Medical records should be examined, and candidates should undergo extensive testing. To misrepresent one's health may be made a criminal act. Though we shouldn't exaggerate the importance of vendors' candor. As Hippen notes, "it is difficult to lie

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[60] That payment would introduce health concerns is addressed in Taylor and Simmerling (2008). They conclude that measures may be taken, as I go on to discuss, to mitigate this concern.

about objective measurements, such as proteinuria, a positive hepatitis serology, or pre-existing conditions such as hypertension" (2005: 601). Moreover, we should not assume donors cannot be motivated to misrepresent their medical histories. In a well-known case, a father, having donated one kidney to his daughter, sought to donate the second to her after the first was rejected (Saunders and Parker 2001). If the choice is to watch a loved one slowly suffer and die, or to risk one's own health, many may take their chances. Even supposing, counter to fact, that screening would be inadequate, we should also keep in mind the choice situation. It is not: A perfect kidney or something less? It is: A premature death on dialysis, or a specimen from the market? Those who languish on the waiting list may prefer the risk of a transplant. Health considerations cannot justify the altruism requirement.

A second suggestion is that the altruism requirement may be justified as a means of ensuring voluntary consent. Compensation, particularly large sums, is thought to compromise consent. Many consider the offer of payment an undue inducement, which precludes the rational assessment of risk. This undermines voluntary choice and so renders consent invalid. Compensation is also thought to render the poor vulnerable to coercion. Those in poverty will become targets of familial, social, or legal pressure to vend. These forces are also thought to invalidate consent. While the issue of consent in kidney sales is an important one, the claimed connection to altruism is mistaken. The two concerns just mentioned focus on compensation. Given that the matter of payment is orthogonal to the motive of the vendor, altruism is not the central concern. Moreover, it should be noted that the issue of consent in kidney *donation* is also an important one. Donors may be subject to a range of consent compromising pressures, some of which may be quite forceful. I take up these concerns, and other consent related objections in chapter 3.

I conclude that the instrumental value of altruism does not justify the altruism requirement, either as a means of ensuring the health of the transplant, or in securing consent.

§2. *The Crowding Objection*

My treatment of the crowding objection is organized in three sections. In the first I present the empirical evidence commonly offered in its support, and explain how market opponents deploy it in defending the altruism requirement. In the second I argue that, given the distinctive motives on which most donors act, there is no reason to expect the net supply of transplantable kidneys to diminish with the introduction of sales. In the third I present recent work in behavioral economics, which further vitiates the crowding objection.

The Objection and its Role in the Debate

As noted, Titmuss's work has frequently been cited by market opponents who offer it as evidence for the claim that a market will erode altruism and, in doing so, reduce the supply of kidneys. Corroborating Titmuss's work, much has been done in motivational crowding theory to show that extrinsic incentives can suppress intrinsic motivation. Behavioral economists Uri Gneezy and Aldo Rustichini have found that instituting a penalty for a particular behavior can actually increase its frequency. Having observed regular rates of late pick-ups at 10 daycare centers in Israel, a modest fine was levied on tardy parents at six centers. Within a week the incidence of late pick-ups increased substantially at the centers that implemented the fine. Further, when the fine scheme was later rescinded, incidence of late pick-ups remained close to what it became after the fine was instituted (Gneezy and Rustichini 2000a). The authors' titular hypothesis was that "a fine is a price". The idea being that the introduction of the fine altered the

exchange from one subject to social norms of right and wrong, to one governed by market norms, wherein one can purchase the privilege of leaving their children late at the center. The introduction of the fine changed the character of the exchange, and so changed the norms governing it.

A 1997 study lends further support to the claim that incentives can undermine intrinsic motivation and in doing so reduce the effectiveness of price mechanisms (Frey and Oberholzer-Gee 1997). Having informed Swiss residents of the liabilities of locating a new nuclear waste site near their homes, researchers surveyed their willingness to host the site. Initially, just over 50% favored locating the site in their neighborhoods. However, when another offer was made, this time including a financial award, the number willing to host the site dropped to close to 25%. Even when the financial incentive was later significantly increased, all but one of the nearly 300 respondents remained opposed to the site. The authors explain this shift in support by positing that the introduction of financial incentives reduced the 'civic spirit' of those supporters of nuclear energy who would have otherwise been willing to host the site. Their intrinsic motivation was crowded out by the extrinsic incentive.

Motivational crowding theory has become one of the most powerful tools in market opponents' repertoire. For, it allows one to resist the market proposal, without the appearance of fetishizing altruism at human cost. Reflecting this, there has recently emerged a pattern of reasoning present in many market opponents' arguments. First, some moral concern about permitting sales is offered: Julian Koplin (2014) argues that even well-regulated markets will inflict unacceptable levels of harm, Kate Greasley (2014) claims that vendors will be exploited, and Simon Rippon (2014a) suggests those in poverty will be subject to harmful social and legal pressure to vend. It is then acknowledged that regulation may mitigate or eliminate this concern. We might, for example, disqualify from vending those who fall below some income level, or permit all to vend, but disallow any from using the proceeds of their sale to satisfy social and legal demands. But, it is reluctantly concluded, this "raises the uncomfortable possibility that kidney markets might not substantially increase—or could even decrease—the number of kidneys available for transplantation" (Koplin 2014: 14). Regulation sufficient to address the concern would exclude as ineligible those most likely to have sold on the market. This fact, combined with the corrosive effects of commerce on altruism, will ultimately lead to a net decrease in the supply of kidneys. The general line of reasoning is expressed succinctly by Rippon:

> [A]s a matter of empirical fact, people who are not financially desperate generally do not want to become living organ vendors. Few of us would consider selling a kidney to obtain frivolous luxuries. Therefore, social and legal pressure plays an essential role in motivating most vendors to participate in live donor markets. As a further matter of empirical fact, research has shown that commodifying things by setting a price for them tends to 'crowd out' altruistic motives for donating those things. So any successful introduction of a market must motivate a larger number of vendors than the altruistic donors it would crowd out. Market proponents are thus forced into a dilemma: they can choose between a weakly-regulated market that increases organ supply precisely by putting harmful pressure on people, or a well-regulated market that insulates everyone from pressure to sell, but ends up actually decreasing organ supply. (2014b: 155)

Thus, it is concluded that no market proposal, despite regulation, can be both productive and ethical.

The significance of the crowding objection is hard to understate. For, if successful, it would seriously challenge the Value of Life argument. This is of obvious importance. And, if unsuccessful, then many market opponents' objections lose their force. This too is of obvious importance. For, the crowding objection, in these arguments, features as the linchpin. Market opponents deploy the objection *after* acknowledging that regulation could address their concerns. Effective regulation is conceivable. The problem, opponents claim, is that instituting it would result in a net decrease of kidneys for transplant. Thus, if we have reason to think adequate regulation is consistent with increasing supply, then a wide range of objections to kidney sales become instead suggestions for market regulation. This indeed would be a significant result.

The Objection Fails

Debra Satz notes that the markets studied in motivational crowding theory are significantly different from markets in human kidneys, as they "involve questions of life and death, not simply convenience, and so it may well be that different motivations are invoked in those performing altruistic actions" (2010: 194). Satz is right to attend carefully to the ways in which the markets studied in the literature on motivational crowding theory are importantly different from the market under examination here. But she draws the wrong conclusion from this difference when she goes on to suggest that these motivations "are more likely to be vulnerable to crowding out" (2010: 194). In this section, by examining the motives of the different classes of donors, I show that we have little reason to expect the supply of kidneys to decrease with the introduction of a market.

Research has found that among those non-directed donors deemed psychologically suitable to donate, the most common motives were as follows: 58% of participants acted on the desire to act in a way "consistent with [their] spiritual belief system", 48% sought to "substantially improve the quality of another's life at an acceptable personal cost", and 43% sought to act in a way "consistent with a spirit of altruism" (Henderson et al. 2003: 207). Given that these donors are substantially motivated by altruism, they seem most susceptible to motivational crowding.[61] Whereas, under the current arrangement, donors are immediately and unambiguously identified as altruistic, the introduction of market elements may weaken this association. The worry then, is that the altruistic potency of the act may be diluted when some donors are vendors.

There are two points market advocates can offer in response to this worry. First, this class of donors is incredibly small: Based on the most current OPTN data, there were fewer than 1,800 non-directed donations ever completed in the United States by November 2015. So even if all potential non-directed donors elect not to donate, the loss may be easily outweighed by the increase in supply delivered by those acting on extrinsic incentives.[62] In this respect the situation is rather unlike that of blood donation, where there is a significant practice of donation. As Stephen Wilkinson has noted, "altruism arguments (insofar as they work at all) work much better

[61] It is worth noting, in light of the pervasive confusion brought out in my discussion of Caplan's work, that not all of these non-directed donors acted on altruistic motives; 10% of donors were motivated by a desire to increase their self-esteem, 19% wanted a relationship with the recipient, and 14% wanted accolades, and viewed donation as a means of expressing their uniqueness (Henderson et al. 2003: 207).

[62] Richard Epstein (2008: 18-20) has devised an economic model of altruism that incorporates the distinctive motives of non-directed donors, which suggests that even under unfavorable assumptions the total number of transplants would increase in a market.

for those things which are already freely donated on a large scale than those which are hardly freely donated at all" (2003: 114).

Second, there is reason to doubt that this class will shrink. Some would-be uncompensated donors may become compensated donors when the selling price is right.[63] These donors would be like the Swiss resident who would have permitted toxic waste to be stored near her home out of a concern for civic duty, but would also allow it for a high enough price. Additionally, a market could allow for uncompensated donation, and even enhance it. Recall Zell Kravinsky. If given the opportunity he may have opted to sell his kidney and donate the proceeds, along with his other $45 million, to charity.

The real threat of crowding out comes from directed donors, who contribute significantly to the supply of kidneys. Annually, directed donations comprise about 40% of all transplants, and about 98% of all live donations (OPTN data, November 2015). If we had reason to believe that this class of donors would shrink with the introduction of a market, an important and significance source of organs would be compromised. It is then important that, if we should expect such a loss, we should also expect the market to compensate for it. And this, indeed, is precisely the case.

Our best evidence suggests that, while there may be some donors displaced by vendors, there will be no decrease in net supply. Consider the varied forces at work in a directed donation. More than 80% are either genetically or legally related, e.g. as the spouse, sibling, parent, or child of the recipient (OPTN data, November 2015). Typically, such donors are principally concerned about the well-being of their loved one. Some also act out of a sense of familial obligation. There are other motives too, which are ethically problematic. Some donors are motivated to restore the health of the family member with a significant and important income; this financial pressure could be a non-trivial factor in one's decision that may be regarded as inappropriate. Other directed donors may want to avoid the guilt of choosing not to donate. Further, as Nancy Scheper-Hughes (2007) points out, there appears to be a significant difference in donation rates by sex. According to OPTN data, to date, roughly 78,000 women have donated, while only 54,000 men have. This may be the product of undue societal or familial pressure.

Pace Satz, the strength and variety of motives on which many directed donors act, suggests that the choice to donate is often overdetermined. Such donors may be acting on a number of motives, any one of which may be sufficient. So, whereas the motive of altruism may be necessary for moving non-directed donors to act, potential donors concerned about a loved one, compelled by familial obligations, or hoping to restore to health an important breadwinner, will still have ample reason to donate in the absence of the altruistic motive.[64]

In discussion of Caplan's objection, I emphasized the need to distinguish between acts and motives. Worries about market incentives crowding out altruism and leading to a reduction in supply are the result of a similar kind of error. I am suggesting, without intending to impugn the generosity of directed donors, that many directed donations are not significantly motivated by altruism. Altruism may be one of many motives on which they act, but it may not be sufficiently strong on its own, and there may be many other sufficiently strong non-altruistic motives. The critical point is that there is a structural difference in the ways the two classes confront the choice

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[63] Unsurprisingly, the offer of a sufficiently high price can lead to increased performance of a targeted behavior even with crowding effects in force (Gneezy and Rustichini 2000b). This important point will receive more attention below.

[64] For further argument to the conclusion that many motives for donation will remain in force even in a market context, see Cherry (2000).

to donate. Directed donors do not begin with the desire to act altruistically and then come to see donation as an opportunity for that; they are presented with a loved one in need, and, in helping that person, engage in an act we describe as altruistic. While we might call such an act altruistic, it would be a mistake to think that it is this feature of the act that explains why it was undertaken. It is but one, relatively small, part of that explanation.

Having offered some rather general reasons to doubt that market incentives will reduce the supply of kidneys, I turn now to a different concern. Some market opponents have pointed to certain kinds of cases in which, they claim, the market supply of kidneys will lead to a reduction in donations, and so a reduction in supply.[65] These cases involve individuals' motivations, but do not rely on any substantive claims about altruism. In each case, I argue, any reduction in the number of kidneys donated will be balanced by an increase in the number of kidneys secured through vending.

The Recipient's Preference case: Currently, many recipients may only reluctantly allow their loved ones to donate. Parents, for example, are often resistant to subjecting their children to the risks associated with surgery. If a parent could avoid subjecting a child to risk, and instead receive a kidney from an unrelated source, some would pursue this option.

Notice, however, that this possibility does not support the conclusion that there will be a net reduction in organs available. There are two relevant elements to consider: the existence of a market and the recipient's willingness to accept a kidney from the potential donor. There are four conditions then:

1. Ann will not accept Ben's kidney, and there is no market option.
2. Ann will not accept Ben's kidney, and there is a market option.
3. Ann will accept Ben's kidney, and there is no market option, so *Ben donates*.
4. Ann would accept Ben's kidney, *but* there is a market option, so Ben doesn't donate.

In the first two conditions Ann is, out of a concern for Ben's health, unwilling to take his kidney. The existence of the market is irrelevant in her decision to reject his offer. Opponents of the market point to the difference between the second pair of conditions as supporting their objection that a market will lead to a net reduction in supply. Without the market Ben would have donated, but with it he won't.

This line of reasoning, however, shows only that there may be a reduction of directed donations, not that there will be a reduction in net supply. In condition 4, Ben does not donate only because the market has made more kidneys available. If the market hasn't increased supply then, effectively, condition 4 collapses into condition 3. So the only circumstances in which a directed donor would have given, but elects not to do so on the basis of the recipient's preference, are those in which someone else has made an organ available. The result is displacement, not reduction.

The Donor's Preference case: To suggest that a market could result in a net decrease in available organs on account of directed donors' preferences requires attributing to potential donors a rather implausible set of motives. For this reduction to materialize we have to suppose these potential directed donors would have donated in the absence of a market, but *would rather watch the would-have-been recipient suffer without a functioning organ, than give freely alongside paid donors*. It is hard to see how, and no evidence has been provided to suggest that, any donor, let alone an appreciable number of donors, operates with these preferences. Rather, most perspective

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[65] See, for example, Ghods, Savaj, and Khosravani (2000), Danovitch and Leichtman (2006), Rothman and Rothman (2006), Koplin (2014), and Capron, Danovitch, and Delmonico (2014).

directed donors are strongly motivated to help the recipient, and will do so at great cost.[66] Their motives are not so fragile as this line of reasoning suggests.[67]

The Reduced Pressure case: If more kidneys were available, then some reluctant potential donors—those who would prefer not to donate but feel unable to refuse due to familial or financial pressure—may choose not to. One would expect this kind of pressure to decrease if there were available an alternative means of securing a healthy organ. Yet, as was the case in the previous two examples, any donations lost by the 'reduced pressure' mechanism are actually displaced by kidneys from the market. The only way such pressure may be reduced is if the market increases supply.

Further, the reduced pressure case actually illustrates one of the virtues of the market. Whereas, under the status quo, many family members are compelled to give, the market, if it functions as expected and increases supply, would afford these people an alternative. We might then expect a reduction in the number of donations that result from ethically worrisome coercive forces.

I have argued that the introduction of a market will not result in fewer living kidney donors. However, market opponents might modify their challenge. Rather than pointing to a reduction in living donation, they could claim that the market will lead to a reduction in *cadaveric* donation. The first concern is that a market might crowd out the altruistic cadaveric kidney donors, resulting in a net decrease in supply. The second concern is even more serious: a market in kidneys may change people's attitudes about organ donation in general, and this could result in a shortage of hearts, lungs, livers, and other vital organs. This would bring about a harm that very well may exceed the benefit of allowing kidney sales and so challenges premise 5 of the Value of Life argument.

There are two reasons to think that this grim possibility is remote. First, there is a lack of theoretical evidence supporting it. It's unclear that motivational crowding theory is an appropriate model for deceased donation. The support for motivational crowding theory reviewed here involves the comparison of the *same* agent's motivation for the *same* behavior, with and without extrinsic incentives. But the concern about deceased donation alongside a market involves one agent's willingness to donate freely after death, and other agents' willingness to donate with compensation while living. There are two *different* acts, performed by two *different* agents. So, motivational crowding theory provides no theoretical support.

There is a second reason, based on historical precedent, to doubt that deceased donation will decrease. The government sanctioned kidney market in Iran suffers many problems, and is in many important ways different from any market that might be established in the United States. However, it is worth noting that deceased donation in Iran has actually increased since the market was introduced in 1988 (Hippen 2008). Deceased donation was not practically or culturally feasible before 2000, when organs from deceased donors represented only 1.8% of the total (Hippen 2007). After legislation in 2000 removed many barriers to deceased donation, rates

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[66] Even fervent opponent of organ sales, and George W. Bush appointee to The President's Council on Bioethics, Leon Kass (1992: 68) concedes that he would buy an organ, or sell his own, if that was necessary to save his child's life.

[67] Moreover, insofar as one thinks donors ought to act altruistically, the suggestion on offer is doubly problematic. For, it is hard to count their act as altruistic if their willingness is extinguished by the existence of the market. The portrait is one of less self-sacrifice and more self-righteousness. Further, one's choice to donate alongside a market option appears rather to enhance one's altruistic intent, a point made by Hippen (2005: 597).

increased to 10% in 2005 (Hippen 2007). Given the differences between the United States and Iran, this evidence does not ensure that rates of deceased donation will rise here, or even remain constant. It does, however, militate against the assertion that markets are likely to lead to decreased deceased donation.

Reflection on donors' motives suggests that while the number of non-directed donors may shrink, on balance we should expect a net increase in supply. Some non-directed donors may take advantage of the chance to increase the value of their gift by giving away their kidney *and* the proceeds from its sale. Many who never would have given will become vendors. And those with a loved one in need of a transplant will still be motivated to give if the market is unable to supply one.

What We Learn From Behavioral Economics

The discussion of motivational crowding within the literature on kidney sales gives the impression that the field of behavioral economics has been stagnant for more than a decade. Even recent articulations of the crowding objection invoke the same handful of publications – or worse, others' work citing these publications – and none of the more recent work on the topic.[68] This is an unfortunate omission. Insofar as our interest in resolving the organ shortage is sincere, and insofar as we take behavioral economics to be relevant to the question of supply, we should not be content repeating the speculative conclusions suggested by early work in the field.

Compounding this concern is the thoughtless alacrity with which many market opponents conclude that the introduction of incentives will decrease supply. The frequently cited work of Rothman and Rothman (2006) is instructive. Their case against the market begins with the assertion that "Advocates think it self-evident that market incentives will yield more organs for transplantation" (2006: 1524). Yet, even in the materials cited by the Rothmans the claim that a market will increase supply is addressed directly. The first three citations offered are works by Arthur Matas, James Stacy Taylor, and Mark Cherry. In each case the authors specifically argue for the claim that incentives will increase the supply of kidneys.[69] What the Rothmans claim is "flatly assert[ed]" is, in fact, squarely addressed with argument and evidence. This error has done little to deter others from favorably citing their work. For example, the Rothmans note – correctly – that when the fines were rescinded at the Israeli daycare that was the subject of Gneezy and Rustichini's study, rates of late pick-up remained the same. The Rothmans then, rather speculatively, suggest that this effect may occur in the context of kidney sales. And this is then enthusiastically cited by prominent figures in the transplant community as compelling reason to resist even experimenting with incentives. Some insist, citing the Rothmans, that if there is crowding out, "such effects would likely persist after the pilot trial" (Delmonico et al. 2015: 3).[70] Other point to the Rothmans' paper as demonstrating that "it is quite unclear that a

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[68] The publications are Frey and Oberholzer-Gee (1997), Gneezy and Rustichini (2000a, 2000b), and Frey and Jegen (2001). Examples of recent publications citing only one or more works from this limited list, or citing a paper citing one of these include Rippon (2014a), Capron (2014), and Delmonico et al. (2015).

[69] See the following passages for the relevant discussion: Matas (2004: 2013); Taylor (2005: 165-187); and Cherry (2005: 99-102).

[70] It is noteworthy that the evidence supplied by Delmonico et al. to motivate the crowding worry, a study of the change in donations rates in Israel after it was made illegal for insurance companies to pay for transplants performed outside the country (Lavee et al. 2013), has precisely

vending-based system would be effective and it could well be destructive" (Danovitch and Leichtman 2006: 1134). Their work, we are told, refutes, on empirical grounds, the case for a market (Delmonico et al. 2012). It seems many enjoy the patina of empirical credibility lent by behavioral economics, though few care to apply it themselves.

Market opponents appreciate that economic incentives may influence moral motivation, but rather than investigate how this phenomenon may inform design of a regulated market, instead seize on the highly speculative possibility that this would result in a net decrease in supply. This is unsatisfying. Recent work in behavioral economics, I suggest, offers two lessons. The first tells against the eagerness of those pressing the crowding objection, who assume incentives are overused when they suppress intrinsic motivation. That is, even if crowding did occur, this does not yet supply reason to reject the market proposal. The second invites us to consider how to wield knowledge of motivational crowding theory to improve the operation of a market.

An important insight from Titmuss's work is that the introduction of an extrinsic incentive may change the character of the targeted act. Although he overstated his case when claiming that markets "deprive men of their freedom to choose to give or not to give" (1971: 239), there is a difference between donating blood, and donating blood along side a market option. As Singer notes, "Even if the opportunity to give still existed, the attitude toward giving would no longer be the same" (1973: 314). Similarly, different norms may operate when picking up one's kids late from daycare, and when doing so for a price, as Gneezy and Rustichini have shown. For this reason Arrow's analysis may have been too quick when he wrote "if to a voluntary blood donor system we add the possibility of selling blood, we have only expanded the individual's range of alternatives" (Arrow 1972: 146). More choice is not always better than less, in part because the addition of an option can change the nature of the choice.[71]

These observations undermine a longstanding presupposition of classical economic thought. While it has widely been understood that moral motivations, in addition to economic incentives, have an important role in influencing individual choice, recent developments suggest a more complex relation than previously supposed. "The standard (if generally implicit) assumption in economics" write Samuel Bowles and Sandra Polania-Reyes, "is that the behavioral functions relevant for mechanism design, public economics, and related fields are separable in social preferences (should they exist) and incentives" (2012: 370). That is, it is assumed that one's preferences, and the constraints that limit how these preferences are satisfied, are independent. They may be treated as distinct considerations without interaction. This simplification, what Samuel Bowles and Sung-ha Hwang (2008) call the 'separability assumption' is innocuous in some contexts, but proves problematic in others. A growing body of evidence suggests that this assumption is often violated; economic incentives and social preferences are importantly synergistic.[72]

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nothing to say about motivational crowding, and makes no attempt to present itself as such. Rather, it indicates that when instead of being fully compensated for transplants abroad, people are threatened with three years in jail and a large fine, fewer people get transplants abroad. This is explained by classical economic theory and offers no support for the crowding objection. Moreover, it actually lends tentative empirical support to the claim I defended above, in the Recipient's Preference case. When it was no longer possible to receive a transplant from a market, directed donations increased to fill the gap.

[71] For an extended defense of this claim, see Dworkin (1982).

[72] For a recent overview of the literature demonstrating the failure of the separability assumption, see Bowles and Polania-Reyes (2012).

Titmuss's work reflects part of this truth. There are good reasons to believe that the offer of incentives, in many contexts, can be counterproductive. A number of plausible explanations have been offered, but the general idea is that such offers convey information apt to influence their perceived import. Incentives may provide cues about appropriate behavior by suggesting which social norms to recognize (Fiske 1992); they may trigger 'moral disengagement' (Bandura 1991); or they may 'overjustify' the choice and so undermine one's sense of autonomy (Deci, Koestner, and Ryan 1999). That certain incentives crowd out desirable behavior in some contexts is well documented, and supplies reason to consider their use carefully. But these facts are not explained as simply as Titmuss supposed, nor do they straightforwardly council against the use of incentives in policy design. In their assessment of Titmuss, Bowles and Polania-Reyes maintain, "Both the diagnosis and the policy implication are wrong" (2012: 418).

Taking up these points in reverse order, consider first the significance of crowding for policy design. The 'sophisticated planner', aware that the separability assumption may be violated, does not immediately reduce incentives in the presence of crowding. For, even if intrinsic motivation is dampened, extrinsic incentives may more than compensate. Under conditions of crowding, "the sophisticated planner may make either greater or lesser use of explicit incentives than would her naïve counterpart" (Bowles and Polania-Reyes 2012: 414).[73] That intrinsic motivation may be crowded out does not alone provide reason to refrain from using incentives. Making plain the mistake of this reasoning, Bowles and Polania-Reyes explain: "The intuition is transparent: the doctor who discovers that a treatment he has been prescribing is less effective than he thought may opt for stronger doses rather than weaker or for abandoning the treatment" (2012: 414). How much incentive should be used, in the face of crowding out of intrinsic motivation, will depend on the value of the good to be promoted, and the nature of the crowding effect.

In some cases then, the efficient response to crowding is to increase economic incentives, not remove them. I suggest the circumstances of the kidney shortage is a clear candidate. Of course, if one posits altruism as a fundamental value of transplant ethics, this point will be missed and an opportunity to save lives lost. Yet, consider the salient facts already discussed. Modest estimates indicate that each day 14 people die waiting for a kidney (OPTN data, November 2015). The human cost of the kidney shortage is staggering. The class of donors most vulnerable to crowding effects – non-directed donors – is in relative terms, minuscule. The crowding effects, if they occur, are unlikely to be significant. A transplant from a single living donor would be cost effective with payments in excess of $100,000 (Matas and Schnitzler 2004: 218). Given that the going rate is $0, we have considerable room to increase the incentive. Moreover, a point not often enough emphasized, the potential benefits accruing to vendors are significant. The upshot is this: the problem we confront is precisely the sort where the sophisticated planner would use incentives, even if crowding were present. Market opponents' eagerness to reject sales in response to the possibility of crowding is unwarranted. The policy conclusion that economic incentives ought not be used when they crowd out intrinsic motivation is premature.

Understanding *why* crowding occurs – its diagnosis – is also critically important. The thought that extrinsic incentives per se are to blame is overly simple. A more compelling explanation points instead to the significance attaching to such incentives. As Bowles and Polania-Reyes claim, incentives are imbued with meaning, and it is this that determines how people react to them: "What accounts for crowding out, we believe, is the meaning of the fines or subsidies to the target of the incentives" (2012: 418). When agents enter a market, their actions reflect, not only the content of their material desires, but also their self-conception, and the reputation they seek

[73] Bowles and Hwang (2008) and Bowles (2011) are cited as support.

to cultivate. An oversized SUV, in the Clinton administration, signaled high status. Perhaps now a fuel efficient Prius is more apt. That economic behavior serves these two distinct purposes is suggested by sociologist Charles Cooley's (1902) concept of 'the looking-glass self', according to which one's self-conception is the product of one's perception of others' judgments of oneself. On this view, "when people engage in trade, produce goods and services, save, and invest, they are not only attempting to *get* things, they are also trying to *be* someone, both in their own eyes and in the eyes of others" (Bowles and Polania-Reyes 2012: 415). Following Bowles and Polania-Reyes we may then usefully distinguish between 'acquisitive' and 'constitutive' market behavior; some choices are about acquiring goods while others are about becoming or signaling to others that you are a certain kind of person.

In positing this dual function of economic behavior, we are positioned to explain what is otherwise paradoxical. As has already been noted, there is considerable evidence that, for example, nominal compensation for acts generally considered charitable is liable to insult the target, and may be counterproductive. Most are averse to others' control, and aim to avoid the appearance of pettiness. Yet, in Ireland in 2002, when a tax on plastic bags was instituted, their use dropped precipitously, by 94% in just three weeks (Rosenthal 2008). Critically, the introduction of the tax was accompanied by a massive public relations campaign that presented the tax as part of an effort to preserve Ireland's natural beauty. This changed the meaning of the incentive. Those using cloth bags, rather than appearing petty, signaled to others and themselves a concern for the environment. Acting to avoid the tax, in this context, amounted to expressing values one endorsed.

As incentives can crowd out behavior, so too can they crowd it in. Once it is understood that incentives convey information, and elicit divergent responses as features of the context change, we are invited to harness these effects for desirable ends. In light of the evidence against the separability assumption our approach to policy requires attention to the complex ways contextual features endow incentives with meaning. Bowles favorably quotes Hume's recommendation that in designing policy, "every man ought to be supposed to be a knave." But, in light of developments in behavioral economics, he proposes a modification: "Good policies and constitutions are those that support socially valued ends not only by harnessing selfish preferences to public ends but also by evoking, cultivating, and empowering public-spirited motives" (Bowles 2008: 1609).

This insight has been partially recognized within the debate over kidney sales. While some remain adamantly opposed to compensation of any kind (Danovitch 2014, Delmonico et al. 2015), others are more open-minded. The form compensation takes is likely to influence how the public, and potential vendors, respond to it (Jasper et al. 1999, Jasper et al. 2004). A variety of proposals have been offered, suggesting compensation involve, for example, tuition vouchers, long term health insurance, tax credits, job training or employment itself (Matas and Gaston 2014). Also important is whether compensation is provided by a government or private agencies. Recent work shows this issue to be highly significant in how incentives are perceived (Niederle and Roth 2014). But this recognition is only partial as its focus is limited to the provision of compensation. The meaning attaching to the incentive, whatever its form, is partially determined by the cultural environment in which it is offered. Of course, repugnance is a powerful constraint on market activity (Roth 2007). It has significant influence on the cultural environment, one that is not easily overcome. We are, however, not helpless in effecting change. The milieu is not immutable. Attitudes can be altered; the framing of an issue can have a dramatic influence on

how it is perceived.[74] The history of organ donation attests to this fact. Current public acceptance of donation is the product of extensive, deliberate, and sustained efforts to craft a narrative that instills death with a new significance.[75] It is now an opportunity for a deceased loved one to live on in another. It is now an opportunity to give the 'gift of life'.

What then are we to make of the metaphor, the 'gift of life'? It is, no doubt, an appealing thought, one that has provided comfort to many who were otherwise inconsolable, and lifesaving organs to many more. These are genuine goods. Yet, the work of this chapter suggests the present requirement of unadulterated selflessness is misplaced. Decades of evidence demonstrate the tragic inadequacy of our insistence on donation. And in any other context we would immediately recognize as unreasonable the demand that those seeking to save lives do so either without compensation, or not at all. To prioritize altruism over welfare is a serious moral mistake. Yet, we need not jettison the metaphor entirely, but rather shift our emphasis. Instead of fixing on the gift given we ought to emphasize the life saved.

The foregoing suggests that the crowding objection lacks the force often attributed to it. Reflection on donors' actual motives reveals that the threat of crowding was never so serious. And attention to recent work in behavioral economics shows clearly that the lessons hastily draw by market opponents are mistaken. Instead of eagerly concluding that incentives will be counterproductive, we ought to consider what can be learned from behavioral economics. Rather than repeating, at higher volumes and with greater confidence, that the problems we confront are insoluble, we should reassess our evidence. A closer look gives reason for optimism. There is much to learn from behavioral economics. It is a valuable tool. But if wielded for exclusively destructive purposes, selectively and strictly in service of promoting one's pre-theoretical conclusions, much will be lost.

Conclusion

I have argued that the altruism requirement is morally unjustified. And further, that even if it were, it would not tell against kidney sales. Neither appeal to the intrinsic nor instrumental value of altruism supports the prohibition. While this conclusion, that altruism is morally insignificant, departs from much thinking in transplant ethics, when situated in the context of transplant policy in the United States it appears less radical. For, changes in the law suggest that the altruism requirement is perhaps better understood as a no payment requirement.

The National Organ Transplant Act (NOTA) of 1984 prohibits the exchange of human organs for "valuable consideration."[76] This legislation was carefully crafted to ensure that none could be materially compensated for a kidney, and none could receive a kidney in exchange for

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[74] For discussion of the phenomenon at the level of individual choice see Tversky and Kahneman (1981). For discussion of the phenomenon as applied to social movements see Benford and Snow (2000).

[75] For an insightful discussion of the efforts required to change public opinion about organ donation see Healy (2010). Drawing parallels with public resistance to life insurance, Healy describes the effort to construct and propagate a cultural account of donation that altered its meaning, and legitimized the practices as morally laudable. That attitudes can be changed is suggested by Lavee et al. (2013), which found that a concerted effort to overcome cultural opposition to organ donation, exerted by the Israeli government and medical leaders, resulted in significant increases in rates of donation.

[76] National Organ Transplant Act, U.S.C. Pub. L. No. 98-507, sec 301 §274e(a).

compensation. With the advent of paired kidney exchange, however, new questions arose as to what precisely qualifies as 'consideration.'[77] Shortly after such exchanges began to take place, bioethicist and legal scholar Jerry Menikoff argued that such transactions *do* involve valuable consideration, and amount to a "prototypical market transaction" (1999: 28). He noted that paired kidney exchanges were performed simultaneously, and suggested, plausibly, that the rationale for this was to avoid the legal challenges that may arise were one party to back out after their intended recipient received her transplant. Because, under NOTA, human kidneys could not be exchanged for consideration, they could not be subject to contract. Accordingly, were a donor to renege there would be no legal recourse.

Questions about the legality of paired kidney exchange have since been resolved as consistent with NOTA's prohibition. Not because, as a conceptual matter, Menikoff's analysis was mistaken. Rather, the 2007 passage of the Charlie W. Norwood Living Organ Donation Act made explicit that paired kidney exchange does *not* involve 'valuable consideration' and so is consistent with NOTA. Of course, such exchanges differ importantly from more familiar market transactions. Because only kidneys are exchanged, and not money, worries about coercion are lessened, as is the possibility that the poor will exclusively supply the rich. Further, concerns about overextension of the market into the non-market domain are mitigated. The matter, however, was resolved by legislative stipulation, not reasoning about contract law. Absent this act of congress, Stephen Choi and colleagues write that paired exchange "would almost certainly be regarded as a classical contractual exchange with consideration" (2014: 291).

In legally condoning such transactions, what is codified in United States' law is not a reaffirmation of the requirement of altruism. It is a clear insistence on the prohibition of payment. Exchange for consideration is permitted, even among strangers. What remains proscribed is a cash transaction. But if the altruism requirement is actually a covert no payment requirement, then this should be frankly acknowledged. And the debate over kidney sales should focus on those considerations that are, in fact, relevant to deciding the matter. This invites the question: What is it about the exchange of money that provokes such concern? I take up this question in the next chapter.

[77] It is notable that these arrangements are not called 'paired kidney donations,' but instead *exchanges*.

CHAPTER 3

KIDNEY SALES AND PROBLEMS OF CHOICE

Perhaps the most salient difference between currently accepted donation practices and the market proposal is the exchange of money. Money changes things. The Value of Life argument defended in this dissertation is predicated on this fact. Few are willing to undergo elective nephrectomy without compensation. This is unsurprising. Many will do for money what they would not do for free. This too is unsurprising. If enough can be persuaded to vend, and their compensation substantial, then their lives, and those of the recipients, may be appreciably improved. In this case, money changes things for the better.

But the introduction of incentives also introduces complications. Despite our enthusiastic embrace of capitalism, and the centrality of patient autonomy in medicine, the prospect of kidney sales arouses disquiet. Since the beginning of the debate many have doubted that vending represents a *genuine* choice. The potent intuition motivating this skepticism is forcefully expressed by George Annas, who writes, "there is really only one major argument against permitting a competent adult to sell his or her nonvital organs: sale is an act of such desperation that voluntary consent is impossible" (1984: 23). While the objections have become more sophisticated, choice continues to feature prominently in the debate over kidney sales. In this chapter, I address a range of objections appealing to features of the choice to vend.

A familiar set of objections appeals to problems with vendors' consent. It is often claimed that the incentives proposed would invalidate or otherwise compromise vendors' choice. Those taking this approach argue that the conditions for valid consent cannot be satisfied in a market. Some hold that vendors would lack the capacity or information necessary to grant morally transformative consent. Some claim the compensation would be irresistible, and so the choice to vend involuntary. Others contend that the inducement, a substantial sum, would be undue; potential vendors would be, blinded by dollar signs, unable to rationally assess their long-term interests. Still others hold that poverty, and the desperation it fosters, effectively coerces. In all of these cases, it is claimed, consent is compromised and so invalid.

These objections are unpersuasive. Some are predicated on implausible empirical claims. Some involve simple errors in reasoning. And most fail to distinguish donation from vending. But there is a further reason to deny that vendors' consent poses a problem for the market proposal. All of these objections presuppose the standard account of consent as *autonomous authorization*. This view is problematic. The consent requirement is justified as a means of protecting and promoting individuals' welfare and agency interests. These purposes are frustrated when one adopts the standard view. For, those who fail to satisfy its rather demanding conditions are left unable to engage in consent transactions that would promote their interests. The *Fair Transaction* model, recently proposed by Franklin Miller and Alan Wertheimer (2010), suffers no such defect. This model represents a more appealing way to conceive of morally transformative consent. And, I suggest, when applied to the question of kidney sales, consent based objections are further shown to be uncompelling. There is, I conclude, no reason to oppose kidney sales on the basis of vendors' purported compromised consent.

There is another way the choice to vend may be found objectionable, which I take up in part two. This line of reasoning points to harms thought to arise merely from the *option* to vend. These objections begin with the observation that the introduction of an option changes the set of choices one faces. They then claim this change is one for the worse. Two such challenges warrant special attention. Simon Rippon (2014a) argues that the market will impose on the poor harmful

social and legal pressures to vend. His conclusion is the rather strong one that even a well regulated market would inflict harmful pressure on those in poverty. Debra Satz (2010) argues that the introduction of a market may unjustly impose on some a cost for their preference not to vend. That is, some may be financially penalized, in the form of a pecuniary externality, for exercising their choice not to sell a body part. These objections are important contributions to the debate over kidney sales. They draw attention to potentially significant harms to those who *don't* participate in the market. This is a large class, and hence the purported harm is potentially widespread. Moreover, a strength of these arguments is that they do not depend on showing that vending itself is harmful. This point is critical as it legitimately distinguishes vending from donation.

I argue that both objections fail. Both Rippon and Satz reason from a common but mistaken view of the market's influence. Empirical facts about the demand for kidneys, in comparison to the number of potential vendors, suggest that vending would be incredibly rare. Once this fact is appreciated, it becomes clear that neither the social pressures that concern Rippon, nor the externalities that Satz points to, are likely to materialize. Thus, without even questioning the moral significance of the purported harms both objections are shown to fail. I further argue that the normative considerations Satz takes to count against sales, on examination, in fact recommend them.

Preliminaries

Neither in this chapter, nor elsewhere in the dissertation do I offer extended treatment of the familiar objection that kidney sales are exploitative. This may come as a surprise. As that charge is among the most frequently expressed by those opposing kidney sales. It seems kidney sales are, in the minds of many, paradigmatic of exploitation. Here I briefly explain why this apparent lacuna is merely apparent.

While the charge that kidney sales are exploitative is commonly leveled, it is rarely stated with any precision, and usually instead functions as an expression of disdain. In many cases the charge follows after some other objection is articulated, almost as punctuation. It rhetorically reinforces the author's conviction that sales are morally objectionable, rather than identifying an additional harm. So, when opponents describe the market as exploitative they are not together fixing on a shared moral concern. They are expressing a diversity of objections with the same accusation. Thus, the ubiquitous claim that kidney sales are exploitative is explained, not by its cogency or importance, but by the widespread resistance to kidney markets generally. The charge of exploitation, as picking out a distinctive moral wrong, is far less common than appearances suggest.

Of course, in some cases the objection does attach to something of distinct moral importance. Yet, even when substantive, the claim takes on a range of meanings. In some cases, the objection of exploitation is better understood as a concern about objectification or instrumentalization.[78] Opposition to sales grounded in these concerns often relies on comprehensive doctrines

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[78] An analysis of exploitation as "*harmful, merely instrumental utilization*" is suggested by Allen Buchanan (1985: 87). John Harris (1992: 120) makes a similar distinction between two kinds of exploitation claims, one he describes as "wrongful use," which picks out the worry of instrumentalization, and the other "disparity of value," which picks out the worry of unfair advantage taking, to be discussed below.

reasonable citizens may reject.[79] Because these objections could not justify a coercive public policy, they are excluded from my discussion. In some cases, the objection of exploitation follows from a Marxist critique of capitalism.[80] Such challenges are also excluded for the same reason.

There *is* an interpretation of the exploitation objection that appeals to fairness considerations, which deserves notice. Alan Wertheimer's (1999) careful study of the concept begins with the suggestion that, stated generally, exploitation arises when one takes unfair advantage of another. He immediately acknowledges that this offers little insight, as it introduces the equally thorny question of what counts as 'unfair advantage'. Yet, even absent an account of fairness, it is easy to see why so many regard kidney sales as fitting the bill. Most associate the sale of a body part with desperation. And desperation with vulnerability. Lacking any bargaining power, one can easily imagine the poor accepting abysmal terms, terms many naturally describe as unfair.

It is not accidental that those pressing this version of the exploitation objection often invoke the miserable conditions of kidney sales in places like Chennai, India. For, in those locations, slum dwellers are so destitute they may be persuaded to part with a kidney for levels of compensation that strike most as a pittance. In such cases, even if the transaction is beneficial to the vendor, the exploitation intuition lingers. These exchanges may constitute, in Wertheimer's terms, "mutually advantageous exploitation" (1999: 14). The transaction may be a Pareto improvement, though still thought unfair. The worry is made vivid by the image of wealthy Westerners deliberately seeking out the worst off, so as to minimize what must be offered to render the choice to vend rational. This seems to many to amount to taking unfair advantage.[81]

If the exploitation objection is interpreted as a claim about fairness, it ceases to apply to the market proposal defended in this dissertation. Even absent an account of fairness, it is hard to see how consenting and informed vendors, given proper care, and compensation of approximately $100,000, can claim the exchange amounts to taking unfair advantage. The objection that sales are exploitative is most compelling in the context of a free market, where prices are determined by demand. It is unpersuasive when posed as a challenge to proposals like that of Erin and Harris (1994), which ensure fair payment.

While this response defuses the charge of unfairness, it does introduce a new concern. For the problem of exploitation is solved by ensuring generous compensation, but such offers are claimed to compromise voluntary choice. Similar issues arise in debates about surrogacy. Wertheimer observes that, if adequately compensated, surrogate mothers would not be exploited (in the unfair advantage taking sense). But increased compensation is not usually proposed as a solution to the problem of exploitation in that context. This is because the offer's "effect on the quality of the surrogate's consent" (1999: 108). As with surrogacy, with vending, an offer too large is claimed to compromise autonomous choice. With so much at stake, some argue vendors would be unduly influenced by the money, and their consent defective.[82]

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[79] Kant's work features prominently. See, for example, Morelli (1999), Cohen (2002), and Kerstein (2009, 2014).

[80] Paul Hughes (1998) takes this approach. His opposition, presented as an objection to kidney sales, in fact applies to virtually all market activities of the proletariat. Kate Greasley (2014) also claims that kidney markets are exploitative. Her argument also casts its net too widely, delivering a conclusion much like Hughes'.

[81] My purpose here is not to defend this objection, but only to articulate it. As will soon be apparent, its cogency is irrelevant.

[82] Some describe undue inducement as a form of exploitation (Beauchamp 2010). I take this to be a merely verbal difference, the resolution of which would not influence the arguments that follow.

And so it should be clear now why my treatment of the exploitation objection is limited, and why it appears in a chapter taking up the issue of consent. In some cases the objection merely expresses disapproval. It doesn't pick out an additional moral harm. In other cases, the objection is really one about objectification or instrumentalization, and relies on non-public reasons. And when interpreted as a concern about unfair advantage taking, it lacks force as a challenge to the proposal I defend. The conditions of the transaction are not plausibly described as exploitative. Yet, the compensation on offer is significant. And so we arrive at the substance of part one of this chapter: consent.

PART ONE: VENDORS' CONSENT

Many things one person may do to another are permissible only after a successful consent transaction, that is, when consent has been given and received. Consent is, in this way, morally transformative. It makes a trespasser a house guest, and changes a kidnapping into a night out. It is the difference between sex and rape. The moral character of these and other acts is *essentially* connected to consent.[83] Elective nephrectomy seems to be an act of this kind. Absent consent, the removal of my kidney is battery. With my consent it is something else entirely. It is widely accepted that one may consent to living kidney donation. Such acts are encouraged. This is what makes consent based objections to kidney sales puzzling. Those who oppose sales on the basis of consent must explain how the exchange of money invalidates consent to a procedure that is otherwise permitted.

§1. *Autonomous Authorization*

The prevailing model of morally transformative consent in medicine is autonomous authorization.[84] As analyzed by Beauchamp and Childress, this requires "(1) competence, (2) disclosure, (3) understanding, (4) voluntariness, and (5) consent" (2009: 120). Accordingly, on this account, a patient that is competent to choose validly consents to a plan when her choice is informed and voluntary. It is noteworthy that the standards of consent in medical, as opposed to commercial, contexts are comparably high. This is explained by the emphasis placed on patients' autonomous choice. Although not unanimous, there is widespread agreement that the fundamental justification for the consent requirement is the value of autonomy.[85] For consent to be morally transformative it must express the patient's authentic choice.[86]

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[83] There are, however, limits to the transformative power of consent. For example, consent offers no legal defense of murder or assault. For an insightful discussion of the limits of consent, see Bergelson (2007).

[84] Perhaps the best known formulation of the autonomous authorization account of informed consent is presented in Beauchamp and Childress (2009). My discussion here is significantly informed by this work.

[85] Noteworthy articulations of this view include Faden and Beauchamp (1986), Dworkin (1988), and Beauchamp and Childress (2009).

[86] There is an instructive parallel between this account of consent and Peter Strawson's (1974) view in *Freedom and Resentment*. Just as exempting conditions (e.g., non-culpable ignorance) render blame inapt, conditions that undermine autonomous choice are thought to render consent invalid. In both cases, what Scanlon calls one's "quality of will" is thought to be necessary and

The approach taken by those opposing sales on the basis of consent is to identify a necessary condition for valid consent, and then argue it will not be met in a market. I turn now to assess these objections.[87]

Competence and Information

The suggestion that vendors would lack competence to vend is among the weakest of such appeals. Many assume only the poorest would be willing to vend. And from this some have reasoned vendors would be "underprivileged and undereducated" and so unable to "fully understand" that to which they consent (Sells 1993: 2983-2984). I have elsewhere offered reason to doubt that only the poor would be interested in vending, and presented evidence suggesting a regulated market might exclude the poorest potential vendors for health reasons.[88] But the claim that the uneducated lack competence to vend is unpersuasive on its face. After all, many donors currently are uneducated yet deemed capable of consenting. Many also undergo other medical procedures requiring consent, some of which are more complex than nephrectomy. Further, standards of competence are relatively low and easily met by most adults (Beauchamp and Childress 2009: 114-115). This objection, like many, fails to meaningfully distinguish between donation and sales.

Another objection claims that what is lacking is not the vendor's capacity or understanding, but the necessary information. "Of course, poor people can make decisions," Arthur Caplan explains, "But the capacity to decide is only a part of what is required to make a free, voluntary choice. Information is required to weigh the risks both of donation and of sale. But information is sadly lacking about what happens long-term to living donors" (2007: 432). This objection is unpersuasive. It warrants attention only because its source continues to play an influential role in medical ethics. Like others, Caplan's objection here fails to meaningfully distinguish between donation and sales. Oddly, this point is evident in Caplan's own formulation of the objection. A lack of information about the long-term health risks of elective nephrectomy cannot be taken to preclude consent to vending, but not to donation.[89] An additional problem with this objection is the unreasonably high standard imposed for what would qualify as an informed choice. Many important medical procedures involve uncertainty. And to the extent that we *do* know about outcomes in medicine, this is only because many patients have, without full information regarding outcomes, undergone these procedures. Finally, one might point to the fact that those with higher socioeconomic status are better equipped to seek out information relevant to their choice beyond that which is supplied by the medical team. While this is true, any such information will exceed the information requirements imposed by the autonomous authorization model of consent.

The suggestions that consent is not possible because vendors will lack competence or information are unpersuasive. Neither meaningfully distinguishes between vending and donation.

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sufficient for moral transformation. For discussion of Strawson's view as a Quality of Will theory, see Scanlon (1988: 160-166). This connection is made in Miller and Wertheimer (2010: 81).

[87] Janet Radcliffe Richards (2010) offers a insightful discussion of the issue of consent to sell body parts, from which I have profited tremendously.

[88] These same heath considerations would also disqualify potential *donors*.

[89] Caplan understates the available information. Even years before his quoted remarks evidence suggested that elective nephrectomy was safe (Najarian et al. 1992, Matas et al. 2003). More recent studies confirm this (Ibrahim et al. 2009).

And both point to remediable problems. Thus, neither supplies reason to think vendors' consent would be invalid.

Voluntariness

Challenges appealing to voluntariness receive much more attention. Such objections emphasize the influence of compensation on consent, and so distinguish between vending and donation. These objections come in many forms.

Irresistible Offers. Some claim potential vendors' consent will be invalid, not because the offer of money undermines their capacity for rational choice, but because the offer will be irresistible. Caplan offers a typical expression: "Choice is imperiled by high compensation, not because the sellers are rendered irrational by the prospect of money, but for those in need of money certain offers, no matter how degrading, are irresistible" (2004: 1933).[90] We should, however, not accept the claim that an offer can be so appealing that it cannot be chosen voluntarily. As many market advocates have noted, that one has few options, or that one of those options is far and away better than the others, is insufficient to render one's choice involuntary.[91] Of course, every day people validly consent to life saving treatments, and autonomously collect lotto jackpots without incident.

Undue Inducement. A more promising tack claims that the offer of compensation interferes with one's capacity for rational decision making. [92] The concept of undue inducement receives much attention in research ethics, but may be put to use in formulating a challenge to kidney sales.[93] As standardly understood, for an inducement to count as undue, four conditions must be met:

> 1. *An Offered Good*—Individuals are offered something that is valuable or desirable in order to do something.
> 2. *Excessive Offer*—The offered good must be so large or in excess that it is irresistible in the context.
> 3. *Poor Judgment*—The offer leads individuals to exercise poor judgment in an important decision.
> 4. *Risk of Serious Harm*—The individual's poor judgment leads to sufficiently high probability that he or she will experience a harm that seriously contravenes his or her interests. (Emanuel 2005: 9)

The central idea is that an offer interferes with one's capacity for rational judgment, which causes them to undertake an excessively risky course of action. It should be emphasized that these

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[90] The same objection, holding that the choice is irresistible, and so undermines voluntary consent, is offered by Capron (2014: 57), Annas (1984: 23), and Sells (1991: 21). In a similar vein, Paul Hughes claims, "people whose circumstances engender no practical alternative to acting in a certain way (e.g., selling a kidney) may be regarded as acting under duress or necessity" (2009: 609).

[91] This reply has been given by S. Wilkinson (2003: 117-126) and Radcliffe Richards (1996: 383), among others.

[92] I have here classified undue inducement, as is standardly the case, as a challenge to the voluntariness element of informed consent. However, one might reasonably categorize undue inducement as undermining the element of competence, as it functions by compromising one's rational capacity.

[93] Recent work on the design of an ethical kidney market takes seriously the worry that vendors would be unduly induced (Fisher et al. 2015).

conditions are individually necessary. Absent any one, and the charge of undue inducement is misplaced.[94]

One rather forceful reason to reject this objection is the total absence of evidence that vendors would exercise poor judgment. To the contrary, there is evidence suggesting that payment for clinical research does *not* impair judgment (Bentley and Thacker 2004, Halpern et al. 2004). And, more to the point, evidence specifically investigating the issue in the context of kidney sales that further suggests undue inducement is of no concern (Halpern et al. 2010). Nonetheless, there is no shortage of armchair speculation that vendors would be unable to think through their choice clearly. Many market opponents are quite comfortable offering their intuitions about the matter. However, if one is already convinced that vending is wrong, it is unsurprising that one would also think the choice to vend an exercise of poor judgment. We ought not base important policy issues on sheer speculation.

Reflection on currently accepted practices of donation casts additional doubt on the claim that vendors would be subject to undue inducement. For most donors, the inducement is provided by the impending death of a loved one. If ever there were occasion for rash judgment it would be in these circumstances. Evidence suggests most donors decide quickly and with little consideration of the facts. A recent survey found that more than 75% of donors "made the decision to donate 'instantly,' and that information about surgery made little difference to their decision" (Stothers, Gourlay, and Liu 2005: 1109).[95] Of course, we do not take donors' consent to thereby be invalidated. As is the practice, a period of time passes between the choice to donate and the procedure. It is not settled in a single afternoon. This period, combined with additional screening, is sufficient to ensure that the choice is adequately endorsed by the donor. Because these conditions do not qualify as undue inducement, nor should those of vending.

There is also the issue of risk. We already allow donors to undergo the risk of nephrectomy. This suggests the risk is not 'excessive.' But two further points should be made. First, when clinical research proposals are reviewed the assessment of risk is not modulated by the payment offered. The IRB is "required not to consider the incentives as a benefit in their assessment" of the risk-benefit ratio (Emanuel 2005: 11). This seems a mistake. Insofar as undue inducement is supposed to operate by undermining one's capacity to rationally weigh risks and benefits, and one rationally considers the payment as a benefit, to assess the level of risk independent of the reward is unjustified. Hazard pay is offered in recognition that people assess risk with consideration of reward. Similar consideration should apply in the context of vending. This supplies further reason to doubt that vending is excessively risky.[96] Second, if we were to conclude that the conditions of vending *do* count as meeting the standards of undue inducement,

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[94] While, as noted, these four conditions are accepted as necessary for undue inducement in research ethics, I find no rationale for requiring that the offer be *excessive*. What matters morally in cases of undue inducement is that one's rational capacity is hampered by an offer that leads one to accept significant risk. While high compensation is apt to do this, other forms of compensation, that are not excessive, may have the same effect. Perhaps, for example, the promise of a handwritten birthday card from Adam Sandler would impair my judgment.
[95] This consideration, it should be noted, also militates against the claim discussed above, that vendors' consent would be invalid because uninformed.
[96] A further point worth mention, but which I cannot fully explore here, is that the assessment of risk should be made in comparison to the alternative courses of action. Insofar as we take risk to be morally relevant, we ought not foreclose one option on the basis of an absolute measure of risk if the result is that another more risky option will be taken instead.

many in poverty would not be capable of validly consenting to their employment. That is, if we interpret the four necessary conditions for undue inducement such that vending qualifies, then we will discover many who work in dangerous labor – e.g., fishing, coal mining, forestry – are also incapable of validly consenting to the terms of their employment. This is an implausible result.

The objection that vending would compromise valid consent on account of undue inducement fails. There is no reason to think vendors incapable of exercising good judgment, steps may be taken to ensure the choice is well-considered, and the risk of harm is not excessive.

Coercion by Poverty. A different challenge claims that, because of their impoverished circumstances, vendors' consent will be invalid.[97] This is the 'coercion by poverty' objection. In contrast to cases of undue inducement, the threat to autonomy in this case is not the appeal of the offer, but the background conditions from which the vendor chooses.[98] James Stacy Taylor, in his influential defense of kidney sales on the grounds of autonomy, devotes considerable attention to this argument, describing it as "simple, elegant and highly persuasive" (2005: 34). I consider Taylor's treatment in some detail in part because his articulation of the position is clear, but also because his analysis demonstrates a persistent mistake in reasoning, one which hampers the debate over kidney sales.

The argument begins with the observation that vending is risky and unpleasant, and likely only done out of desperation. Taylor elaborates:

> The motivation of the typical kidney vendor would thus be very similar to that of any typical victim of coercion who is also forced by his coercer to act out of a desire to prevent his situation from becoming worse – for example, to prevent himself from being shot if he refuses to hand over his wallet to a highwayman. Thus, the proponents of the argument from economic coercion continue, the agents concerned are required by their situations to perform actions that they would nor otherwise perform, and that they resent performing, but which they do anyway from fear of the consequences if they do not. […] Thus, the proponents of the argument from economic coercion conclude, respect for the personal autonomy of potential vendors requires that such markets be prohibited, not allowed. (2005: 33)

Taylor (2005: 63-70), over the course of two chapters, responds to this challenge by arguing that coercion essentially involves ceding control over one's actions to another, that only intentional agents can control, and that poverty is no such agent; therefore, he concludes, poverty cannot coerce. He thus contends that vendors would not suffer impaired autonomy with respect to their choice to vend. While some of his discussion of autonomy is interesting, the coercion by poverty argument is refuted straightforwardly. Moreover, his resolution leaves something to be desired.

In the above construal, Taylor likens poverty to a highwayman. Whereas the highwayman demands, 'give me your wallet or lose your life', poverty demands 'sell your kidney or do something you consider worse.' As Taylor stipulates, the alternative to the kidney sale is regarded

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[97] The objection, as if too obvious to state, is often framed as a rhetorical question: "Surely abject poverty, such as is seen in urban slums in Bombay and Calcutta can have no equal when it comes to coercion of individuals to do things – take risks – which their affluent fellow-citizens would not want to take?" (Dossetor and Manickavel 1992: 63).

[98] A distinct objection claims that the background conditions of poverty will render the poor vulnerable to third-party coercion. I take up this objection in part two of this chapter.

as the lesser option. It is so bad one would prefer to sell a kidney to avoid it. Given this, it is surprising that Taylor would then entertain the suggestion that removing an option, in either of these cases, would promote autonomy. For, if one is prohibited from handing over one's wallet, or from selling one's kidney, then one is forced to the even less desirable option. Janet Radcliffe Richards, granting poverty the status of metaphorical coercer, offers a similar response (1996: 382). When one understands how coercion works, it becomes obvious that foreclosing further options is wrongheaded. To successfully coerce another, one constrains the other's choice set until the best available option is that which one wanted them to select. The highwayman eliminates the option of you keeping both your wallet and your life, thus making the option to hand over your wallet the best one. She concludes that, if one thinks poverty amounts to a kind of coercion, removing options only makes things worse. This is, I believe, approximately the right response.[99] Importantly, this response is appropriate whether the agent of coercion is poverty or the highwayman.

Taylor, however, rejects Radcliffe Richards's reply. "Despite its simplicity the argument from economic coercion has occasionally been misunderstood," Taylor writes, "which has sometimes led to its too-swift dismissal" (2005: 52). He clarifies his construal of the argument:

> [It is] *not* based on the view that such a market itself coerces the poor into selling their kidneys, as Radcliffe Richards's response to it implies. Rather, it is based on the view that allowing a current market in human transplant kidneys will *enable* coercion to take place. Once this is recognized one can reconstruct the argument from economic coercion in a manner that avoids Radcliffe Richards's objection. A current market in human kidneys would enable the poverty of destitute people to coerce them into selling their kidneys, and would provide the necessary conditions for the poor to suffer from impaired autonomy. (2005: 53)

Taylor's claim here is puzzling partly because Radcliffe Richards's response does not imply that the market is the agent of coercion, but explicitly notes that the "commonest agent of alleged coercion is poverty" (1996: 381). Questions of interpretation aside, we should reject Taylor's reconstruction of the argument. It is as unpersuasive as the original.

Of course the option to sell one's kidney is a necessary condition for a kidney sale. Similarly, the option to hand over one's wallet is necessary if one wants to appease the highwayman. But these facts supply no reason to foreclose either option. It may be true that I do not validly consent to the highwayman's request. This simply means the highwayman cannot appeal to my consent when defending his actions. Incidentally, I wouldn't validly consent to being shot either. Taylor seems not to appreciate that the agent of coercion, poverty or the highwayman, is not removed when one's options are. He is right – in closing the option to vend I cannot be coerced to vend. But this has the perverse consequence of consigning me to something I judge to be worse, and something to which I also do not validly consent. If we thought the choice to vend was coerced, then surely I am coerced when forced to take the option I perceive as worse than vending. When the highwayman alters my choice set so as to exclude the option of keeping both my wallet and my life, one does me no favors in also removing the option to give my wallet.

To be clear, I agree with Taylor that poverty is no agent of coercion. Nor should we think cancer coerces patients into chemotherapy, or end stage renal failure coerces them into dialysis or transplant. We should reserve the term for the undue controlling influence of literal agents.

[99] Here Radcliffe Richards moves too quickly. As I discuss in part two of this chapter, the addition of an option can, in some cases, effectively reduce one's choices.

However, Taylor's strategy, of showing that vendors would in fact autonomously consent, is problematic. For, in some cases autonomous authorization may be impossible. It would be a moral disaster to prevent one from paying the highwayman on account that one's choice was not autonomously authorized.

I suggested above that Taylor's response demonstrates a common mistake in the debate over kidney sales. I now want to make that explicit. The merits of the market proposal are essentially comparative. If we have reason to allow kidney sales, it is that we think this course of action preferable to the alternative. However, this crucial point is often underappreciated. Much discussion focuses exclusively on facts about the sale itself. For example, Julian Koplin (2014) concludes that vending is bad for vendors because he takes the harms of the transaction to exceed the benefits. I argued in chapter one that he is mistaken on this point, but even if Koplin were right about these facts, he would not have demonstrated his conclusion. To demonstrate that vending is bad for vendors one must show that vendors are worse off vending than they would be on the course of action undertaken instead. Koplin does not do this. Similarly, Taylor has focused narrowly on facts about the transaction itself. In responding to the coercion by poverty objection, he seeks to show that the act of vending is unobjectionable. But what instead must be shown is that the act of vending is preferable to the alternative. The importance of this point is not easily understated.

While the coercion by poverty objection fails, a similar and more troubling possibility is in the offing. While poverty doesn't coerce, third-parties might. Though I will later argue the objection that vendors will be subject to third-party coercion is misplaced, our model of consent should accommodate the possibility of such cases. We need an account of morally transformative consent that delivers plausible results even when the quality of one's choice is compromised. And the autonomous authorization model, on this score, falls short. I turn now to elaborate the problem with this model of consent, and present an alternative.

§2. *The Fair Transaction Model*

It is widely held that the consent requirement is justified on the basis of autonomy. That persons are able to control their bodies and what happens to them is of obvious moral importance. And the autonomous authorization model of consent effectively protects agents from being treated in ways which they did not choose. If one's token of consent fails to satisfy the conditions of autonomous authorization then it is invalid, there is no moral transformation, and the transaction does not proceed.

As Miller and Wertheimer (2010: 93) have argued, while the autonomous authorization account does a sterling job preventing uninvited incursions, it fails miserably to serve patients' interests when their autonomy is compromised. This is a serious problem, not just for consent in medical contexts, but for consent transactions in general. If all consent transactions are precluded if one's autonomy is impaired, then the consent requirement, which was supposed to promote personal autonomy, will effectively limit it. Just as one exercises autonomy when refusing to engage in consent transactions, one also does so when proposing them. Miller and Wertheimer offer as an instructive example the case of the mentally disabled consenting to sexual relations:

> Consent by the mentally retarded exhibits the tension between the negative or protective and positive or facilitative functions of consent. We could protect the mentally retarded from sexual predators by claiming that they are simply not capable of giving valid consent to sexual relations, but doing so would come at the price of disabling them [from] participating in an important dimension of human life. (2010: 89)

If we emphasize the protective function of consent we risk neglecting its facilitative purpose. And this can be costly. This case also brings out the role consent plays in promoting welfare. Autonomous action may contribute instrumentally to one's welfare, and may also be a constitutive component of it. But even in the absence of considerations of autonomy, it is evident that consent transactions can also promote agents' welfare.

As should be clear, concerns about defective consent have featured prominently in the debate over kidney sales. They also highlight the shortcomings of the autonomous authorization model. Consider the following consent-based objections:

> [W]hen it comes to markets in organs, there are good reasons to think that many of the sellers are not acting voluntarily. "When people are choosing between selling their children and their kidneys to meet essential family needs or to temporarily escape crushing debt, coercion and exploitation—not autonomy—are the more apposite terms." (Capron 2014: 57)[100]

> Watching your child go hungry when you have no job and a wealthy person waves a wad of bills in your face is not exactly a scenario that inspires confidence in the 'choice' made by those with few options to sell vital body parts. (Caplan 2014: 412)

While these authors take themselves to be offering reason to oppose sales, the reasons they supply most obviously suggest the opposite. Let us assume, as these opponents believe, that these potential vendors' consent falls short of autonomous authorization. They are nonetheless faced with a choice. And, if it is between, as Capron suggests, selling either a child or a kidney, morally decent people do not foreclose the option to vend, thereby forcing the sale of a child. It is similarly perverse to recommend, as Caplan implies, that one should be forced to keep both kidneys and watch one's family starve. I consider these claims, not because I think they accurately represent the conditions of likely vendors in a regulated market (I think they do not), but because they make vivid the theoretical limitations of the autonomous authorization model.

To insist that moral transformation requires autonomous authorization is to lose sight of the purpose of the consent requirement. The point is put nicely by Miller and Wertheimer: "Although we may think that we are offering agents protection of their (negative) autonomy when we refuse to treat their consent as transformative," they write, "to prohibit them from entering into (otherwise) consensual transactions is to prevent them from moving from a very bad state of affairs to a less (but still) bad state of affairs, and this is inconsistent with the fundamental values that consent is meant to serve" (2010: 93). What is required is a conception of morally transformative consent that functions under non-ideal circumstances. In many cases agents lack the capacity for autonomous authorization, but stand to benefit from engaging in consent transactions. The autonomous authorization model excludes too many and at too high a price.

Miller and Wertheimer (2010: 81), propose a promising alternative, the Fair Transaction model, according to which one permissibly proceeds to transact with another when one has treated the other fairly, and responds reasonably to the other's expression of consent. The account, as so far developed, is lacking much detail. It crucially employs the concept of fairness, which is a substantive matter. Moreover, it is offered as a theory of consent transactions generally, not only in the context of medicine. The view is ambitious. Yet, it is, as they describe it, a *preface* to a theory of consent transactions. Given my limited interest here, I will only offer a

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[100] Here Capron quotes from Biller-Andorno and Capron (2011: 1390).

brief sketch, and focus on those aspects of the account relevant to my present aim, namely, how to conceive of morally transformative consent when autonomy is compromised.

The idea central to the Fair Transaction model is this. Consent transactions are morally transformative when they satisfy the conditions of fairness appropriate for the domain in which the exchange takes place. Thus, "a consent transaction between B and A is morally transformative if B tokens consent under conditions in which A has acted fairly toward B or," and this is a critical addition, "in the case of a flawed or unsuccessful consent transaction, that A is permitted to proceed in the absence of B's consent if it is fair for A to do so" (Miller and Wertheimer 2010: 94). On this account, voluntariness, information, and competence remain important elements in moral transformation. But how they feature in the transaction is modulated by the standards of fairness appropriate to the domain of exchange. For example, as Miller and Wertheimer observe, in a casino the bar for competence is low. A lot of people are drunk and many labor under the gambler's fallacy. They may consent to whatever bet they like. Still drunk, however, their consent to sex falls short of moral transformation. Competence to undergo elective nephrectomy is still more demanding. You've got to be sober and psychologically stable. The point to emphasize here is that morally transformative consent is analyzed in terms of fairness, not autonomous authorization. And what counts as 'fair' varies by context.[101]

The Fair Transaction model appears to be a better guide to morally-transformative consent than that of autonomous authorization. One virtue is brought out in assessing flawed consent transactions. Consider

> *Lawn Blower*. A asks B whether he can borrow B's lawn blower, about which (unbeknownst to A) B is quite proprietary. B mistakenly thinks that A has asked to borrow his lawn mower, about which he is not proprietary. B says, "Sure, it's in my garage; help yourself when you need it." (Miller and Wertheimer 2010: 85)

In this case it is clear that B has not autonomously authorized the use of his lawn blower. But it is not at all clear that A acts wrongly in borrowing it. Indeed, A does not. This brings out an important feature of Miller and Wertheimer's account. Theirs is not a "quality of will" theory. On this account, consent is morally transformative when the consent transaction has a certain character, rather than when the agent's mental states satisfy some description. This accommodates the fact that consent transactions are *bilateral*. Of course it matters that B's negative autonomy interests are served. It matters that B consents. But it also matters that A's positive autonomy interests are served. It matters that A is treated fairly in accepting B's token of consent, given that it was secured under fair conditions.

Another feature of the Fair Transaction model comes out in cases where background conditions are problematic. Consider this variation on the standard case of coercion

> *Highwayman Transfer*. Dissatisfied with the contents of B's wallet, A credibly threatens to shoot B unless B has C transfer B's savings into A's offshore account.

[101] To be clear, the Fair Transaction model offers an account of morally transformative consent in general, and not merely in medical contexts. Further, it is not derived from, or subsidiary to, the autonomous authorization model. It is not a 'second best' alternative taken only when conditions preclude autonomous authorization. It presents a fundamental account of the concept of morally transformative consent.

I suggest *Highwayman Transfer*, although it involves third-party coercion, is no more morally complicated than the original. There may be reasons for C not to complete the transfer. C may not want to be implicated in A's coercion of B. Or we may want to avoid setting a precedent. But insofar as we are concerned about B giving C morally transformative consent, the case is clear. B should not be prevented from engaging in a consent transaction with C on the grounds that B's consent is defective. In contrast to standard cases, here the coercer is not also the person seeking consent. The transaction is bilateral, taking place between B and C. And the question, on the Fair Transaction model, is whether *that* exchange is a fair one.

Now, returning to the matter of consent to kidney sales, we can see how the Fair Transaction model is applied. Again, the concern is most acute in a case of third-party coercion, when a literal agent makes a credible threat.[102] Consider

> *Abandonment*. B is financially dependent on A, who has full parental rights over the couple's children. A has threatened to leave B, taking their children, unless B sells a kidney. B prefers to remain with the children and pursues a kidney sale with C.

There is much we might say about these circumstances. We may judge B's choice imprudent. Perhaps we think the end of the relationship is inevitable anyway. Perhaps we think the imbalance of power toxic and so the relationship not worth continuing. And we likely regard A as abusive. But the question is not whether B should vend, or should be permitted to vend, for many unrelated considerations bear on these matters. As in *Highwayman Transfer*, C may not want to be implicated in A's coercion of B. Or we may think it would set a bad precedent to allow the sale; perhaps we expect others to pursue A's strategy in their own homes. But what is at issue is whether B can give morally transformative consent to C. And again, that is determined by the conditions of the bilateral exchange between them. B's circumstances are plainly miserable. But to deny B the ability to enter into consent transactions that B judges beneficial is to further worsen her condition.

The above considerations are not intended to suggest consent poses no problem. They are not intended to imply that third-party coercion is unimportant, or that it can easily be dealt with. The point to emphasize is that there are cases in which the voluntariness of one's choice is compromised (e.g., *Highwayman Transfer* and *Abandonment*), but when one may nonetheless give morally transformative consent.[103] On the autonomous authorization model, B's consent is invalid because a controlling influence renders choice involuntary. I claim this is the wrong conclusion to draw. The Fair Transaction model delivers the right verdict even in constraining conditions: B's consent is morally transformative.

In closing my discussion of consent, I want to clarify the reason for rejecting the autonomous authorization model. The motivation is largely theoretical. In the context of the market proposal I defend, it likely makes little practical difference. Many consent-based objections, like those articulated above by Capron and Caplan, probably *can* be accommodated by the autonomous authorization model. As argued, background conditions of poverty are not coercive and do not

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[102] Miller and Wertheimer (2010: 96-97) develop this aspect of the Fair Transaction model of consent with a case involving a pimp, a prostitute, and a john. My discussion parallels theirs, adapted to the context of a kidney sale.

[103] Notice, on the Fair Transaction model, one's consent may be morally transformative *even* if predicated on misinformation, or misunderstood (e.g., *Lawn Blower*). What is crucial is that both parties are treated fairly according to the norms appropriate for the context of the bilateral transaction.

invalidate consent. So, in many cases the two models of consent will deliver the same results. Moreover, as I argue in part two of this chapter, those conditions in which the models do diverge, when consent truly is non-autonomous as a result of third-party coercion, are unlikely to arise in a regulated market. This is not to say there is no practical import of adopting the Fair Transaction model. Even if roughly extensionally equivalent, we should prefer an account that delivers the right verdicts for the right reasons. The correct model will be modally robust. It will reliably deliver the right verdicts, even in unusual cases. Beyond this, there is the ancillary consideration of questions of consent to kidney sales in other markets, where the concern about third-party coercion is more salient. While I do not address that topic directly, I do note that the Fair Transaction model of consent may have important practical implications for markets in other parts of the world.

The foregoing suggests there are no good reasons to oppose kidney sales on the grounds of consent. Although such objections are common, and have featured in the debate since its inception, none are supported by reason or evidence. Some challenges are predicated on empirically implausible assumptions. Some involve blatant errors in reasoning. And many of the arguments would persuade no one when presented in relevantly similar contexts. I turn now to a related pair of objections, focusing on the *choice* to vend.

Part Two: Vending as a Bad Option

One of the more remarkable claims of Richard Titmuss's (1971) *The Gift Relationship* is that the option to sell one's blood deprives others of the freedom to give a special kind of gift. At the time, this struck many as odd. Kenneth Arrow's response captures what some thought counterintuitive about Titmuss's claim: "if to a voluntary blood donor system we add the possibility of selling blood, we have only expanded the individual's range of alternatives" (Arrow 1972: 350). What this reply overlooks is that the addition of an option to a set can change the nature of one's choices. One could still donate blood alongside those who were paid, but the perceived significance of the gift would be altered.

But the phenomenon is general. The addition of a choice, even if not taken, changes one's choices. And in some cases having more options is worse than having fewer. This idea is clearly articulated by Gerald Dworkin (1982). Of course, more choices may require time and energy to acquire information and deliberate, and may make regret more likely, or unreasonably increase one's expectations. These considerations provides some reason, in some cases to prefer fewer choices. But of particular interest here is the suggestion that one might prefer not to have an option so as to avoid being accountable for choosing to decline it:

> Indeed, once I am aware that I have a choice, my failure to choose now counts against me. I now can be responsible, and be held responsible, for events that prior to the possibility of choosing were not attributable to me. And with the fact of responsibility comes the pressure (social and legal) to make 'responsible' choices. (Dworkin 1982: 52)

The point to be emphasized is that the introduction of an option may alter the expectations of others in unwelcome ways.[104]

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[104] It is worth noting that Dworkin only explicitly links the possibility of social and legal pressure to the debate over kidney sales in a later paper (Dworkin 1993). There he acknowledges that such

Radcliffe Richards (1996: 394-397) claims that the most promising challenge to kidney markets would likely focus not on the harm of the sale itself, but on the harm of having the option to sell. This kind of objection is distinctive in that it does not depend for its force on showing that market participants will be swindled, coerced, or otherwise wronged. Rather, its central insight is that one may rationally prefer not to have an option, even if, were the option offered, it may rationally be taken. Here I consider two challenges to the market proposal that appeal to this fact. Both maintain that it is the *option* to vend that is objectionable.

§1. *Rippon's Challenge*

Simon Rippon argues that providing the option to vend, even in a well-regulated market, would cause intolerable harm. His concern is for all of those in poverty who, if kidney sales are permitted, will be subject to harmful social and legal pressures to vend. If vending is normalized, Rippon claims, then the economically disadvantaged will find themselves under pressure to sell. Presently, the most one can offer is one's labor and possessions. But when the market makes human kidneys commodities, one's 'spare' kidney becomes a transferable possession, and is treated as such. When circumstances demand ready cash, many will find themselves pressured, by family members or moneylenders, to sell a kidney. To be subject to such social and legal pressure to vend, Rippon maintains, is to be harmed in a morally significant way. And because this harm cannot be avoided through market regulation, a prohibition on sales is justified.

Rippon's argument has attractive features. First, the harm purportedly caused by allowing sales – social and legal pressure to vend – is widespread. Large segments of the population would be susceptible to such pressure. The benefits of permitting kidney sales may be outweighed if the pressure Rippon has identified is as pervasive and pernicious as he claims. Second, the argument is said to retain its cogency even under moderately idealized conditions. Regulation sufficient to prevent the harmful pressure from arising, he claims, will disqualify precisely those who would be willing to vend. Finally, the argument is not paternalistic. Rippon takes his opposition to kidney sales to be justified on the grounds that such a policy would be autonomously chosen by those affected by it. This is precisely the kind of challenge Radcliffe Richards thought promising many years ago. It is then unsurprising that, in her commentary on the piece, she describes Rippon's paper as "probably the best there is in defence of prohibiting the sale of organs" (2014: 152).

Despite its initial appeal, Rippon's challenge is, I argue, unsuccessful. The harmful social and legal pressure that is the linchpin of his opposition is neither a necessary feature of the market, nor is it likely to play a significant role in its operation.

Harmful Social and Legal Pressure

The implications of introducing a kidney market, Rippon insists, would be unwelcome and far-reaching. Permitting sales, he claims, would "fundamentally change the norms of the relationships of each of us to our bodily organs and to each other" (2014a: 147). He worries 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" (2014a: 147). The unfortunate and predictable consequence is that many, especially those in poverty, will "find themselves faced with social or legal pressure to pay the bills by selling their organs" (2014a: 148).

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pressure may be felt, and count as a "psychic cost" that comes with a kidney market, but he insists that the harms of prohibiting sales are far greater.

Why is social and legal pressure to vend more harmful than comparable pressure to sell one's time or possessions? Rippon offers two reasons: the first is "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" (2014a: 149). Call this the *veto claim*. "The second important special feature of organ selling," Rippon observes, "is the small but not insignificant life-changing risks involved" (2014a: 149). This risk, he emphasizes, is likely to be disproportionately taken by the poor. And being pressured to take an option that unfairly allocates risk is a further harm. Call this the *risk claim*. The special harm of being socially and legally pressured to vend is then explained by the veto and risk claims.

Rippon grants that measures could be taken to ensure that no one is unduly pressured to vend. He suggests two. First, we might disqualify from vending those who fall below some income level. Second, we might permit all to vend, but disallow any from using the proceeds of their sale to satisfy social and legal demands. These regulations would guarantee that none were subject to undue social or legal pressure to vend. However, they would also reduce the pool of those who are eligible to vend to a class of people unwilling to vend. Thus, Rippon (2014b: 155) claims, any regulated market faces an unhappy dilemma: choose regulation sufficient to protect potential vendors from harmful pressure, or regulation permissive enough to procure a net increase in transplantable kidneys.

Reply to Rippon

Central to Rippon's objection is the thought that being pressured to take an option may harm one, even if the option one is pressured to take is itself not harmful. Rippon's example is helpful. "I do not think that having sex with a celebrity (ordinarily) harms a person" he notes, "But I do think it would harm a person to be put under significant social or legal pressure to have sex with a celebrity" (2014a: 149). Were the act different—suppose someone was pressured to solve algebra problems—the pressure to take that option would also be different. I concede that one may be harmed by social and legal pressure to engage in certain acts. But I deny Rippon's claim that this harmful pressure is a necessary consequence of permitting kidney sales. As I will now show, Rippon's opposition mistakenly treats two phenomena as one.

There are two importantly different ways in which one may be subject to 'social and legal pressure to vend.' First, just as Rippon imagines, one may be pressured specifically to sell one's kidney. Pressure to take such an option would invoke the veto and risk claims, and so, according to Rippon, harm those subject to it. I will refer to this simply as *pressure to vend*. Second, economic need may give rise to social and legal pressure to secure cash. After assessing one's options, one may come to regard vending as the best means to relieve that pressure. Here, too, we may say one is subject to pressure, but it is of a rather different kind. A critical difference between the two is that in this case, no one is pressured to undertake any specific act. I will call this *pressure with the option to vend*.

Notice, Rippon's account of the harm of being socially and legally pressured to vend applies to only one of these forms of pressure. *Pressure to vend* invites both the veto claim and the risk claim. It is the character of the act that renders the pressure objectionable. But if the harm of the pressure is partially determined by the act one is pressured to take, then one can only be subject to this harm when one is pressured to act in a specific way. Thus, in cases of *pressure with the option to vend*, where no one is pressured to perform any specific act, neither the veto claim nor the risk claim is triggered.

Applying this distinction to Rippon's own example is illuminating. When we shudder at the thought of someone being socially and legally pressured to have sex with a celebrity, we imagine someone pressured to engage in a specific act. Such pressure is objectionable. But altering the case delivers a different conclusion. Suppose Ann, with student loans coming due, is under economic pressure. After considering pawning heirlooms, and working in retail, Ann decides to become a pornographer. Her first day on set she has sex with a celebrity. Though she was subject to pressure, and did have sex with a celebrity, Ann was not subject to pressure to have sex with a celebrity. We may lament Ann's circumstances, but this cannot be because she was pressured in a way that invokes either the veto or the risk claim.

It may be objected that the distinction between *pressure to vend* and *pressure with the option to vend* is one without a difference. One may grant, of course, that in some cases the distinction is apt. If my range of options is wide enough, for example, we may sensibly distinguish between the two. However, one may claim that the distinction loses its moral force when one's options are sufficiently constrained. Many people, even if not specifically pressured to vend, may nonetheless feel such pressure *de facto*. If one's set of options is tiny, and the economic pressure one feels is great, then one may, in effect, be subject to *pressure to vend*. At the core of this objection is the thought that the harm of *pressure with the option to vend* may be, in some cases, morally similar to the harm of *pressure to vend*.

This objection misunderstands a conceptual difference between these two ways of being pressured. A distinguishing feature of *pressure to vend* is that it can be relieved if the option to vend is removed. The harm of that pressure is eliminated when the option is eliminated. But this is not so in the case of *pressure with the option to vend.* Suppose economic need gives rise to social and legal pressure to secure some cash, and one judges vending to be the best means to relieve it. Removing the option to vend in this case does nothing to remove the pressure. How we ought to respond to these two forms of pressure is quite different. The more acute the *pressure to vend* is, the greater the *pro tanto* reason we have to remove that option. However, as economic pressure to take an option increases, so too does the harm caused by eliminating that option. In the former case, removing the option removes the harm. In the latter case, removing the option compounds the harm.

I have distinguished between *pressure to vend* and *pressure with the option to vend*, and argued that Rippon's account of the harm of being socially and legally pressured to vend applies only to the former. This is sufficient to refute Rippon's claim that the market will necessarily exert harmful pressure. But a reply is in the offing. Even if *pressure to vend* is not essential to the market, it may be a probable consequence. If one can show that introducing the option to vend is likely to cause *pressure to vend*, then one may resist the market on these grounds. Call this more modest position: the *probable pressure reply*. The reply is plausible enough; as one critic of kidney sales observes, the "instant reward from a kidney sale" may make third-parties particularly tempted to exert undue pressure (Malmqvist 2013: 11). The task then, which I turn to now, is to demonstrate that the option to vend is unlikely to give rise to significant levels of *pressure to vend*.

People are vulnerable to pressure when they can easily be made to act so as to procure some good. *Pressure to vend*, then, will only arise if vending is a reliable means of securing money. There is, however, compelling reason to deny that vending will serve this purpose, and so, compelling reason to deny that the option to vend will give rise to *pressure to vend*. The *probable pressure reply*, as I will now argue, is predicated on a misunderstanding of how a regulated market would operate.

A Realistic View of the Market

According to Rippon, if kidney sales are permitted "many of us" will consider vending (2014a: 147). If "organs can be easily exchanged for cash" he claims, "it is reasonable to assume that your organs would soon enough become economic resources like any other" (2014a: 147). Kidney sales will be so common, Rippon insists, that people struggling to make this month's rent may be pressured to vend. These grim predictions are not merely speculative. Rippon offers, as support for this view of the market, empirical research into markets in Chennai, India. He cites a well-known study that found 96% of vendors sold to relieve debt, though most remained indebted years later (Goyal et al. 2002). He also cites the work of anthropologist Lawrence Cohen (1999), who found that moneylenders became more aggressive in their collection tactics in areas where vending was common. The picture that emerges depicts vending, not as a means to escape poverty, but as a demand accompanying that condition.

Rippon holds what I will call the 'newfound capital' view of kidney commodification, according to which, permitting sales would be substantially similar to bestowing all with a surgically accessible token redeemable for $100,000.[105] On this view, introducing the option to vend would cause dramatic and widespread change. If sales were permitted, everyone would become one abdominal surgery away from potentially transformative sums of cash. Of course, if the newfound capital view were accurate, moneylenders would adopt more aggressive tactics. Under these conditions we should expect the economically disadvantaged to be targeted. With so many people with a kidney to spare—now potentially worth $100,000—there would be countless new opportunities to extract handsome sums from unsavvy or otherwise vulnerable actors. In addition, this perspective further supports Rippon's claim that introducing a market will 'fundamentally change the norms of the relationships of each of us to our bodily organs and to each other.' As other critics have also noted, the compensation on offer is significant and could easily distort intimate relations in unexpected ways (Rothman and Rothman 2006).

Pace Rippon, in a regulated market, kidneys will not become 'economic resources like any other'. The 'newfound capital' view is mistaken. Those who need a kidney, as a percentage of the population, is incredibly low. Accordingly, the demand will be met, and so no more kidney purchased, when only a small percentage of the population sells. Consider first, the design of the market proposal I take as my starting point, namely the Erin and Harris proposal (1994). This proposal is distinctive in that the market would be monopsonistic, with a single agency as the only buyer. The price should be fixed and significant; as noted, evidence suggests that a compensation package worth approximately $100,000 is economically feasible. Kidney allocation may continue based on medical need rather than the ability to pay. Qualified vendors will be in excellent health, provide valid consent and receive suitable medical care throughout. Finally, the market will be geopolitically bounded such that vendors and recipients come from the same catchment area.[106] This feature of the Erin and Harris proposal renders Rippon's appeal to evidence from India inapt. The market studied there is 'open' – most vendors reside in the slums

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[105] Recall, modest estimates indicate that it would be cost effective to compensate vendors in excess of $100,000 (Matas and Schnitzler 2004).

[106] This feature of the Erin and Harris proposal serves a number of purposes. The point relevant to this discussion is that a closed market ensures that the number of vendors, compared to the population, is always low. This restriction also makes it easier to ensure that follow-up care is provided, and to collect data on vendors' outcomes for the purpose of assessing various market designs. It should be noted that the Erin and Harris proposal is a starting point, open to revision.

of Chennai, while most recipients come from elsewhere. As a result, vending is far more common and its societal influence greater.

Now consider that the demand for kidneys is naturally capped and relatively low. To see this, consider some admittedly crude calculations: As of November 2015, according to the Organ Procurement and Transplantation Network (OPTN), more than 36,000 people were added to the waitlist in the United States in 2014. If this is indicative of annual demand, and if we transplant only living kidneys procured on the market, then about 1 in 9,000 people would become vendors annually. This natural 'cap', combined with the monopsony's fixed price, makes kidneys quite unlike other economic resources. Each of the first 36,000 transplantable kidneys offered annually would fetch $100,000, and each after that would be refused because unneeded – a far cry from the newfound capital view.

From this empirically informed view of the market the sad picture Rippon paints looks unrealistic. Whatever norms govern the relationship between people and their body parts, we have no reason to believe that permitting 1 in 9,000 to vend annually will 'fundamentally change' them. Nor should we accept Rippon's claim that vending will be 'simply expected' of those in financial need. The facts of the matter suggest that the practice will never be sufficiently common to influence societal expectations in the ways imagined.

It also becomes clear that introducing the option to vend is unlikely to give rise to *pressure to vend*. This is because, in short, under a regulated market pressuring others to vend will not reliably result in their vending. Three considerations support this claim. First, as I have argued, because the market is geopolitically bounded, and the demand for kidneys is fixed and low, rates of vending within the general population will be low. Second, because the compensation on offer is appreciable even by middle-class standards many people, from a range of demographics, are likely to pursue the option. And even if only 1 in 1,000 find sales appealing, for every one successful vendor, there would be eight who tried and failed. Vending will be competitive. Finally, the market will be designed to include safety features to provide further protection. For example, we may provide potential vendors with the chance to discreetly disqualify themselves at the screening stage, or impose a waiting period between when one qualifies to vend, and when one is permitted to. The upshot is this: because *pressure to vend* will not reliably lead to vending, few will bother to exert it.

My central aim has been to refute Rippon's objection without challenging his substantive normative claims. I did not, for example, dispute his account of the harm of being pressured to vend, or question its relative moral significance. Rather, I argued, the pressure he takes to be pervasive and unavoidable is, in fact, unlikely to feature significantly, if at all in a regulated market.

§2. *Satz's Challenge*

Debra Satz (2008, 2010) argues that the introduction of a market may impose on some an unjust cost for their preference not to vend. To see the force of the objection it will be useful to begin with a mundane example. One way in which one's options are influenced by others in a market is through the effects of demand on price. Generally, when more rather than fewer people want to purchase a good, that good commands a higher price. Satz points to the development of a market in second homes as demonstration. If more people enter the market for a second home, then the demand for homes increases, and real estate prices rise. As a consequence, those who could have afforded a first home, had others bought just one, may no longer be able to. The market in second homes has pecuniary externalities. Transactions in that

market influence others' choices by influencing the prices of homes generally. This is a straightforward example of how one's options can be changed by the choices of others.

Satz claims something similar may happen with the introduction of a kidney market. But instead of the price of homes going up, she claims the price of credit may rise. She writes, "where kidneys are viewed as potential collateral, moneylenders may acquire incentives to seek out additional borrowers as well as to change the terms of loans" (2008: 275). She supports this claim with empirical evidence from markets operating in India (Cohen 1999). The worry Satz articulates is that someone who did not want to sell or mortgage her kidney, may find it more difficult to secure a loan, or may be unable to get the same favorable rates she could have, were there no kidney market. In this way some may be held responsible for declining the option to vend. Those in this position may "have less effective choices insofar as they will no longer be able to find reasonable loan rates without mortgaging their organs" (Satz 2010: 201). It appears, then, that those who do not want to participate in the market are made worse off than they would be were there no market at all.

Satz notes that what has been shown thus far does not undermine the case for a market in human kidneys any more than it undermines the case for a market in second homes. Costs of goods are affected by what buyers do in every market, and this, in itself, is no reason to prohibit commercial exchange. Rather, Satz suggests, "we need to ask: should people have to pay a cost for their unwillingness to sell their organs?" (2010: 201). It is not enough to show that one person's choices impact others. It must further be shown that the way in which other people's choices are altered is morally objectionable.

Here it will be useful to introduce a distinction, suggested by Kaushik Basu (2003: 149), between two classes of preferences. There are many preferences to which people have a right. Of these, there are those that are *maintainable* and those that are *inviolable*. My preference for leisure is one that no one could object to, but I may have to pay a price to satisfy that preference. My income will be lower as I work fewer hours. This preference for leisure is maintainable. My preference not to be sexually harassed, Basu suggests, belongs in the second category, that of inviolable preferences. Not only do I have a right to prefer not to be sexually harassed, I should not be made to pay a price to maintain this preference.

Satz argues that one's preference not to sell one's body parts, call it the *bodily integrity preference*, is inviolable. To support this she appeals to the work of Ronald Dworkin who, in developing his preferred account of egalitarianism, confronts the question of where one's person ends and one's resources begin. Absent a clear boundary, uncomfortable questions arise: "Would it be outrageous to require blood donations according to some fair lottery? Kidney donations? Eye donations?" (1983: 39). And these questions are best avoided, Dworkin suggests, by "adopting a prophylactic line" around the body "that comes close to making the body inviolate" (1983: 39). This amounts to a substantive normative claim about the limits of the market:

> *The Prophylactic Line Constraint.* One's body parts and products are to be protected from market forces.

This sharply differentiates one's body parts from one's resources, and places the former beyond the reach of the market.

Satz finds the prophylactic line constraint plausibly supported by the fact that "our relationship to our body parts is so closely bound up with our ability to control what happens to us, what we can be and do" (2008: 277), and the thought that "a person's relationship to their body is so important that it should enjoy a special protection against the effects of market forces" (2008: 278). This rationale draws heavily on language familiar to the capabilities approach

introduced by Amartya Sen and developed by Martha Nussbaum.[107] Satz also approvingly references Sen's view of entitlements as "the conditions that enable individuals to mobilize the resources they have as a means to becoming full members of society" (2008: 271). These considerations justify the prophylactic line constraint, and that normative claim is what justifies Satz's treatment of the bodily integrity preference as inviolable. We then have a *pro tanto* reason to prohibit sales: to ensure that none are unfairly made to pay a price for their bodily integrity preference.

Thus, while the market for second homes limits the options available to others, this is a consequence of an unobjectionable expression of autonomy; pricing some first-time homebuyers out of the market is not morally troublesome. But a kidney market *is*. As Satz notes, some non-donors "would have preferred loans be available at worse terms than those they could have if they were willing to put up their kidneys, but better terms than they will find in a world where kidney selling is legal and they do not wish to sell their kidneys" (2008: 276). These people are made to pay a price to maintain an inviolable preference.

This objection to kidney markets, Satz acknowledges, is not decisive. She notes that a market prohibition makes those in need of a transplant worse off than they would be with a market. Further, Satz allows that if regulations can be implemented to limit the influence of the pecuniary externalities—for example, by preventing "kidney sales from entering into other kinds of contracts … as loan collateral or as a means of eligibility for social services"—then the market may be permissible (2010: 205). Such measures would respect the prophylactic line constraint.

Reply to Satz

There is reason to doubt that the pecuniary externalities that Satz points to will arise in a well regulated market. Not because, as she suggests, regulation will ensure that kidney sales are excluded from contracts. Rather, because empirical facts about the operation of the market suggest vending will simply be too uncommon. Because vending will be so rare, it will not be cost-effective to modify the terms of loans as occurred in Chennai. With only 1 in 9,000 people vending per year, for most, vending will not actually be an option. Like Rippon's, Satz's objection is predicated on a mistaken view of the market. However, Satz's reasoning is problematic in other ways deserving of attention. For, even if the troubling pecuniary externalities were to arise, it would be a mistake to regard them as supplying reason to oppose sales.

Promoting and Protecting Capabilities

I argue that the prophylactic line constraint is poorly suited to promote the interests cited by Satz. If we are concerned to preserve the substantive freedoms associated with the capabilities approach, then we ought to reject the prophylactic line constraint. First, it disallows some actions that seem fully consistent with our 'ability to control what happens to us, what we can be and do.' It, for example, precludes markets in solid organs, but also blocks sales of sperm, ova, blood, plasma, and surrogacy. All of these exchanges, when engaged in by a sufficiently large number of people, may lead to the same kind of effects that motivated the prohibition on a market in human kidneys. Many of these practices are already common, and some are generally regarded as

[107] For influential work on the capabilities approach, see Sen (1980) and Nussbaum (1992).

ethically unproblematic, for example, selling plasma.[108] While I think a prohibition on the seemingly innocuous practice of selling plasma is counter-intuitive, and unsupported by concerns about capabilities, this failure of extensionality is not what is most worrisome about the constraint Satz endorses.

The second, and more serious problem concerns what the prophylactic line constraint *permits.* The constraint is fully consistent with our willingness to pay people to do dangerous work, some of which is clearly more risky than having a kidney removed, and clearly a greater threat to our capabilities. Our best data suggests that 3 in 10,000 kidney transplants will result in death (Matas et al. 2003, Ibrahim et al. 2009). This stands in sharp contrast to the 12.7 deaths per 10,000 fishers, and the 10.4 deaths per 10,000 loggers recorded in 2011 (Pegula and Janocha 2013). Further, in 2011, the median annual wage for a logger was $33,760. So, while a vendor, if Matas and Schnitzler's previously cited estimates are correct, might be offered a compensation package worth $100,000 or more, a logger, working an entire year, faces three times as much risk and is paid about one-third as much. It is thus unclear why, if commercial fishing is consistent with the prophylactic line constraint, selling one's kidney in a well-regulated market is not.

Further, the choice of some individuals to take these dangerous jobs may impact the choices others face. When a coal mine opens in a community, or logging jobs become available, members of that community who are unwilling to take up risky work may suffer a disadvantage in much the same way those who are unwilling to sell a kidney might. A loan applicant with a reliable job at the local mine will be preferred to the applicant with lower-paying, less stable employment at the cafe. Accepting these dangerous jobs may have the same pecuniary externalities that Satz worries would come about if large numbers of people within a community choose to sell their spare kidneys. I contend that the prophylactic line constraint is poorly suited to promote the values it is claimed to serve, and so should be rejected.

The Better Option

Satz's objection to kidney markets faces another, related problem. We are confronted with a comparative judgment. We might concede that the pecuniary externalities in question are objectionable, and violate the prophylactic line constraint, yet prefer these conditions to those likely to arise under any alternative. The fact that a market gives rise to objectionable externalities does not immediately reveal whether closing that market would better or worsen the situation. This is Satz's *own* insight (2010: 110-111). If potential vendors, when prevented from vending, become mercenaries instead, or prostitutes, then we have likely undermined our own aims. What is required, if we are to assess the prohibition on sales according to Satz's own normative standard, is a comparison. We need to know how market forces influence people's relationships with their bodies under the status quo *and* as expected under any alternative. The very same values motivating Satz's commitment to the prophylactic line constraint, viz. the importance of "our ability to control what happens to us" (2008: 277), may be better served by regulating the market, not closing it.

Notice that the pecuniary externalities on the basis of which Satz opposes kidney sales are traceable to the credit market. When one is made to pay a price for one's bodily integrity preference, this is because those offering credit adjust the terms of their loans. Were there no

[108] Notice, even when there are ethical concerns with some of these practices, like that of selling blood (Cf. Titmuss 1971), the worry is not that vendors' capabilities are diminished, but that civic spirit is dampened.

credit market there would be no violation of the prophylactic line constraint. Recall Satz's own example, the market in second homes. In that case, transactions in one market increased prices for goods in the same market. But the concern Satz raises here is rather different. It is not the kidney market that increases the costs of obtaining a loan. It is the credit market. Were there no credit market there would be no cost for maintaining one's bodily integrity preference.

Thus, market forces will inevitably influence how people relate to their bodies. If the state prohibits kidney sales in response to the credit market, then that prohibition will itself be the result of market forces. That is, if the state responds to the credit market by closing the kidney market, then it has allowed the credit market to influence people's relationships with their bodies; specifically, it has caused a prohibition on kidney sales. While this does ensure that no one pays a price for their bodily integrity preference, in so doing it allows the credit market to have a profound indirect influence; those in need of a kidney are not permitted to acquire one through purchase, and those who would have sold their spare are not able to do with their body what they prefer.

Does it matter that under a prohibition the credit market's influence would only *indirectly* undermine people's relationships with their bodies? I claim not. If a market has to directly influence people's relationships with their bodies to count as having an objectionable influence, then we could not prohibit kidney sales on the basis of their pecuniary externalities. Those externalities are the direct consequence of the credit market, and only indirectly caused by kidney sales. Satz herself thus seems to be concerned about indirect influence.

The influence of the credit market on individuals' internal resources is unavoidable. Once this inevitability is accepted we can go about the business of making the necessary comparative evaluation: In which case does the credit market pose a greater threat to bodily integrity? Is 'our ability to control what happens to us' impaired more by imposing slightly higher interest rates on those who would rather not mortgage a kidney, or by imposing a value of zero dollars for all kidneys and prohibiting their purchase by those in need? When the question is posed clearly, I submit, the answer is obvious.

Conclusion

I have argued that considerations of choice do not tell against the market. The claim that vendors will not give morally transformative consent is unsupported. Challenges pointing to problems with information and competence are unfounded. Moreover, they fail to distinguish vending and donation. If either condition posed a problem for consent, it would apply with equal force to donors. This would be an implausible result. Concerns about the voluntariness of the choice are more common. The objection that payment would be irresistible has never been made compelling or stated with adequate clarity. A related objection, that the inducement would be undue, does posit a mechanism by which consent might be compromised. However, no evidence suggests the worrisome conditions necessary for undue inducement will ever obtain. Rather, the evidence indicates that vendors would have no trouble rationally assessing the risks and benefits of their sale. The common claim that poverty will coerce the poor into vending is also unmoving. Setting aside the fact that coercion requires agency and poverty is no agent, even if we accepted the claim we would have no reason to foreclose the option. I argued that this would merely amount to limiting an already constrained set of options. Finally, I claimed that these consent based objections have a common weakness. All are predicated on the autonomous authorization model of consent. Following Miller and Wertheimer I suggested the Fair Transaction model better captures the moral transformation constitutive of consent. This alternative has practical

and theoretical virtues. Moreover, if correct, all consent based objections to the market must either be rejected or reformulated. The upshot is this: No consent-based objection supplies reason to oppose the market.

The second part of the chapter took up the possibility that having the *option* to vend constituted its own harm. While these objections were judged more promising, they were found lacking. Both Rippon and Satz reasoned from a mistaken conception of the market. Once corrected, the worrisome harms, Rippon's social and legal pressures, and Satz's pecuniary externalities, were shown to be unlikely to arise. Moreover, I argued that the normative considerations motivating Satz's opposition in fact recommend a market. If we are concerned that people can do and be many things, than we should permit, not prohibit kidneys sales.

CHAPTER 4

MARKET ASSESSMENT AND THE POLITICAL CASE FOR KIDNEY SALES

That the market has a significant and important role in modern democratic states is no longer seriously disputed. Its reach, however, the purview of things money can buy, remains hotly contested. A significant literature has developed around the question: What are the moral limits of the market?[109] It has been argued that a range of goods, including women's sexual labor, human kidneys, line-standing services and much else, belong outside the market. These goods are, of course, unobjectionable in themselves. They can be permissibly possessed or freely given. Further, they survive the transaction intact; kidneys function regardless of sourcing. Thus, the philosophically interesting position taken by those opposing specific markets holds that subjecting certain goods to market forces constitutes a non-economic harm of legitimate state interest.

Prominent in the literature are two strategies for defending limited markets. The first appeals to facts about specific goods and their social meanings to justify limits on their sale. Michael Walzer's (1983) seminal *Spheres of Justice* introduces the idea that different goods were properly allocated in accordance with their social meanings. Reflecting on how various goods are conventionally valued, Walzer argues that limits to the market are required to ensure equal democratic status despite inequality within various spheres. Critically developing this approach, Elizabeth Anderson (1990, 1993) defends an account of the market's domain based on a socially-grounded pluralistic theory of value. Anderson holds that different kinds of goods are rationally valued in different ways, some of which require suitable social conditions. She argues that if some goods are to be properly valued, they may need to be removed from the market. This is justified by the liberal values of freedom and autonomy.

A second strategy for defending limits on the market is proposed by Debra Satz (2010) and takes an egalitarian ideal as a constraint on the market. Satz too holds that some markets in specific goods are objectionable and properly subject to state interference. But rather than identifying these markets by reflecting on how to rationally value specific goods, Satz proposes four general parameters that can be used to assess any market. Markets that are extremely harmful for individuals or for society, or involve participants with diminished agency or those who are vulnerable, are deemed 'noxious' and become candidates for intervention. The unifying thought in Satz's work is that markets in specific goods become objectionable when their operation undermines the conditions necessary for citizens to interact as equals.

The influential work of Anderson and Satz is of special significance as both offer answers to the central question I pursue in this chapter: Under what conditions, if any, does the state justifiably interfere in the market for non-economic reasons? And both defend accounts of the market's limits that may be wielded as objections to the Value of Life argument defended in this dissertation.[110] Here I offer my response. I show that both accounts are deficient. Moreover, once

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[109] Major contributions to this literature include Walzer (1983), Anderson (1993), Radin (1996), Satz (2010), and Sandel (2012). For other notable works, see Wolff (2011), Keat (2000), Soule (2003), and Claassen (2009).

[110] Both defend accounts that draw on values accessible through public reasons. Satz (2008) has addressed kidney markets at length. Anderson (1990) mentions the topic but offers no direct discussion of it. Nonetheless, one can easily extend her general view, and her discussion of the sale of human blood, to the specific case of kidney sales.

this deficiency is corrected, it becomes clear that both Anderson and Satz should favor kidney sales. It is recommended by their own normative commitments.

The chapter proceeds, after some preliminary remarks, in three parts. Part one is expository. There I detail Anderson's and Satz's accounts. Some of this discussion focuses on differences. What each theorist takes to be normatively relevant to justifying state intervention in the market is captured in the different *evaluative standard* each employs. Anderson deems interference justified if it is necessary to preserve the social conditions requisite for freedom and autonomy. Satz justifies interference by appeal to a status oriented conception of equality. Though their evaluative standards differ, they both understand the project of market assessment as requiring two judgments. The first involves assessing a specific market according to an evaluative standard. The second involves assessing the prospects of efficacious intervention into that specific market. Because both start with specific markets assessed in isolation, both take the *Markets First Approach*.

Part two presents my critique. I contend that Anderson and Satz, in taking the Markets First Approach, encounter three problems. First, their accounts endow markets in specific goods with undue significance. Specific markets play no theoretical role that would justify their treatment as primary objects of assessment. And, in casting them in that role Anderson and Satz offer accounts that are systematically insensitive to a range of normatively relevant phenomena. This results in the *problem of incomplete accounting*. The second problem resulting from the Markets First Approach is that neither account is action guiding. After assessing a specific market, urgent questions about how the state should respond to that market remain unanswered. Finally, both accounts call for a judgment of how specific markets influence an evaluative standard. And in both cases this judgment is problematic.

The foregoing supplies reasons to reject the accounts of market assessment defended by Anderson and Satz, and so indirectly defends the Value of Life argument. In part three, I directly defend this argument. I propose an alternative account of market assessment. Rather than assessing a specific market, and then assessing the prospects of intervention, on the *State First Approach*, these judgments are collapsed into one. Market assessment is construed as an assessment of the state. If there is an action open to the state – a means of interfering in the market – that is expected to improve *the state's* conformity with an evaluative standard, then that action is justified. Thus, specific markets play no essential justificatory role. The chief virtue of this approach is that it solves the problem of incomplete accounting arising from the Markets First Approach. It also has the practical advantage of guiding action. Once applied, the questions of whether and how the state should interfere in the market are answered. Further, in making the state the object of assessment, the account avoids fraught judgments about the normative import of specific markets. Having sketched the account, I make the political case for kidney sales. Drawing on the evidence and argument offered in the preceding three chapters, I show that the state's prohibition is unjustifiable, and that we should introduce a regulated kidney market. Importantly, this conclusion follows whether one accepts Anderson's or Satz's evaluative standard.

Preliminaries

The following remarks are preparatory for what follows. I define 'market', and explain the assumed relation between the market and the state that operates in the background of this debate. I also clarify my aims. I establish what an adequate answer to the central question would involve.

Markets are institutions in which goods and services are *voluntarily* exchanged on an ongoing basis.[111] Coerced exchanges are not market exchanges as they are not voluntary. A single transaction falls short of a market. A market emerges only when a sufficient number of exchanges take place. Markets, in contrast to mere transactions, have macro-level effects.

The state plays a significant role in furnishing the background conditions that accompany a stable market. Of course, for one to exchange property on the market, there must be property to exchange. This requires the state to recognize and enforce property rights. Such rights must be publicly known, and known to be relatively stable. There must also be the legal institutions necessary to adjudicate contract disputes. The provision of property rights, and the enforcement of contracts, both of which are essential for the operation of markets, requires sustained coercive action on behalf of the state.

The state has many familiar reasons to promote market exchange, though I emphasize only two here. One virtue of markets is that they are thought to most efficiently distribute goods, where efficiency is understood, roughly, as providing the most effective and least costly means to a given end.[112] Markets promote the flow of information through pricing, incentivize innovation, punish wastefulness, facilitate coordination, and thereby generally foster mutually beneficial exchange. The efficiency of the market can be formally established by appeal to the generally accepted criterion of Pareto efficiency. Under the proper conditions, market exchange involves a series of Pareto improving changes. Markets are also closely linked to freedom.[113] In an open market individuals are free to choose, among a wide range of options, what they purchase and from whom they purchase it. In Hirschman's (1970) phrase, markets favor 'exit' to 'voice'. The social relations between buyers and sellers are horizontal. No special authority oversees and permits exchange; exchange occurs when both parties agree to it. The fact that markets effectively decentralize power and information further contributes to their freedom expanding potential.

There are a number of important views on the question of the state's role in the market that I will not be addressing. One prominent libertarian strain of thought takes markets to be *essentially* linked to freedom. Milton Friedman (2009), for example, argues that economic freedom is a prerequisite for political freedom. On this approach, the market's limits coincide with its participants' *a priori* rights. Thus, if no individual rights are violated, no interference in the market can be justified. However, given my principal interest in defending the Value of Life argument, I am primarily concerned to engage with the work of those who challenge that aim. Anderson and Satz defend views that may be wielded as objections and so have my attention.

Notice that I do not explore why some things that should not be owned should not be sold. Because it is wrong to *possess* child pornography, it is an uninteresting fact that a *market* in child pornography is objectionable. No appeal to the market is required to explain the badness of that. Nor do I ponder the ways particular market transactions may be objectionable in light of incidental moral considerations. That you promised not to buy a drink may make it wrong for you to do so. And that a patron is dangerously drunk may make it wrong for you to serve her. In these cases the market plays only an incidental role. The more interesting position taken by Anderson and Satz holds that the *market* makes its own objectionable contribution. They defend

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[111] For a recent helpful overview of the philosophical issues surrounding markets, see Herzog (2013).

[112] For a detailed discussion of measures of efficiency, see Buchanan (1985).

[113] Much of my discussion about the relation between markets and liberty is informed by Satz (2007b: 122).

views that purport to explain why sex may be given freely though not sold, and why you may be encouraged to donate a kidney, but must not sell one.

Under what conditions, if any, does the state justifiably interfere in the market? This, again, is the central question. An answer requires more than simply identifying some market activity as worrisome. For, what appears in isolation to be an objectionable transaction may, in context, play a very different practical role. And, as will soon become apparent, discerning the moral significance of a specific market is anything but straightforward. An important feature of markets, noted by Hayek (1945), is that they contain decentralized information. Perhaps a corollary of this is that interference in markets involves much uncertainty. Changes in one specific market can have propagating consequences in others. Uncertainty about the effects of interference is one problem. But not the only one. Markets influence their participants in many and varied ways. The problem is made vivid in the case of the 'double bind'.[114] Many hold that markets in women's sexual labor constitute a harm to women. However, prohibiting prostitution may exacerbate that harm if it condemns them to options they regard as worse. In some cases, to interfere in a market that appears corrosive to a value may in fact make things worse from the perspective of that very same value.[115] To answer the central question, then, one must provide an account that is sensitive to the complex and sometimes conflicting normative considerations relevant to assessing markets. We need an all things considered judgment of the deontic status of state interference.

Part One: Two Accounts of Market Assessment

§1. *Anderson's Account*

Anderson argues that freedom and autonomy – values often claimed to recommend an expansive free market – in fact impose limits on the market's scope. Her view is doubly pluralistic: it acknowledges that there are many legitimate conceptions of the good life, and it holds that different kinds of goods are rationally valued in different ways. This value pluralism informs her understanding of freedom and autonomy. Part of what it means to be free is to be able to value many things in many ways. As Anderson writes, "Call a person free if she has access to a wide range of significant options through which she can express her diverse evaluations" (1993: 141). And part of what it means to be autonomous is to endorse one's evaluations. In Anderson's words, "Call a person autonomous if she confidently governs herself by principles and valuations she reflectively endorses" (1993: 141). On this view, the market poses a problem because many goods can only be properly valued in suitable social contexts, and these contexts may be eroded or degraded when subject to market forces.

This concern for freedom and autonomy, so understood, is expressed in Anderson's evaluative standard, which I will call *Liberal Values*. Liberal Values deems market activity objectionable when it interferes with people's ability to rationally value certain goods, or undermines individual or collective autonomy. Thus, Anderson writes, "the state has a case for prohibiting or restricting commodification of a good if doing so increases freedom – significant opportunities for people to value different kinds of goods in different ways – or if it increases autonomy; that is, the power of people to value goods in ways they reflectively endorse" (1993:

[114] For extended discussion of the phenomenon, see Radin (1987).
[115] This insight is developed in Kanbur (2004) and incorporated in Satz (2010).

154). Liberal Values captures what Anderson regards as normatively relevant to justified state interference.

To implement Anderson's account requires some means of identifying those goods properly valued on the market, and those requiring special protection. Which goods may be commodified and which must be realized in a non-market sphere? Put differently, we need some way of showing that the marketing of some goods violates Liberal Values. This takes the form of what Anderson calls an *ideal type analysis* of the market. Her proposal is this: We reflect on the ways commodities are valued, the ideals the market embodies, and the norms characteristic of it, and from this derive an ideal type of the market, and an ideal type of the goods properly exchanged there. This analysis is then employed to show that certain goods, if their value is to be fully realized, must be shielded from the market.

Her ideal type analysis of the market begins with an examination into how we value commodities. Commodities, Anderson claims, are properly valued as objects of "use" which is "a lower, impersonal, and exclusive mode of valuation" and which contrasts with "higher modes of valuation, such as respect" (1993: 144). To use an object is to value it merely instrumentally, disregarding any intrinsic value it may have. Things appropriately valued as objects of use are "fungible" and "traded with equanimity for any other commodity at some price" (1993: 144). Further, commodities, as objects of use, are exclusive. One's enjoyment of such goods is private. In contrast, some goods are shared, like public parks and sites of historical interest. If their value is to be fully realized, these goods must be enjoyed with others.

How we value commodities is only one aspect of the market's ideal type. Perhaps more revealing is the particular ideal of freedom, conceived of largely in economic terms, said to be embodied in the market.[116] Freedom here is understood as involving access to a wide range of goods, and the power to use these goods as one wishes without consideration of others or their interests. This view of economic freedom, Anderson claims, is among the market's most important ideals, one that pervades all transactions.

Much of the substance of Anderson's ideal type analysis is derived from her examination of the norms that govern the production, distribution and use of economic goods. She focuses on five features of these norms, which she claims, "express a shared understanding of the point and meaning of market relations recognized by every experienced participant" (1993: 145). First, the market's norms are suitable for coordinating the interactions of strangers. They are impersonal. They allow participants to cooperate without concern for the others' personal characteristics. Second, the market is egoistic. Freedom in the market is freedom to ignore the needs and interests of others. For this reason Anderson regards any extension of the market as "an extension of the domain of egoism" (1993: 145). Third, the market is exclusive. Because "individuals' interests are independently definable and satisfiable only with respect to goods that are exclusive and are rivals in consumption," the market is incompatible with the exchange of shared goods (1993: 145). Fourth, the market is a want-regarding institution. Markets are responsive to "'effective demand' – desires backed by the ability to pay" (1993: 146). And they are insensitive to the difference between strong desires and urgent needs. As a result, preferences are reduced to "mere matters of taste" (1993: 146). Finally, the norms of the market are oriented toward 'exit' rather than 'voice'. Disputes are resolved, not in a forum, and not by appeal to shared values, but with money or the withholding of it.

Having considered the ways we value commodities, the ideals embodied in the market, and the features characteristic of the norms structuring market interactions, Anderson derives an

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[116] For a recent and thorough treatment of freedom as 'market freedom' see MacGilvray (2011).

account of the goods properly subject to market exchange. She reasons "a thing is a pure economic good if its production, distribution, and enjoyment are properly governed by the five norms above and its value can be fully realized through use" (1993: 146). That is, what is properly treated as a commodity, is that which is properly valued in the mode of the market.

We are now situated to better see how Anderson's account is to operate, and more specifically, how it instantiates the Markets First Approach. Equipped with her ideal type analysis of the market, Anderson proceeds to evaluate goods of civil society, personal life, and politics. In each case the account proceeds in the same way. Some particular good is examined, and an account of how to properly value that good is offered. It is then claimed that to subject such a good to the market would undermine the social conditions necessary for its value to be fully realized, or undermine autonomous agency. It would violate Anderson's evaluative standard, Liberal Values.

By way of demonstration, consider her treatment of markets in women's sexual labor. Anderson takes prostitution to be "the classic example of how commodification debases a gift value and its giver" (1993: 154), and argues that markets in women's sexual labor may be limited as necessary to secure women's freedom and autonomy. She begins with an account of the special value one finds in intimate personal relations. These goods clearly differ from those exchanged on the market. The ideals of intimacy and commitment play a special role in the personal sphere, influencing how people value each other as well as how they value the goods exchanged there. Gifts are valued in a higher mode than mere commodities. For the value of the good is partially constituted by the motives on which the giver acted. Such goods are responsive to the personal features of the recipient. Reflection on the "nature" of human sexuality, Anderson claims, reveals that the good, and the provider of it, are degraded when subject to market norms. "The specifically human good of sexual acts exchanged as gifts," she writes, "is founded upon a mutual recognition of the partners as sexually attracted to each other and as affirming an intimate relationship in their mutual offering of themselves to each other" (1993: 154). When this good is treated as a commodity the social conditions necessary to enjoy it as a shared gift value are eroded.

Anderson is not merely claiming that those who engage in commodified sex enjoy a degraded experience. If this were all that was of concern, Anderson would have little reason to think the market requires limits. After all, one might consistently hold that commodified sex is degraded, without yet calling for a prohibition. Rather, Anderson defends the more ambitious claim that the commodification of sex cannot be sustained alongside the practice of intimate sex shared as a gift. The former will contaminate the latter. Drawing on feminist theory, Anderson argues that the attitudes fostered in commercial sex will spill over into intimate relations:

> When heterosexual masculine identity is partly defined in terms of the power to have sex with a woman, prostitution and pornography supply the unmet demand for sexual intercourse generated internally in the personal sphere; they also provide techniques and models for sexual gratification that men import back into the sphere of personal relations and make normative for their intimate female partners there.[117] (1993: 154)

Thus, the sale of sex cannot continue alongside intimate sex, without undermining the social conditions necessary for its full enjoyment. And this is, on Anderson's view, an affront to freedom, and so an occasion for justifiable state interference. As she writes, "The full realization of significant opportunities to value heterosexual relationships as shared and personal goods may

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[117] Anderson references MacKinnon (1989).

therefore require that women's sexuality not be commodified" (1993: 155). She further argues that the case for limiting markets in women's sexual labor is stronger when viewed as a threat to women's autonomy. Because the prostitute is not only degraded, but also alienates a good embodied in her person, her autonomy is thwarted. "Her actions under contract," Anderson maintains, "express not her own valuations but the will of her customer" (1993: 156).

§2. *Satz's Account*

Prominent in Satz's work is the claim that markets shape who we are and who we become. She traces this insight back to classical economists, Adam Smith and David Ricardo (2007b). Smith emphasizes two ways that markets influence the larger community. First, he recognizes that certain forms of labor are apt to replicate the social relations of domination characteristic of feudalism. One of the market's best features, Smith claims, is its influence on social relations: markets "gradually introduced order and good government," and relieve many of their "servile dependency upon their superiors" (2007: 265). Smith also recognizes that markets, especially certain labor markets, can influence who people become. They can alter people's preferences, attitudes, and capacities. In extreme cases, this influence can be debilitating, rendering citizens incapable of participating even minimally in their political community (2007: 506). More recently Samuel Bowles expresses a similar thought, arguing that markets "shape our culture, foster or thwart desirable forms of human development, and support a well defined structure of power" (1991: 11). Given the many ways we are effected by the market, we should understand our preferences as endogenous, that is, informed by and dependent on, the market (Bowles 1998). Once it is understood that our preferences are shaped by the market it becomes clear that measures of market efficiency cannot tell the whole story: "Where markets shape the capacities, values, and desires of the exchanging parties the standard normative case [for the market] collapses" (Bowles 1991: 15).

Taking seriously the claim that certain markets influence who we become, and how we relate to others, Satz proposes a theory of market assessment emphasizing participants' status as equals. This supplies Satz's evaluative standard, which I will call *Equal Status*. Although some of its content is captured by measures in welfare economics, this ideal also draws on values that are distinctively non-economic.[118] Satz elaborates the role of Equal Status with reference to a status-oriented conception of citizenship developed by T. H. Marshall (2009). On Marshall's view, citizens are entitled to equal political rights and freedoms, but also the material conditions of their exercise. One of Marshall's three conditions for equal citizenship is 'the social element,' which includes the "right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society" (2009: 149). When markets, even those that are perfectly economically efficient, prevent citizens from sharing in society 'to the full', Equal Status requires interference.[119]

The process of mapping the limits of the market involves assessing the operation of specific markets for their influence on Equal Status. Here we see clearly Satz taking the Markets First Approach, and employing Equal Status as her evaluative standard. Markets in specific goods are evaluated along four dimensions, or parameters, which are thought to capture the normative content of Equal Status. Any market that scores highly along even one is prima facie problematic. The account works as follows.

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[118] For a nice discussion similar to Satz's own view, see Kanbur (2004).
[119] Satz (2007a: 636-639) elaborates her commitment to Equal Status.

The first two dimensions, harm to individuals, and harm to society, characterize the consequences of some markets. The worry about harm to individuals is not merely that some transactions end badly; that is par for the course. The worry is that some outcomes are so harmful that citizens' basic needs are left unmet. "The idea of basic interests," Satz elaborates, "is meant to capture the idea that there are universal features of an adequate and minimally decent human life" (2010: 95), and that no one should be permitted to slip below that threshold. The sale of conflict diamonds, which finance civil wars, is one case of a market leading to extreme harm to individuals (Silberfein 2004). The second dimension characterizes markets that are extremely harmful to society. Child labor produces uneducated quasi-citizens, incapable of fully participating in society. Bonded labor can encourage servility and dependence. Neither of these markets is consistent with Equal Status; both erode "the social framework needed for people to interact *as equals*, as individuals with equal standing" (Satz 2010: 95).

The second two dimensions, weak agency and vulnerability, characterize the conditions out of which some markets emerge. Markets feature weak agency when their participants lack important information or adequate agential capacity. Many participants in the kidney market in India, for example, appear to have been misinformed about the risks associated with a nephrectomy (Goyal et al. 2002). Weak agency is also a concern when goods are marketed to children who lack the cognitive powers to promote their own interests. Markets in women's reproductive labor also raise concerns about weak agency, as few women can anticipate the difficulties of giving up a child. The next dimension, vulnerability, characterizes markets whose participants bargain from disparate positions. "When people come to the market with widely varying resources or widely different capacities to understand the terms of their transactions," Satz writes, "they are unequally vulnerable to one another" (2010: 97). The differences in bargaining positions can result from many causes. Some participants may not be able to exit the market, as in the case of famine, because the goods sought are necessary. Others may be financially desperate. Faced with few options, vulnerable participants may agree to almost any terms. Transactions from such disparate positions are not exchanges between equals and, Satz maintains, can quickly erode citizens' equal status.

To illustrate how her account is applied, consider Satz's assessment of markets in women's sexual labor. It is uncontroversial that many sex workers are profoundly mistreated. Satz denies, however, that the sale of sex is *intrinsically* degrading (1995: 85). She invokes the image of a young 'streetwalker' who is desperate, subject to violence, and under the control of a pimp. By contrast she describes "a Park Avenue call girl" who "engage[s] in what seems to be a voluntary activity, chosen among a range of decent alternatives... without coercion or regret" (2010: 138). The weak agency, vulnerability, and individual harm associated with the streetwalker are not concerns for the call girl. However, the fourth parameter, societal harm, is salient in both cases. A central thesis in Satz's treatment of this topic holds that markets in women's sexual labor contribute to societal attitudes that undermine the equal status of women as a class. But even this harm is not a feature of the market as such. "In different circumstances, with different assumptions about women and their role in society," Satz claims, "prostitution might not be troubling, or at least no more troubling than many other labor markets currently allowed" (2010: 153). The bare act of selling sex is not the problem. The problem is that the market interacts with norms, attitudes, and other features of the social environment in ways that undermine Equal Status.

Part Two: Problems with the Markets First Approach

Here I present three problems for the accounts defended by Anderson and Satz. Most significant is the problem of incomplete accounting. The problem is similar to one that arises in the context of assessing the market system, and may be instructively compared. In his discussion of the moral standing of the market system, Amartya Sen (1985) observes that assessing the value of that institution is difficult. One of the challenges to offering such an assessment is that the consequences of the market's operation are significantly influenced by a host of background conditions. As Sen writes, "it is an extraordinarily ambitious program to judge one part of the social arrangement (the market mechanism) without assuming something specific about the other parts" (1985: 13). Proper assessment of the market system, as a form of economic organization, cannot be carried out in isolation. Differing inputs – economic and social inequality – will deliver a range of more or less palatable outputs. I suggest the task of assessing specific markets involves a similar challenge. Even if one knows all there is to know about the transactions comprising a specific market, unless that market's operation is considered as it features in the market system, one will have an incomplete picture of its normative contribution. And, I contend, neither Anderson nor Satz take this wider perspective. The Markets First Approach prevents it.

I consider two additional problems. In taking the Markets First Approach, both Anderson and Satz defend accounts that are insufficiently action guiding. After application of their accounts, there remain urgent questions as to whether the state should interfere in the market, and if so, how. A final problem arises from the need for a judgment of how the operation of a specific market influences an evaluative standard. There are, in both cases, reasons to doubt that this judgement will be accurate.

§1. *The Problem of Incomplete Accounting*

Although there are important differences between the evaluative standards employed by Anderson and Satz, a crucial commonality is that in market assessment the primary site of normative interest is the interface between people and the world. Facts about the market and what is exchanged there are secondary. Anderson asks: Are people free and autonomous? And Satz: Can citizens interact as equals? What matters is how markets promote the values expressed in their evaluative standards, Liberal Values and Equal Status. That is, the consequences of the market are what matter.[120] Once markets are understood as instruments in this way, however, the assessment supplied by the Markets First Approach is revealed to be misguided.

Anderson regards specific markets as instrumentally valuable. Consider her treatment of markets in women's sexual labor. Recall, she argues such markets may require prohibition so as to preserve the possibility of fully realizing the shared good of human sexuality. This is surely an important consequence on Anderson's view, but it is not the whole story. For, the market has many other relevant consequences. Lacking significant economic opportunities, some women may regard prostitution as the best of a miserable range of options. It may also make an

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[120] A similar conclusion is defended by Amartya Sen, who, in taking up the more general question of the moral standing of the market, also argues for an understanding of markets as instruments, which are to be assessed by their consequences for the "fundamental social values of well-being, freedom, and justice" (1985: 8).

important financial contribution to securing their basic needs. To foreclose this option then may condemn these women to something worse. And this, of course, would be counterproductive. "If the prohibition of prostitution is to serve women's interests in freedom and autonomy," Anderson concedes, "it should not function so as to drive them to starvation" (1993: 156). She continues: "It can serve these interests only where expanded economic opportunities eliminate women's need to resort to prostitution." Though I will return to these remarks shortly, they serve now to demonstrate that the normative significance of a market in a specific good may vary by context. The market, in different conditions, will have importantly different effects. Thus, Anderson values markets as instruments for the promotion of Liberal Values.

Satz, too, understands markets as instruments. On her view, recall, what makes a market objectionable is simply that it has undue consequences for Equal Status. And what makes state interference justifiable is that it is likely to improve these conditions. A specific market in isolation is thereby not assessable. What is normatively relevant for Satz is how the market interacts with other features – e.g., prevailing norms and attitudes. Fully recognizing that markets may have many consequences, both good and bad, Satz takes her account to identify candidates for state interference, rather than markets that should be prohibited outright. This is because the value that might motivate us to close a market may be better served through regulation. For example, markets in child labor may be objectionable because they interfere with individuals' capacity to develop into autonomous citizens. However, if the closure of such markets forces children into prostitution or mercenary work, conditions that may be much worse than those in the sweatshops, then our response will have misfired. How we respond to particular objectionable markets cannot be determined a priori. It instead requires careful attention to the market's practical role, and the likely consequences of interference.

On both accounts market assessment involves two steps. First, there is an assessment of a specific set of transactions, then there is an assessment of the prospects of effective interference. In the first step, the set of transactions are evaluated in terms of their consequences for Liberal Values or Equal Status. Here the focus is on only facts about the transactions. Then there is a second judgement, one which takes into account how that set of transactions features in a larger system. This requires a judgment of the effects of intervention. Again an evaluative standard is consulted, and the likely consequences of intervention are assessed.

I grant that there is something intuitive about this approach to market assessment. It is natural to understand a specific market's normative contribution as an aggregation of the consequences of the transactions it comprises. So one might think that if kidney markets are objectionable, it is so because each transaction constitutes an attack on human dignity. Or, if you believe that prostitution degrades the prostitute, you may explain why markets in women's sexual labor are objectionable with reference to the harm so inflicted. For these reasons the Markets First Approach is an appealing and intuitive one. We already know which markets are problematic, and that supplies a starting point for assessment.

Although a natural thought, this approach to discerning the normative significance of a specific market is problematic. Given their conception of markets as instrumentally valuable, Anderson and Satz should reject the Markets First Approach as theoretically misguided. The error of interest can be seen by noting an important difference between the task of market assessment as called for on Anderson's and Satz's accounts, and that which is required by their evaluative standards.

On the Markets First Approach, the question of justified state interference is always posed with respect to a specific market. One considers some specific market, and assesses its operation according to an evaluative standard. If deemed objectionable, another judgment is made, one

about the prospects of effective intervention into that specific market. Accordingly, the specific market plays an essential role in the judgment that intervention is justifiable. In contrast, when markets are valued instrumentally, the question of state interference is simplified: The state justifiably interferes in markets when doing so is expected to produce greater conformity with an evaluative standard. Put simply, interference is justified if it is required by Liberal Values or Equal Status. The crucial point is this: Because markets are understood as having instrumental value, the question of state interference is posed without reference to markets, whereas the Markets First Approach casts specific markets in a mediating role.

Notice, because markets in specific goods are valued instrumentally, there is nothing normatively significant about any set of transactions that would supply reason to single them out for assessment. Yet this is exactly what the Markets First Approach does. Assessment begins with what is, from the perspective of an evaluative standard, an arbitrary collection of transactions. Moreover, in choosing which set of transactions to assess, one is also fixing the background against which that assessment takes place. So the individuation of the specific market is arbitrary, as are the background conditions against which one performs the cost-benefit analysis. To be clear, the problem is not that *transactions* lack normative significance. The problem is that they lack significance *as a market in specific goods*. If one values markets as instruments for the promotion of the values expressed in an evaluative standard, then there is no reason to perform, on any particular set of transactions, the cost-benefit analysis called for on the Markets First Approach.

This problem with the Markets First Approach is structurally similar to a problem discussed earlier. Recall this pair of theses introduced in chapter one:

> *Bad on Balance Thesis*. The welfare costs of vending, even in a well-regulated market, exceed the benefits conferred by compensation.

> *Non-Optimific Thesis*. Kidney sales exact greater costs on vendors than those costs that would result from taking what they judge to be their next best option.

There I argued that establishing the Bad on Balance thesis was insufficient to justify a prohibition on kidney sales. Insofar as we are concerned with vendors' welfare, we should only prohibit sales if we expect would-have-been vendors to fare better on their alternative courses of action. Put differently, we can not discern the normative import of kidney sales merely by examining the costs and benefits of transactions involving kidneys. We have to compare the outcome of the market with the outcome that results in its absence. We have to establish the Non-Optimific thesis.

We can modify these theses so as to be suitable for market assessment generally:

> *Bad Transactions Thesis*. As assessed by an evaluative standard, the negative consequences of some set of transactions φ, exceed the positive consequences of φ.

> *Bad Market Thesis*. As assessed by an evaluative standard, the consequences of some set of transactions φ, are worse than those that would follow from state interference.

To prove the Bad Transaction thesis is to show something normatively significant. But what is thereby established is insufficient to justify state interference. The information supplied by such a judgment is inadequate. It tells us something about the transactions, but nothing about them as

they feature in a larger market system. It leaves unanswered the crucial question: what effect do these transactions have on the values expressed in an evaluative standard? Bad Transactions may not form a Bad Market and a Bad Market may not comprise Bad Transactions. And both theses may be true, or both false. There are no valid inferences from either thesis.

The accounts defended by Anderson and Satz effectively seek to establish the Bad Transactions thesis with respect to some specific market. This is the first of two steps. And it is the step their theorizing is almost exclusively devoted to. Their accounts principally aim to establish the conditions under which the Bad Transactions thesis holds. The second step, in which the prospects of effective intervention are assessed, is not developed systematically. Moreover, the judgment required by the second step always makes reference to the specific market judged to comprise Bad Transactions. No attempt is made at establishing the Bad Market thesis.

We are now situated to appreciate the problem of incomplete accounting, which arises from the Markets First Approach. Once markets are understood as instrumentally valuable, to be assessed as they feature in a system, specific markets become a kind of theoretical interloper, placing needless constraints on the task of market assessment. By mediating the relation between the state and the market with specific markets, the Markets First Approach renders Anderson's and Satz's accounts sensitive to only a subset of market activity that may influence their evaluative standards. The Markets First Approach presumes that all objectionable market activity is identifiable at the level of a specific market. This is to constrain, without reason, the site of normative interest. The problematic result is that both accounts systematically fail to identify market activity as objectionable that is, by their own evaluative standards, objectionable.

The problem of incomplete accounting has three parts. First, notice that neither Anderson's nor Satz's accounts is capable of assessing individual transactions, although individual transactions surely appear capable of influencing individuals in significant ways.[121] The worry, then, is that normatively relevant activity, at the level of the transaction, may be obscured or altogether ignored. On these accounts, individual transactions are not theoretically significant, though they surely are normatively significant.

Second, both accounts assume that all bad markets are comprised of Bad Transactions. But we should not preclude from the outset the possibility that some set of transactions are judged, as transactions, to be permissible, while also judged, as a market, to be objectionable. For example, some people may benefit from employment at very low compensation, but may benefit more from imposition of a minimum wage.[122] The claim here is that it is possible, for any set of transactions φ, that the Bad Market thesis holds even if the Bad Transactions thesis does not. Yet, because the Markets First Approach only considers state interference after a judgment that the Bad Transactions thesis holds, it is possible that some Bad Markets may never be identified as such.

A third and related worry emerges when we consider diverse sets of transactions. We, again, should not preclude the possibility that some eclectic sets of transactions, those involving parts of many different markets, may have undue influence on the values embodied in an evaluative standard. The Markets First Approach involves assessing markets individuated by the goods

[121] Marc Fleurbaey (2011: 470), in his review of Satz's book, makes the point that problematic trades can occur in any market, and in a single transaction.

[122] I here do not intend to defend any empirical claims about the effects of minimum wage laws. I only aim to show that two things may be true of a single set of transactions: 1. Their consequences may promote some value, and 2. That value may be better served by their prohibition.

transacted. There may be some diverse collections of goods, however, that comprise a Bad Market.

In taking the Markets First Approach, and framing judgments of state interference with reference to Bad Transactions, both Anderson and Satz defend accounts of market assessment that are systematically insensitive to market activity that influences what they take to be normatively relevant. The point, to be clear, is not one about practical limitations. There is no expectation that an adequate account of market assessment identifies every *actual* objectionable transaction as objectionable. The problem, rather, is that even from the perspective of the theory some market activity that is objectionable will not be identified as such. Normatively relevant phenomena are screened off from counting as normatively relevant.

In focusing on specific markets Anderson and Satz defend accounts of market assessment that are structurally deficient and extensionally inadequate. The problem of incomplete accounting is the theoretical upshot of taking the Markets First Approach. In casting specific markets in a mediating role, both needlessly constrain their assessment.

§2. *The Problem of Action Guidance*

The Markets First Approach faces another problem. It fails to provide action guidance. The central question, which asks when the state justifiably interferes in the market, is a practical one. We need an account that can guide action. What makes market assessment difficult is that it involves anticipating changes in a complex system. Any action will have a range of consequences, many of which are likely unexpected. What we want is an account that will enable us to better act in the market, so as to secure its operation consistent with the values embodied in an evaluative standard. Once we've applied the account, we should have some indication as to how to proceed. But both Anderson's and Satz's views fall short on this point. And do so even in cases that should be easy.

Return to Anderson's treatment of markets in women's sexual labor. Anderson has done extensive work addressing this topic and related questions. It is unfortunate then, that even on an issue her account should be able to handle, it falters. After explaining why prostitution is objectionable, Anderson acknowledges that it may provide for the urgent needs of some women, and so concedes that her argument against the market is not conclusive. This is the problem Margaret Radin (1996) describes as 'the double bind'. The suggestion is that to allow commodification of women's sexuality is thought harmful, but so too is its prohibition. Recall Anderson's assessment. "If the prohibition of prostitution is to serve women's interests in freedom and autonomy," she explains, "it should not function so as to drive them to starvation" (1993: 156).[123] She continues, "It can serve these interests only where expanded economic opportunities eliminate women's need to resort to prostitution" (1993: 156). So, on Anderson's view, markets in women's sexual labor undermine Liberal Values, but a prohibition, absent improved economic conditions, would also undermine Liberal Values.

Of course, this is no solution at all. We cannot respond to the difficulty presented by the double bind, by committing to prohibiting prostitution just as soon as economic opportunities make the prohibition unnecessary. Understood this way, the prohibition is otiose. Either prostitution is of interest to disadvantaged women in poverty, in which case the prohibition would cause them harm; or alternative economic opportunities have rendered prostitution unattractive, and no prohibition on the practice is needed. In short, the suggestion that we instate

[123] Here Anderson references Radin's work on the 'double bind' (1987: 1921-1925).

the prohibition only once doing so no longer threatens detrimental consequences, is an unacceptable response to the problem. What the state should do about prostitution, if anything, remains an open and urgent question. Anderson's account fails to guide action when it is reasonably expected to.

Similarly, Satz's account also fails to guide action. There is no straightforward means of determining how to respond to a market that scores highly on one or more of the four parameters that constitute her evaluative standard. This is because the value that might motivate us to close a market may be better served through regulation. As Satz notes, even "if a market interfered with or failed to promote certain values, banning it might be worse overall from the point of view of those same values" (2010: 110). Once a market is identified as objectionable, there still remains the task of determining whether the state should interfere, and if so, how.

The case of markets in women's sexual labor is again apt. Satz is sensitive to the many ways the prohibition on prostitution harms women, rendering them vulnerable to the control of pimps and subject to disproportionate punitive measures (2010: 151). And she suggests reasonable principles to regulate a legal market, principles designed to decrease vulnerability and weak agency. Principles are offered, rather than determinate policy suggestions, because features of the context play such a significant role in assessing the consequences of interference in the market. How we ought to respond to particular objectionable markets cannot be determined a priori but requires careful consideration of empirical evidence, and attention to the specific ways that market functions to undermine Equal Status. "If we are troubled by prostitution," Satz concludes, "then we should direct much of our energy to putting forward alternative models of egalitarian relations between men and women" (2010: 153). Even if true, suggestions such as this are hardly responsive to the central question. Again, as was the case with Anderson, what the state should do about prostitution, if anything, remains an open and urgent question.

§3. *The Problem of Judgment*

The Markets First Approach requires a particular judgment. It must be determined how specific markets are assessed according to an evaluative standard. For Anderson and Satz this involves very different kinds of judgments, but both are fraught with difficulty. This is problematic as it heightens the probability that the resulting assessments will miss the mark. And the aim of constraining market activity according to an evaluative standard is thereby undermined.

The problem of judgment has two sources in Anderson's account. The first arises from her appeal to the notion of goods' social meanings. There is widespread and persistent disagreement over the social meaning of many goods. They are notoriously disputed. Satz offers a representative expression of the concern: "as a practical matter we may be unable to reach consensus on the best meaning of many specific goods" (2010: 82) There is disagreement, and it doesn't appear to be the tractable type requiring only patience. The point is also made by Michael Sandel (2000). In discussing the burden of fixing the markets limits with reference to the social meanings of goods he writes, "it must be shown how, in each case, market valuation and exchange degrades or corrupts important values" (2000: 106). One worry, then, is that agreement will remain elusive and the account will be a practical failure. We will simply never settle on crucial details. In the absence of agreement, the best we can hope for is a compromise. And a compromise is unlikely to reflect the truth.

The problem of judgement is exacerbated by a second feature of Anderson's account. Even if there were agreement on the matter of goods' social meanings, there remains the possibility that

these meanings do not straightforwardly promote Liberal Values. Goods' social meanings may be problematic. Rather than making markets conform to meanings, we ought, in some cases, to change the meanings. For example, Anderson argues, invoking Richard Titmuss' work, that human blood ought to be distributed according to norms of fraternity: "the value of blood to both the recipient and the donor is partially dependent on the motives for which it is given," she claims, "and enhanced when these motives are not commercial" (1990: 197). While one might (and should) deny the claim that those receiving 'altruistic' transfusions receive something of greater value than those receiving purchased blood, this point is non-essential.[124] Instead, I suggest that even if human parts and products *did* have some social meaning that recommended distribution according to the norms of fraternity, those very norms should be subject to moral assessment. If the social meaning of blood did recommend a donation only model, and that model resulted in less blood than alternatives, then we have reason to criticize the norms that call for that arrangement. Similarly, this year thousands of people will die for lack of a healthy kidney. If this shortage is the consequence of distributing kidneys according to their social meaning, by norms of fraternity, then we ought to alter that social meaning.[125]

The judgment of how a specific market influences Anderson's evaluative standard is thus doubly problematic. It appears unlikely that agreement will arise, and even if it did, we have reason to doubt that the upshot would promote Liberal Values.

The problem of judgment is acute on Satz's account as well. Her view relies critically on our intuitions. Yet, we have good reason to think these intuitions are prone to error. Accordingly, we have good reason to worry that Satz's account is vulnerable to distortion. It may identify as objectionable market activity that in fact is permitted by Satz's own normative commitments. And so the account is extensionally inadequate. This problem has two sources. First, Satz's account places excessive emphasis on our intuitive reactions to specific markets; and second, it offers inadequate means of discerning when these reactions reflect genuine violations of Equal Status, and when they are merely the product of repugnance.

Satz opens her discussion by observing that markets in some goods, like conflict diamonds, sex, and weapons are "seen as fundamentally different from, and elicit very different reactions than, markets in automobiles or soybeans" (2010: 3). These markets often "evoke widespread discomfort and, in the extreme, revulsion" (2010: 3). While the account Satz defends is clearly normative, it also seeks to *explain* why people react strongly to some, but not other, markets. In this way, intuitions are cast in a significant role. And Satz is fully aware of this:

> Some may wish to question placing so much moral weight on our intuitive reactions to particular markets pointing out that people were once horrified by the idea of life insurance. Perhaps many of our reactions are little more than an irrational repugnance at that which we dislike. (2010: 112)

[124] It is worth noting, the claim that blood products are distributed according to norms of fraternity is misleading. As Julia Mahoney (2000) has demonstrated, the distribution of human biological materials involves commerce at virtually every step in the supply chain. Only donors are asked to contribute uncompensated, and their gifts "bestow significant benefits on entities that pursue their financial interests aggressively" (2000: 175).

[125] Jason Brennan & Peter Jaworski (2015) argue, drawing on sociological and anthropological evidence, that the social meaning attaching to the marketing of goods is contingent, socially constructed, and mutable.

Concerns that 'irrational repugnance' might illicitly influence what we deem to be permissibly marketed are well founded. Alvin Roth's (2007) work on repugnance as a constraint on markets reveals just how powerful repugnant attitudes can be. In addition to life insurance, futures markets and currency speculation were also once thought unacceptable. And once indentured servitude was deemed permissible, as was the sale of indulgences and religious offices. These practices are not openly tolerated today. A key insight offered by Roth is that people's attitudes, even if irrational, can exert an influence on what can be feasibly marketed "every bit as real as the constraints imposed by technology or by the requirements of incentives and efficiency" (2007: 38). The worry, then, is that repugnance may unduly influence which kinds of market activity we judge permissible.

The four parameters at the core of Satz's account are introduced as means of distinguishing "the markets that people find especially objectionable from other types of markets" (2010: 94). In this way our intuitive reactions to specific markets are afforded considerable normative significance. They are understood as data in need of an explanation. I doubt, however, that many of these intuitions warrant the authority they are granted. Some may be motivated by atavistic fears bestowed by natural selection. While these intuitions may have offered valuable guidance in the past, they may be unreliable in contemporary contexts. Other intuitions may indirectly reflect sexist or other bigoted norms. In accommodating these intuitions we may inadvertently perpetuate social inequalities. Still others will simply be irrational or based on misinformation, lacking any substantive connection to citizens' equal status. Though in some cases our intuitive reactions to certain markets may be helpfully revealing, in other cases they may be misleading or even pernicious. Satz's account, I suggest, in granting these intuitions such significance, is likely to err in its assessment of how specific markets influence citizens' equal status.

The worrisome influence of repugnance is compounded by the fact that Satz's account offers inadequate resources for evaluating whether our intuitions actually warrant deference. Of course, our reaction to a specific market may be identified as non-authoritative if we are unable to characterize the market's badness in terms of one or more of Satz's four parameters. So, if we begin with the thought that some market is objectionable but fail to identify a parameter along which it scores highly, we can conclude that the initial thought was mistaken. However, this judgment itself may be subject to distorting repugnance. Assessments of vulnerability are especially susceptible. For example, Satz writes, "For some a kidney sale is objectionable because it is a paradigmatic *desperate exchange*, an exchange no one would ever make unless faced with no reasonable alternative"(2010: 195).[126] Similarly, those who feel the persistent intuition that prostitution is intrinsically degrading may regard it in much the same way.[127] One moved by these intuitions may take others' willingness to enter these markets as sufficient evidence that they lacked a reasonable alternative. Then the claim that these markets feature vulnerable participants follows without argument. But this assessment merely reflects, rather than confirms, the pre-theoretical intuition that these markets are objectionable. It provides the appearance of independent verification without its substance.

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[126] Though, see the previous chapter for discussion of the significance of kidney sales under conditions of desperation. In many cases, the more desperate the exchange, the more harm caused by foreclosing the option.

[127] Satz herself references research from Richard Brant (1979), indicating that the intuition that prostitution is intrinsically degrading persists even after "errors of fact and inference are corrected" (2010: 153).

PART THREE: THE STATE FIRST APPROACH AND THE POLITICAL CASE FOR KIDNEY SALES

I have argued that Anderson's and Satz's accounts of market assessment are beset by significant problems and so offer little opposition to the Value of Life argument. There is, however, something stronger to be said. Anderson's and Satz's normative commitments, as expressed in Liberal Values and Equal Status, in fact *recommend* the introduction of a regulated kidney market.[128] My argument to this conclusion follows.

§1. *Foundational Agreement: Democratic Equality*

As presented in her 1993 book, *Value in Ethics and Economics*, state interference in the market is justified when necessary to preserve autonomy and freedom. Thus, her evaluative standard, Liberal Values. In her more recent work, Anderson (1999) defends a form of egalitarianism she calls *Democratic Equality*. Precisely what relation the latter view bares to the former is unclear. This interpretive question poses no problem, however, as it ultimately does not matter which view one holds. Both will deliver the conclusion I defend here.

In the following, I will focus on Democratic Equality for three reasons. First, it is developed in Anderson's more recent work, and so presumably better expresses her considered views. Second, because, as will soon be apparent, Democratic Equality is more demanding than Liberal Values, in showing that the former recommends kidney sales, I will have shown the same for the latter. Third, Satz's own view, Equal Status, is substantially similar to Democratic Equality. Although, again, Democratic Equality is perhaps more demanding.[129] My argumentative strategy, then, is this: I elaborate the normative content of Democratic Equality, show that Satz accepts this content, and finally, show that it recommends the introduction of a regulated kidney market.

Anderson's view, Democratic Equality, conceives of equality as a relational rather than distributive ideal.[130] So construed, equality is primarily a matter of equal social relations, or equal status. Its point is to abolish class hierarchies and forms of social domination. Walzer captures the central thought nicely: "This is the lively hope named by the word *equality*: no more bowing and scraping, fawning and toadying; no more fearful trembling; no more high-and-mightiness; no more masters, no more slaves" (1983: xiii). Satz, too, understands equality in relational terms. This is clear in her appeal to Marshall's conception of democratic citizenship. On that view, recall, citizens are entitled not merely to formal political and civil rights, but also the economic and social preconditions to "share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in the society" (2009: 149).[131] While equality understood as a relational ideal has distributive implications, what matters primarily is that citizens are able to relate as equals, not that they have equal bundles of goods. Here Anderson

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[128] For reasons that will later become apparent, this conclusion is defeasible. If established, however, it is sufficient to shift the burden of proof to those who oppose kidney sales.
[129] If Satz's Equal Status differs from Democratic Equality it is because she intends it to have application in non-democratic contexts.
[130] In addition to Anderson, Samuel Scheffler (2005a, 2005b) is also a well-known relational egalitarian.
[131] Quoted in Satz (2010: 100). Satz (2007a) articulates and defends a commitment to a relational conception of equality in the context of equality of education.

and Satz depart from luck egalitarians, who hold that equal concern requires that people be compensated for unchosen inequalities but not for those for which they are responsible.[132]

A second point of agreement emerges in their answers to the 'equality of what?' question.[133] Anderson and Satz deny the general egalitarian claim that what citizens are owed is properly conveyed in a common currency. Rather than seeking to equalize welfare or resources, Anderson and Satz take capabilities, that is, what people are able to do and be, to be of principal interest.[134] And for both, the relevant capabilities are those connected with democratic citizenship:

> Citizens have a claim to a capability sufficient to enable them to function as equals in society (assuming they have the potential to do so). Democratically relevant functionings include adequate safety, health and nutrition, education, mobility and communication, the ability to interact with others without stigma, and to participate in the system of cooperation. (Anderson 2010b: 83)[135]

From this perspective it is easy to see why the redistribution of all-purpose resources is deemed an inadequate response to certain inequalities. If one lacks the basic education necessary to cast a meaningful ballot, cash compensation will fall short of rectification. Importantly, the rationale for supplying specific goods as opposed to all purpose resources, is not the paternalistic claim that a citizen will choose poorly if given cash. Rather, it is that the state's obligation can only be discharged if it supplies specific goods. This is true even if those owed the goods would prefer their cash equivalent. The underlying thought here is made vivid by T. M. Scanlon: "The fact that someone would be willing to forego a decent diet in order to build a monument to his god does not mean that his claim on others for aid in his project has the same strength as a claim for aid in obtaining enough to eat" (1975: 659-660). On this view, the state's role is to promote Democratic Equality, not simply satisfy citizens' preferences.

I am not primarily interested in defending Democratic Equality as the proper interpretation of egalitarian justice or defending the capabilities approach as its currency. My aim is more modest. I seek to show that a conception of egalitarian justice that is endorsed by Anderson and Satz, when incorporated into an account of market assessment, recommends the introduction of a regulated kidney market.

Though my ambition is thereby limited, I do not regard this as a significant shortcoming. This is, in part, because I do not think much, in practice, hangs in the balance. Even if one adopts a different answer to the currency question than that accepted by Anderson and Satz, the account of market assessment I develop below may be adjusted accordingly, without significantly altering the verdict on the permissibility of kidney sales. No plausible conception of egalitarianism, I suggest, supports the outright prohibition of sales. While there are many important differences among the various interpretations of egalitarianism, they are more pronounced in theory than in practice. This claim is defended by Jonathan Wolff and Avner de-Shalit (2007). They develop a practicable egalitarian theory intended for application to problems in social policy. Wolff and de-

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[132] Prominent defenses of luck egalitarianism include Dworkin (1981), Cohen (1989), Arneson (2004), and Tan (2012). For an informative discussion of the fundamental disagreement between luck egalitarians and relational egalitarians, see Anderson (2010a).

[133] This question is introduced in Sen (1980).

[134] The virtues of adopting resources (such as Rawlisn social primary goods) verses capabilities is explored in Brighthouse and Robeyns (2010). Anderson (2010b) defends capabilities as the 'currency' of egalitarian justice.

[135] Satz (2010: 100-104) makes similar claims.

Shalit argue that many forms of egalitarianism, even if they diverge in theoretically significant ways, may overlap on certain practical matters. They claim, for example, that the dispute between those favoring equality, priority, and sufficiency, is, given plausible empirical assumptions, muted in practice: "all of these views appear to converge on the same general policy prescription in the short to medium term: *identify the worst off and take appropriate steps so that their position can be improved*" (2007: 3). This claim is not uncontroversial.[136] However, without glossing over meaningful theoretical differences, I suggest that my central contention, regarding the permissibility of kidney sales, will follow regardless of the interpretation of egalitarianism that one adopts.

There is a second reason my limited ambition is not a significant shortcoming. What is original about my account of market assessment is that it solves the problem of incomplete accounting that results from the Markets First Approach. It, further, is action guiding and avoids the problematic judgments of specific markets required on Anderson's and Satz's accounts. These advantages do not presume any particular form of egalitarianism. Regardless of how that debate plays out, I suggest, my account of market assessment makes a contribution. I turn now to my proposal.

§2. *The State First Approach*

Recall, both Anderson and Satz answer the central question – about the conditions under which the state justifiably intervenes in the market – with a two-part judgment. First, there is an assessment of a specific market; and second, there is an assessment of the prospects for effective intervention. I have argued that this, the Markets First Approach, is mistaken. I claimed that one could not discern the normative significance of a specific market without understanding how it featured in the larger market system. This was the problem of incomplete accounting. What is required is a wider perspective. This perspective, I argue, is supplied by the alternative account developed here, the *State First Approach*. I propose that the state, and not specific markets, is the primary object of assessment.

The account begins with a view of what Democratic Equality – successfully realized – looks like. We ask: What would be required for this relational conception of equality to obtain? In answering this question, we arrive at a conception of a citizen enjoying equal status. This conception is then translated into a functional description of such a citizen. We can then, using this device, gauge the extent to which the state succeeds in securing Democratic Equality. At any time, the state will be more or less successful in satisfying the demands of Democratic Equality. Under poor conditions many citizens will fail to satisfy the functional description, in that some citizens will lack certain capabilities, or possess them less fully than they should. Under ideal conditions, Democratic Equality is fully realized; all citizens fully satisfy the functional description. Rather than assessing a market, and then assessing the possibility of effectual interference, the State First Approach collapses the judgments into one.

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[136] For a skeptical reply, see Arneson (2010). An initial worry about Wolff and de-Shalit's proposal is that the differing theoretical positions do not in fact so converge. Or, if they do, it is only possible because the views' normative commitments have been attenuated to the point of denaturation.

In schematic form, the State First Approach proceeds as follows.[137] The state has a 'position'. Its position is the totality of its policies. Any change in the state's position constitutes a 'move'. Introducing a tax or a subsidy, prohibiting some practice or promoting one, count as moves. The state justifiably interferes in the market when a legitimate move – i.e., a move that is reasonably expected to promote Democratic Equality as measured by the functional description – is open.[138]

Devising the correct functional description of a citizen enjoying equal status is of primary importance. It must be determined what elements are to be included in the functional description. This is a non-trivial task. Our success at this juncture requires careful thinking about how to translate the demands of Democratic Equality into a description that is specific enough to be sensitive to all relevant capabilities, yet general enough to be workable. As a starting point, we might begin with the list offered in Anderson's quotation above.

Suppose this task is complete. We are left with an even more difficult one, namely solving the 'indexing problem', which arises when we attempt to assess along a single dimension a plurality of goods, like the various capabilities included in the functional description. In following Anderson and Satz in taking capabilities as the currency, I also inherit the practical problems it comes with. My proposal requires a judgment about the expected *promotion* of Democratic Equality, and this seems to require a comparison of the incomparable. We must determine how these elements are to be weighted, that is, how much each contributes to the satisfaction of the demands of Democratic Equality. To make use of the functional description, it must be possible to rank various levels of attainment. But the heterogeneous elements of the functional description resist comparison. Of course, if there is a move open to the state that influences all citizens positively, one that is Pareto improving, then it can permissibly be taken. However, given that any plausible functional description will include a number of elements, and that most moves will have a range of propagating effects, rarely if ever will such a dominant option be available.

Fixing the details of the functional description, and solving the indexing problem, are, no doubt, important. However, it should be noted that my ambitions here are limited. I seek, not to defend an account of distributive justice, but to show that an interpretation of egalitarianism favored by Anderson and Satz, employed as part of an account of market assessment, recommends introducing a regulated kidney market. Thus, the conditional conclusion: if one accepts Democratic Equality, then one ought to favor kidney sales. Whatever challenges arise from adopting Democratic Equality, they cannot be construed as disadvantages of my account, when compared to that of Anderson or Satz. These problems are just as pressing on the Markets First Approach. Accordingly, while I recognize the need for a clearer specification of the functional description, and the need for a solution to the indexing problem, these problems need not be solved for my purposes.[139] For they are not unique to the alternative account on offer.

Even bracketing these important issues, one may reasonably wonder how this proposal could be put into practice. I have argued that specific markets lack theoretical significance, and that state interference is justified directly by the expected influence such action will have on citizens.

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[137] Of course, as this is only a sketch, many details will here be left aside. I hope, however, to say enough to gesture at what a fully developed account would look like.

[138] To count as legitimate, a move must satisfy the liberal principle of legitimacy. This coheres with the limited scope of the Value of Life argument defended in this dissertation, which is sensitive only to those considerations citizens may be reasonably expected to endorse (Rawls 2005).

[139] Wolff and de-Shalit (2007: 89-107) sketch a solution to the indexing problem that may be taken as a starting point for the practical implementation of my proposal.

This requires a judgment that the input into a complex market system will deliver the desired output for citizens. It is not obvious, however, given our limited understanding of markets, and the unlimited moves open to the state, that we can identify any moves that we should expect to promote Democratic Equality. It was claimed as a virtue of the account that specific markets played no essential role in mediating judgments of state interference, and that in rejecting the Markets First Approach we avoid the problem of incomplete accounting. And it was claimed a problem for Anderson and Satz that their accounts required a judgement of how specific markets influence their evaluative standards. Yet, it seems in the absence of specific markets, the epistemic matter of coming to a judgment about interference is more difficult. Having eliminated specific markets as mediating judgments about interference, and focusing only on the output of possible moves, the State First Approach may appear unworkable.

The above reasoning misunderstands the limited way in which specific markets are eliminated from theory. While it is true that such markets lack theoretical significance in the justification of state interference, this does not entail a lack of significance full stop. As already noted, what makes the Markets First Approach appealing is that it offers a natural starting point for market assessment. There is, for example, pro tanto reason to be concerned about markets involving excessive danger, humiliation and degradation, and low compensation. However, on my proposal, such markets arouse concern, not because they are, as markets, objectionable, but because they are symptomatic of remediable conditions. The existence of such markets is a source of valuable information. But to locate the badness of these markets in there mere existence is to fail to see how they feature in a larger complex of choices. It obscures what is relevant to the matter of justified state interference, namely, whether there is a move open that can improve citizens' satisfaction of the functional description.

We might usefully distinguish between conceiving of specific markets as playing an essential justificatory role, and, in contrast, as having only evidential significance. Those taking the Markets First Approach cast specific markets in an essential role. On Anderson's view, for example, the judgment that state interference is justifiable makes essential reference to a specific market. Facts about the specific market ground interference. The explanation as to why interference is justified, on her account, must refer to the specific market targeted. So too with Satz's account. By contrast, on the State First Approach one may regard specific markets as having only evidential significance. Justification ultimately requires no reference to any specific market. And, importantly, this is compatible with the use of specific markets as heuristics, as providing evidence about how to proceed.

We may, to make the point clear, employ something like the distinction between a criterion of right action and a decision procedure.[140] State interference is right insofar as it promotes Democratic Equality as measured by citizens' satisfaction of the functional description. Yet, this end may be best served if specific markets receive careful attention, for example, as they do on Satz's account. While a specific market may then feature in a judgment that state interference is justifiable, their role in such a judgment is non-essential. The claim is that, while promotion of Democratic Equality is the criterion for right action, any decision procedure may be employed to achieve this end. The State First Approach thus has enormous flexibility.

On this proposal one can make use of any other account of market assessment to identify specific markets apt to undermine Democratic Equality. We may, for example, appropriate the theoretical apparatus of Satz's account. Although I have argued that specific markets lack the significance they are endowed with by the Markets First Approach, I concede that there is often

[140] This distinction is nicely elaborated in Bales (1971).

good reason to focus on particular *kinds* of transactions. Taking specific markets as a unit of assessment is recommended not only by practical administrative considerations, but also by the fact that certain transactions, for example, those involving votes, babies, sex, and dangerous labor, are more likely to undermine equal relations than others. This is to reaffirm the insight of the classical economists like Smith and Ricardo, and emphasized by Satz, that markets are heterogeneous. Because attending to specific markets may best promote Democratic Equality, such markets may feature in our judgments about possible moves, even if they play no essential justificatory role. In this way we can use Satz's account as a heuristic; its four parameters are intended to provide evidence that the operation of a specific market is inconsistent with Democratic Equality. Even if imperfect, the application of these parameters delivers intuitively plausible results. These may usefully inform policy decisions or, put differently, choices about what moves the state should make. One advantage of the State First Approach, then, is that it is compatible with the use of any means of identifying problematic market activity. It places no constraint on the decision procedure.

It is worth emphasizing, while I grant that other accounts of market assessment may be of use, I clearly do not adopt the view of the Markets First Approach. That is, I do not regard specific markets as having normative significance in isolation. Recall, Anderson and Satz understand the badness of a specific market to reside in the badness of the consequences of the transactions it comprises. Thus, markets in women's sexual labor are objectionable because their operation undermines women's equal status as a class. By contrast, the State First Approach analyzes the normative import of a specific market (or any set of transactions) in terms of the consequences of the alternatives. Accordingly, a given market may involve many transactions that themselves are objectionable, and which leave the participants worse off, yet still, assessed as a market, be judged to have positive normative import. This would be so if it were the case that, were the market closed or otherwise interfered with, the ensuing consequences would be comparatively worse.[141]

An advantage of construing market assessment as an assessment of the state is that any results will be action guiding. It was a problem, I suggested, that on both Anderson's and Satz's accounts, once one has assessed a specific market, there remains a question about action. Both allow for the possibility that a market, like that in women's sexual labor, may be deemed objectionable, yet should remain open. This follows from the Markets First Approach, which involves two acts, the assessment of the market, and, if deemed objectionable, the assessment of the prospects of intervention. In contrast, on the State First Approach, there is no such gap. To judge that a market is objectionable, is to judge that the state could make a move that would promote Democratic Equality. And this judgment includes the specific action recommended to the state.

Note also a further advantage that arises from the specificity of the functional description. While the account permits any means to be adopted, it requires state interference to be justified by a reasonable expectation that it will promote Democratic Equality as measured by the functional description. I suggest this judgment less problematic than those required by the

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[141] These claims may be familiar as this reasoning was employed in my critique of Koplin in part three of chapter one. There I argued that, absent information about what would-be vendors would do were the option to vend closed, we could not conclude that vending made them worse off. Expressed in the terms I used there, even if vending is bad on balance, to make the case for prohibition, one must defend the Non-Optimific Thesis. If the state is to justifiably interfere in the market, there must be reason to expect the alternative conditions thereby produced to be preferable.

Markets First Approach. Consider Satz's account. The four parameters she employs are quite general. And, as I argued, the judgment that some market features vulnerable participants, for example, is susceptible to the undue influence of repugnance. I further claimed that Satz's account lacked the theoretical resources necessary to eliminate these distorting effects. Equipped with the functional description, however, this problem is mitigated. To be justified, an act of interference must be reasonably expected to improve capabilities relevant to democratic citizenship. In requiring an explicit justificatory link between the proposed act of interference, and the capacity expected to be improved, the account is better situated to resist the influence of repugnance.

To complete the sketch of the State First Approach, I turn to the matter of its application. An appealing feature of the Markets First Approach is that the phenomenon of interest is neatly defined. It is the specific market under assessment. Disputes about this local domain are relatively tractable. By contrast, on my account any judgment that state interference is justifiable involves a judgment about the entire market system. Such a judgment is global. However, given our limited epistemic capabilities, and the huge range of possible moves open to the state, no such global judgment is feasible. Accordingly, while the criterion of right calls for a global judgment, in practice the best we can expect is far more limited. When a move is proposed, it will be justified with reference to only the range of considerations relevant to that move. The justification for these moves will be in this way 'restricted'. It will incorporate only those factors salient for the given proposal. And this introduces the possibility of conflict. For, one may conclude, when only a range of considerations are in play, that a particular move promotes Democratic Equality, while another may conclude that an incompatible move, recommended by a different set of considerations, also promotes Democratic Equality.

To adjudicate such disputes I introduce what I will call the propose-and-challenge model of application. The aim is to devise a procedure whereby the various moves, each of which enjoys only restricted justification, can be aggregated to approach a global judgment. This is achieved through iterated comparisons of candidate moves, each of which incorporates more evidence. The suggestion, roughly, is this: Call the state's position P_0. One may propose some move, M_1, which would result in position P_1. That P_1 promotes Democratic Equality may enjoy restricted justification. That is, when P_0 and P_1 are compared, we may conclude P_1 results in greater satisfaction of the functional description, and so is preferred. Yet, there may be another proposed move, M_2, which is incompatible with M_1, and would result in the state taking position P_2 . This proposal is said to challenge M_2. At this point we compare the relative merits of P_1 and P_2 with respect to the promotion of Democratic Equality. This comparison effectively expands the range of considerations incorporated into our assessment of the proposed moves. Supposing P_1 is preferred, the restricted justification it enjoys is now expanded and so more credible. It subsumes the considerations relevant to both moves M_1 and M_2. If there are no further challenges, then move M_1 is made. If, however, there is an additional challenge, move M_3, which results in position P_3, then we compare the relative merits of P_1 and P_3. Because each iteration takes into account more information, we should expect our restricted judgments to approach those we would arrive at via a global judgment.

Though there is much more to say, I hope the State First Approach is sufficiently determinant for my purposes. Recall, here I am interested in defending the conditional conclusion that if one accepts Democratic Equality, then one ought to favor regulated kidney markets. To this end I have sketched an account of market assessment that construes state interference as justifiable when it is reasonably expected to promote Democratic Equality. I suggest this proposal is an improvement over both Anderson's and Satz' accounts. Chiefly, it rejects the Markets First

Approach, and so avoids the problem of incomplete accounting. This is a significant advantage. It collapses the judgment of a market, and the judgment of interference, into one judgment, and so is reliably action guiding. And it employs a specific interpretation of Democratic Equality, as specified in the functional description, and so is less vulnerable to the distorting influence of repugnance. I turn now to apply the account to the matter of kidney markets.

§3. *The Political Case for Kidney Sales*

Currently, in the United States the 1984 National Organ Transplant Act prohibits the exchange of human kidneys for valuable consideration.[142] Thus, the state's position involves a policy banning sales. Here I defend the claim that there is a move open to the state that is reasonably expected to promote Democratic Equality. Namely, end the prohibition on sales and introduce a regulated kidney market.

As noted, my account of market assessment has only been sketched. Many crucial details are absent. I have not, for example, specified what should be included in the functional description. Nor have I offered a solution, even in outline, to the indexing problem. However, even lacking these details, I suggest the case for the market is readily discernable. For, it is uncontroversial that citizens in poor health will fail to satisfy the functional description. This modest claim goes considerable distance to my conclusion.

It follows from my account of market assessment that my conclusion will be defeasible. What I offer here is a move, and an argument that the state, in making that move, will improve its position with respect to citizens' satisfaction of the functional description. My case for sales will enjoy only restricted justification. But once made, it is for the market opponent to propose a challenge, and offer an argument demonstrating their proposal's superiority.

The work of the previous chapters has completed much of the task. Many of the most common concerns about sales have been addressed. Here I make three points.

I first note that the current prohibition is implicated in considerable preventable death and suffering. Many suffer and die for want of a healthy kidney. This is a problem. More than 100,000 are currently waiting for a transplant. This number would be much higher if 5,000 of those waiting didn't die every year. And if 3,600 more weren't removed after becoming too sick for transplant (OPTN data accessed November 2015). And it would be much higher still if so many weren't excluded as unsuitable.[143] As incidence of diabetes and hypertension increase so too will the demand for transplants. Given that rates of living donation have been stagnant for more than a decade, and rates of deceased donation only marginally better, we should expect the human toll taken by the kidney shortage to swell (Cook and Krawiec 2014: 12).

I next note that the benefits of a market would also accrue to vendors. Kidney transplantation is safe. Carefully screened donors have longer than average life expectancies, and the risk of death is estimated to be 3 in 10,000 (Ibrahim et al. 2009, Segev et al. 2010). Vending need not involve significant harm. Further, compensation would remain cost effective at rates over $100,000. Such levels are, for most people, transformative. Significant changes are possible with sums so large.

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[142] National Organ Transplant Act, U.S.C. Pub. L. No. 98-507, sec 301 §274e(a).

[143] Though, what counts as 'unsuitable' is disputable. In 2008 it was estimated that around 135,000 patients excluded from the wait list have life expectancies of greater than 5 years (Schold et al. 2008: 59). We should expect that number to have grown in the intervening years.

Finally, as I have argued in previous chapters, we have reason to believe these benefits are obtainable at little to no moral cost. Concerns about diminished altruism are unfounded. Worries that a market will result in a net reduction in supply are without support. We have reason to expect a market to be productive. Claimed problems of consent range from trivial and remediable, to outright implausible. And we should reject the suggestion that allowing sales would "fundamentally change the norms of the relationships of each of us to our bodily organs and to each other" (Rippon 2014a: 147). The charge that sales would lead to harmful social and legal pressure, or third-party coercion, is predicated on mistaken view of the market.

A market would improve the health of recipients, and the economic conditions of the vendors, and these are uncontroversial goods. However the functional description is elaborated, the expected consequences of allowing sales will surely improve the extent to which some satisfy it. In the absence of reason to think anyone would less fully satisfy the functional description, the case for the market is clear. And, importantly, the reasons in favor of the market are recognizable on any plausible form of egalitarianism. Health, and the relief that comes with compensation, are valuable whatever else one values. To the problem presented by the shortage of kidneys, I suggest the solution is sales.

Beyond this little more need be said. It is now for someone else to offer a better suggestion.

CONCLUSION

The work of this chapter features in my defense of the Value of Life argument in two important ways. One of my aims was to address objections appealing to the moral limits of the market. Anderson and Satz both offer accounts of market assessment that may be wielded in opposition to kidney sales. I sought to show that both accounts are deficient, and neither supplies reason to resist the market proposal. But I also pursued a more ambitious goal. I made the political case for kidney sales. I developed a novel account of market assessment, the State First Approach, that solves the problem of incomplete accounting arising from the Markets First Approach. And, drawing on the work of previous chapters, argued that the state's current prohibition is unjustified, and that the introduction of a regulated market would promote Democratic Equality.

CONCLUSION

The shortage of transplantable kidneys is a problem. This dissertation defends a solution: we should introduce a regulated kidney market. Here I return to the argument to this conclusion. The first three premises are unobjectionable:

> (1) Many people are suffering and dying for lack of a healthy kidney;
> (2) this death and suffering is bad;
> (3) if we can act to address this problem without bringing about a comparable or worse harm or serious rights violation, we should be permitted to.

The moral cost of the shortage is well documented and made vivid by the ever-expanding waitlist. That this is bad, and that we should be permitted to prevent the resulting harm if we can do so without causing a comparable or worse harm, is, I submit, uncontroversial.

The fourth premise is contentious. It states:

> (4) A carefully regulated market would both (i) increase the supply of transplantable kidneys, thus reducing the death and suffering caused by the current shortage and (ii) improve the welfare of vendors.

The claim of (4i), that the offer of payment would induce more to undergo elective nephrectomy is supported by commonsense and survey reports. But it is not unchallenged. The crowding objection points to the possibility that the introduction of incentives will change the significance of donation, making it less appealing, thereby reducing supply. In chapter two, I show that this worry is predicated on an implausible view of donors' motives and, drawing on recent work in behavioral economics, revealed it to be empirically unsupported.

The claim of (4ii) – that vendors' welfare would be improved – is supported by empirical facts about the minimal risks of elective nephrectomy, and the benefits of compensation. I defended this claim against two lines of resistance. The first holds that vendors will be unacceptably harmed. In chapter one I showed that sensible regulations may prevent this. I further argued that those opposing sales on the basis of harm to vendors have failed to properly conceive of the welfare contribution of kidney sales. The relevant comparison is not, as is often assumed, between the costs and benefits of the transaction, but between vendors' welfare across two possible courses of action. No evidence has been supplied to substantiate the judgment that vendors are harmed in the relevant sense.

The second line of resistance I address holds that vendors would not validly consent to their sale, and would thereby be harmed. In chapter three I showed that these objections, despite their currency, are unsupported by fact or reason. Moreover, all are predicated on the autonomous authorization model of consent, which I maintain is deficient. The Fair Transaction model developed by Miller and Wertheimer represents a far more compelling conception of morally transformative consent. Once accepted, consent-based objections become even less convincing.

The fifth premise is contentious. It states:

> (5) We have compelling reason to think that such a market can be arranged so as to secure these benefits without causing comparable or worse harm.

Three significant objections were addressed. One claimed that altruism is intrinsically valuable and held that this value would be diminished by allowing sales. In chapter two I argued that this reasoning proceeds on the unsupported assumption that vendors act out of self-interest. Those

pressing this objection make an important mistake, what I called the individuation error, when they draw conclusions about vendors' motives on the basis of the act of selling.

A second kind of objection, considered in chapter three, claims that a market will harm those who do not vend. Rippon argues that those in poverty would be subject to harmful social and legal pressure. This objection fails to distinguish between being subject to pressure to perform a specific act, and being subject to general economic pressure while having the option to perform an act. His opposition also proceeds from an empirically false view of the market's operation, assuming sales far more common than is realistic. Satz's claim that some may be unjustly forced to pay a price for their preference not to vend also assumes an unrealistic view of the market. Moreover, the normative considerations she offers to support her opposition, on examination, actually recommend sales.

Premise (5) faces a third challenge. Anderson and Satz both defend accounts of market assessment that may be wielded as objections to kidney sales. In chapter four I argued that both accounts face what I call the problem of incomplete accounting. This arose because, in taking the Markets First Approach, both endow markets in specific goods with unwarranted theoretical significance. As a result, their accounts failed to identify as objectionable all those transactions that, by their evaluative standards, are objectionable. I also argued that both encounter problems of content. Anderson's account relies on social meanings which are notoriously controversial. Satz's account is vulnerable to the distorting influence of repugnance. And neither is adequately action guiding. I sketched my own account of market assessment that avoids the problem of incomplete accounting, eschews social meanings, is resistant to the undue effects of repugnance, and is action guiding. I argued that if one accepts Democratic Equality, which is favored by both Anderson and Satz, then one should support the introduction of a regulated kidney market. This supplies the political case for sales.

I take the foregoing to yield the conclusion:

> (6) We should provisionally introduce a regulated kidney market.

Two final remarks are in order.

My conclusion is limited. I have focused almost exclusively on the case for sales in the United States. My argument is influenced in form and content by this fact. The issue of sales elsewhere is urgent. It is also complex. Many places lack the resources required for dialysis. Without a transplant, patients simply die. Many of these places also lack government institutions of sufficient strength to maintain a prohibition, let alone a market like that which I have proposed. To make the case for sales on a global scale requires an entirely different set of arguments. Such an undertaking is not possible in a project such as this one.

My conclusion is qualified. At the outset I noted that I would limit my discussion to considerations discernable through public reason. I, accordingly, have omitted objections that rely for their cogency on claims reasonable citizens may reject. This seems an appropriate restriction for discussion of policy within a liberal democracy. But the argument of this dissertation has implications even for those who think public reason unduly constraining. For the values I appeal to should be compelling to all. I have cataloged a range of goods supplied by the market. Many lives may be extending and many saved. The suffering of those in need of a transplant, and the suffering of those who watch their loved ones wither while waiting, may be prevented. Those who make this possible will know their contribution's influence. And their compensation may do much to improve their own lives, and the lives of others. Even if one takes additional considerations to be relevant to the moral assessment of kidney sales, the facts I have

marshaled cannot be ignored. I invite those who remain opposed to the market proposal to identify those considerations of such import that would justify forgoing these benefits.

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