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OWNING ORGANS:
THEORY, BIOETHICS, AND PUBLIC POLICY

by

MARK JOSEPH CHERRY

A THESIS SUBMITTED
IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE DEGREE
DOCTOR OF PHILOSOPHY

APPROVED, THESIS COMMITTEE

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May, 1999
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1999
OWNING ORGANS:
THEORY, BIOETHICS, AND PUBLIC POLICY

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ABSTRACT

Owning Organs:
Theory, Bioethics, and Public Policy

by

Mark J. Cherry

This study examines arguments for and against the sale of human organs for transplantation by exploring the ways in which one can conceptualize the ownership of organs. The conclusions I offer lead to bringing into question current prohibitions against the selling of human organs.

Despite the considerable disparity between the number of patients who could significantly benefit from organ transplantation and the number of organs available for transplant, as well as the apparent potential of a market in human organs to increase the efficiency and effectiveness of organ procurement and the number of organs available for transplantation, an emerging consensus holds such a market to be morally impermissible and promotes global prohibition.

This study critically assesses the grounds for such proscription. I examine the moral, ontological, and political theoretical concerns at issue in a human organ market. The various advantages and disadvantages of such a market are explored. In each chapter, I mark out the grounds for holding that the global consensus to proscribe organ sales does not
have the force usually assumed; indeed, how it may be misguided. First, it fails adequately to appreciate the phenomenological and physiological distinctions among different body parts, the relative strength of ownership rights, as well as the general significance of forbearance and privacy rights. Second, the global consensus fails as well to take adequate account of the closeness of the analogy between dominion/possession/ownership of one's body and dominion/possession/ownership of other types of things, or of the ground and extent of moral political authority. Moreover, third, maximizing health care benefits, promoting equality, liberty, altruism, and social solidarity, protecting persons from exploitation, and preserving regard for human dignity are more successfully supported through permitting a market rather than through its prohibition. Finally, I consider foundational arguments from the history of philosophy, including the positions of Aquinas, Locke, and Kant, which would usually be held to prohibit the sale of organs. In each case the arguments on closer examination do not unequivocally preclude the selling of redundant internal organs or those from cadaveric sources. On balance the analysis supports a market in human organs, rather than its prohibition. Indeed, such prohibition likely causes more harm than benefit.
ACKNOWLEDGMENTS

This project benefitted through the kind efforts of many. I am in the particular debt of the members of my committee: H. Tristram Engelhardt, Jr., Baruch A. Brody, George Sher, and Gerald McKenny, whose comments and criticisms were integral to the final form of the analysis. Mark Kulstad, Larry Temkin, Richard Grady, Donald Morrison, and Steven Crowell provided philosophical background which assisted in the shaping of the arguments. Minranda Robinson-Davis ensured administratively that all went well. Additionally, I wish to express my thanks to the support and kindness of the Center for Medical Ethics and Health Policy, Baylor College of Medicine, especially Baruch A. Brody, Laurence McCullough, Linda Hunt, and Delores Smith. Discussions with B. Andrew Lustig, Joseph Boyle, and Kevin Wildes also helped to shape the character of this project.

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My deepest gratitude goes to Frank and Charlotte Cherry for their nurturing of intellectual skills as well as for unfailing encouragement and emotional support. to Carl and Lois Dorman for their kindness over the years, and to Mollie Cherry, who besides possessing the virtues of faith, hope, and love, together with a sense of humor, typed all of Chapter One, endnotes, references, and revisions, in a single weekend.
For

Mollie Elizabeth
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>CHAPTER ONE: ORGAN SALES AND MORAL ARGUMENTS:</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Body for Beneficence and Profit</td>
<td>1</td>
</tr>
<tr>
<td>Introduction</td>
<td>1</td>
</tr>
<tr>
<td>The Challenge for Public Health Policy</td>
<td>3</td>
</tr>
<tr>
<td>A &quot;Global Consensus&quot;</td>
<td>7</td>
</tr>
<tr>
<td>Factors which Influence Consent:</td>
<td>9</td>
</tr>
<tr>
<td>Commercialism vs. Altruism</td>
<td></td>
</tr>
<tr>
<td>Organ Markets are Exploitative.</td>
<td>14</td>
</tr>
<tr>
<td>Morally Repugnant, and Violate Human Dignity</td>
<td></td>
</tr>
<tr>
<td>Equality and Justice</td>
<td>19</td>
</tr>
<tr>
<td>Health Care Outcomes</td>
<td>23</td>
</tr>
<tr>
<td>Prohibition: Philosophical Arguments</td>
<td>28</td>
</tr>
<tr>
<td>and Background Assumptions</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>CHAPTER TWO: A MARKET IN HUMAN ORGANS:</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ontological, Moral, and Political Theoretical Presuppositions</td>
<td>49</td>
</tr>
<tr>
<td>Introduction</td>
<td>49</td>
</tr>
<tr>
<td>Not All Body Parts are Created Equal</td>
<td>53</td>
</tr>
<tr>
<td>Owning One's Body and Owning Things</td>
<td>62</td>
</tr>
<tr>
<td>Moral Repugnance: Adjudication Among Intuitions</td>
<td>76</td>
</tr>
<tr>
<td>Government, Health Care Policy, and Private Choices</td>
<td>79</td>
</tr>
<tr>
<td>Summary</td>
<td>91</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>CHAPTER THREE: A MARKET IN HUMAN ORGANS:</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Costs and Benefits, Vices and Virtues</td>
<td>105</td>
</tr>
<tr>
<td>Introduction</td>
<td>105</td>
</tr>
<tr>
<td>Health Care Costs and Benefits</td>
<td>111</td>
</tr>
<tr>
<td>Special Moral Costs and Benefits: Equality and Liberty</td>
<td>127</td>
</tr>
<tr>
<td>Exploitation:</td>
<td></td>
</tr>
<tr>
<td>Organ Markets Verses Other Allocation Strategies</td>
<td>136</td>
</tr>
<tr>
<td>Harmful Exploitation</td>
<td>138</td>
</tr>
<tr>
<td>Mutually Advantageous Exploitation</td>
<td>140</td>
</tr>
<tr>
<td>Moralistic Exploitation: Improper Commodification</td>
<td>148</td>
</tr>
<tr>
<td>Some Final Reflections on Exploitation</td>
<td>155</td>
</tr>
<tr>
<td>Community, Altruism, and Free Choice</td>
<td>156</td>
</tr>
</tbody>
</table>
CHAPTER FOUR: THE BODY, ITS PARTS, AND THE MARKET:
        Insights from the History of Philosophy:
        Revisionist Interpretations

Introduction
Thomas Aquinas: The Principle of Totality
and the Selling of Body Parts
John Locke: The Limited State and Natural Duties
Immanuel Kant: The Categorical Imperative and One's
        Obligation Not to Use Oneself as a Means Merely
Robert Nozick: The Moral Authority of Consent
Summary

CHAPTER FIVE: CONCLUSION

BIBLIOGRAPHY
CHAPTER ONE

ORGAN SALES AND MORAL ARGUMENTS:

The Body for Beneficence and Profit

I. Introduction

This study addresses a cluster of conceptually independent philosophical concerns. They are related by an urgent public health challenge: the considerable disparity between the number of patients who could significantly benefit from organ transplantation and the number of human organs which are available for transplant. For example, in 1996, in the United States, 72,386 patients waited on the United Network for Organ Sharing lists for transplants (UNOS, 1998). By August of 1998 the waiting lists included 57,839 patients (UNOS, 1998). Yet, in 1997 only 19,998 organ transplants of all types were performed (UNOS, 1998). Organ availability is not expected significantly to increase in the near future. Proposals to address this crisis, include national educational programs on the benefits of transplantation and the pressing need to donate organs, as well as laws which range from requiring physicians to ask families to
donate organs from recently deceased relatives, to those which make organ retrieval upon death mandatory or which reward those who do donate, to the creation of a for-profit commercial market\(^1\) in human organs.\(^2\)

Such proposals cluster a number of questions: (1) What does it mean to own an organ? (2) Under what circumstances do governments have moral authority to regulate how persons utilize their own body parts? (3) What are the costs and benefits of a market in human organs, measured in terms of medical efficiency and effectiveness, moral virtues and vices, as well as scientific integrity and community directed altruism? Despite the apparent potential of a market in human organs to increase the efficiency and effectiveness of organ procurement, as well as the number of organs available for transplantation, an emerging consensus holds such a market to be morally impermissible and promotes global legal prohibition.

This study presents a geography of the ontological, moral, and political theoretical foundations of a market in human organs. It considers the arguments and assumptions that support the consensus which frames the nearly global prohibition on selling human organs for transplantation. It evaluates not only the likely costs and benefits of such a market, but also the probable costs and benefits of its proscription. While the analysis does not provide a definitive resolution to these controversies, it offers some probable conclusions: first, that under scrutiny the various considerations support the permissibility of a
market in human organs. rather than its prohibition. and second. this suggests that the global consensus advocating the prohibition of a market in human organs causes more harm than benefit.

II. The Challenge for Public Health Policy
Consider the extent of the medical challenges. In 1996. 4022 patients died while waiting for suitable organs (UNOS. 1998). Many others endured temporary life sustaining measures. such as kidney dialysis, while waiting on the organ que. While there were 40,634 registrants for kidney transplants in August of 1998. only 11,409 were performed in 1997. Similarly. there were 11,115 registrants for a liver transplant. but only 4166 were performed during 1997. The data regarding pancreas and heart transplants is similar: there were 416 patients registered for a pancreas and 4118 for a heart. with 206 pancreas transplants and 2292 heart transplants performed in 1997. The following chart summarizes this comparison with regard to various organs (UNOS 1998).
<table>
<thead>
<tr>
<th>Type of Organ</th>
<th>Number of Registrants(^3) (August 1998)</th>
<th>Number of Transplants performed (1997)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kidney</td>
<td>40,634</td>
<td>11,409</td>
</tr>
<tr>
<td>Liver</td>
<td>11,115</td>
<td>4,166</td>
</tr>
<tr>
<td>Pancreas</td>
<td>416</td>
<td>206</td>
</tr>
<tr>
<td>Kidney-Pancreas</td>
<td>1,765</td>
<td>854</td>
</tr>
<tr>
<td>Intestine</td>
<td>90</td>
<td>67</td>
</tr>
<tr>
<td>Heart</td>
<td>4,118</td>
<td>2,292</td>
</tr>
<tr>
<td>Heart-Lung</td>
<td>240</td>
<td>62</td>
</tr>
<tr>
<td>Lung</td>
<td>3,006</td>
<td>942</td>
</tr>
</tbody>
</table>

61,489 Total Registrants 19,998 Total (57,839 patients)

Circumstances appear even more serious in other countries. For example, in India, there are a reported 80,000 persons per annum presenting with end stage renal failure. There are relatively few resources for kidney dialysis (613 hemodialysis machines total in 1988). Without organs, many such patients will die (Reddy et al., 1990, pp. 910-911; Thiagarajan et al., 1990, pp. 912-914; Dossetor et al., 'Discussion', 1990, p. 935; Johny et al., 1990, pp. 915-917).\(^4\)

Moreover, waiting times are being exacerbated by the growing pool of potential transplant candidates. The median waiting time for a kidney transplant was 400 days in 1988 compared to 824 days in 1994. With blood type B patients waiting 1,329 days. Patients listed for repeat kidney transplants waited 1,550 days in 1993. Generally, patients with panel reactive antibodies (PRAs) of 20-79% waited much longer (1,325 days in
1994) than patients with PRAs under 20% (619 days in 1994). Median liver waiting time increased from 33 days in 1988 to 246 days in 1995, and again to 366 days in 1996. Patients with blood type O experienced the longest wait for livers of 501 days in 1996. Similarly increasing wait times are being experienced for other organs (UNOS. 1998).

Given such circumstances, more attention should be paid to the potential of a commercial market to alleviate organ shortages and to decrease the time patients spend on waiting lists. For example, a futures market or a market in cadaver organs might significantly address heart or pancreas needs. However, a commercial market in human organs may be most feasible where need is the greatest: kidney and liver transplants. The transfer of single kidneys from living persons is medically possible: 3,628 such transplants were performed in 1997 (UNOS. 1998). Perioperative mortality for nephrectomy is very low, approximately 0.03%, with other major complications occurring in less than 2% of cases. Moreover, provided that healthy donors retain a substantial portion of the liver, its overall regeneration is possible after the donation of a segment (see, for example, Singer et al., 1989; 1990; Siegler, 1992). Although some published reports describe a mortality rate as high as 11% for such operations (McDermott and Ottinger, 1966; Starzl et al., 1980; Adson et al., 1981), most centers with surgeons who have considerable experience in
partial hepatectomy report no mortalities (Iwatsuki et al., 1983: Nagao et al., 1985). 

Despite such possibilities, a for-profit commercial market in human organs is often denounced as inappropriately commodifying the human body. Selling human organs for a profit is held to be exploitative and degrading, morally analogous to slavery, as well as incompatible with basic human values, such as human dignity, sanctity of life, and important social goals, such as equality and a spirit of altruism. The human body, it is argued, should not be treated as property (Scott, 1981: 1990). Financial incentives are believed to coerce the poor into selling parts of their bodies and to corrupt the scientific practice of medicine. For example, in 1970 the Committee on Morals and Ethics of the Transplantation Society held that “the sale of organs by donors living or dead is indefensible under any circumstance” (1970) and the World Health Organization’s (WHO) “Guiding Principles on Human Organ Transplantation” prohibits giving and receiving money for organs. Moreover, the WHO urges member states to pass legislation forbidding the commercial trafficking of human organs (WHO, 1991). Currently, at least thirty-nine countries legally proscribe the purchase of human organs for transplantation. For example, in the United States, Title III (Section 301) of the federal “National Organ Transplant Act” makes it unlawful for any person knowingly
to acquire, receive or otherwise transfer human organs for valuable consideration for use in transplantation.

This study's analysis of the issues at stake, as well as the costs and benefits of a market in human organs, challenges the moral assumptions and conceptual arguments which apparently ground such a consensus. As this analysis will demonstrate, on balance, prohibition of organ sales often fails to sustain important social and medical goals as well as important basic human values.

III. A "Global Consensus"

The emerging global consensus against a for-profit market in human organs is marked by a view that organs should be understood as gifts, not commodities. They are viewed as a social resource to be distributed according to medical necessity and to support public interests, rather than sold for private commercial gain. Organs are to be a "gift of extraordinary magnitude" which transplantation surgeons "hold ... in trust for society" (Transplantation Society. 1985, p. 462). Organs are to be donated in the spirit of altruism and constitute a "national resource to be used for the public good ... to best serve the public interest" (U.S. Task Force. p. 9). Since the "... physicians who select the recipient of a donated organ are making decisions about how a scarce public resource should be used" (U.S. Task Force. p. 86). organs are to be allocated on
the basis of acceptable medical criteria and social goals, rather than patient financial status. These foundational background assumptions, in particular that available organs are a public resource which states are morally in authority to allocate, colors much of the debate regarding the permissibility of an organ market (Gorovitz, 1987).9

While most laws simply prohibit payment for organs, certain professional statements, and moral arguments have been broadly influential. For example, the Transplantation Society (1985), the World Medical Association (1985; 1987), UNESCO (1989), The World Health Organization (WHO)(1991), as well as the Nuffield Council on Bioethics (1995) and the U.S. Task Force on Organ Transplantation (1986) each condemns the creation of a for-profit market in human organs. The emerging consensus is supported by arguments which evaluate the moral and political theoretical parameters as well as the costs and benefits of a market in human organs. Such arguments purport to show that, unlike altruistically motivated donation, (1) offering financial incentives undermines consent, coercing the poor into selling their organs, and (2) that a market in human organs exploits the poor, violates human dignity, and is morally repugnant. Moreover, opponents argue that such a market would lead to (3) greater inequality between the rich and the poor as well as (4) worse health care outcomes than the current system of donation.
A. Factors which Influence Consent: Commercialism vs. Altruism

For consent to organ donation to be morally effective, it must be voluntary and free from coercion. While it is often difficult to insulate patients and family members from institutional and social pressures, it is argued that potential organ donors "should be free of any undue influence and pressure and sufficiently informed to be able to understand and weigh the risks, benefits and consequences of consent" (WHO, 1991, p. 472). As the U.S. Office of Technology Assessment Report points out, psychological, emotional and medical needs, as well as a desire to please others may influence one to donate organs (1987, p. 96). Family members may agree to donate organs to avoid confrontations or to satisfy some personal, family or social objective. This is especially the case if the alternative to the proposed procedure is the suffering and death of a loved one. However, opponents of an organ market argue that unlike altruistic motivations, the prospect of financial gain, in particular, inappropriately influences a subject's decision to give consent.

Consider, for example, the Committee on Morals and Ethics of the Transplantation Society's description of money's coercive potential:

In a South American country ... advertisements from desperate individuals have appeared in newspapers offering a kidney or even an eye ... for money. In this regard, many of us receive occasional pathetic appeals from people in disadvantaged
countries offering to sell a kidney to get money often for care of an ill relative ... It does not seem unlikely that a few of the unscrupulous will acquiesce to the profit motive ... (pp. 461-462).

Insofar as considerable emphasis is placed on the prospect of financial gain, it is considered that this may constitute an undue influence which overwhelms and subjugates voluntary consent with impoverished potential donors (Sells 1994: 1992: Daar and Sells 1990).

Numerous professional statements agree with this assessment. For example, the U.S. Task Force recommended that transplanting kidneys from living unrelated donors be prohibited whenever financial gain rather than altruism is the motivating factor (1986. p. 10). It called for prohibition on federal and state levels (p. 10). Similarly, the WHO's guiding principles on organ transplantation proscribe advertising for organs with an intent to offer or seek payment (1991. p. 472). The Transplantation Society simply condemns advertising by transplant surgeons for donors or recipients (p. 463). and the American Medical Association prohibits the purchasing of organs from living donors for transplantation (1994/95. p. 26).10

In contrast, altruistic donation is believed to support individual freedom by fostering personal choice. As the Transplantation Society argued with regard to living unrelated donors: "altruism on the part of
the donor may be a real motivating factor ... the wish to donate an organ need not be a sign of mental instability" (p. 466). Their proposed guidelines for the distribution and use of organs from cadaver sources and living donors specifically requires that donors be altruistically motivated.

It must be established by the patient and transplant team alike that the motives of the donor are altruistic and in the best interests of the recipient and not self-serving or for-profit ... especially in the exceptional case where the emotionally related donor is not a spouse or a second degree relative, the donor advocate would ensure and document that the donation was one of altruism and not self-serving or for-profit (1985, para 2).

Unlike commercial transfers, altruistic donation purportedly binds persons to their families and communities.

The market is viewed as corrosive of the "gift-of-life" sentiments, which have characterized organ procurement. After all, altruistic donation has powerful psychological and social repercussions which are of value to society and interpersonal relationships. Altruistic donation is seen as a voluntary free expression of important human values as well as of communal commitments. Fox and Swazey encapsulate this view as they lament that many believe that organ transplantation is "analogous to a commercial industry
and product and that its nonconformity to a market model is not only curious but possibly subversive" (1992. p. 207). They argue that this position "... makes it difficult for us to identify with the way that transplants ... are now being conceived and interpreted" (p. 207). Rather than thought of as parts of living persons, "offered in life or death to sustain known or unknown others, that resonate with the symbolic meaning of our relation to our bodies, our selves, and to each other". Fox and Swazey express concern that organs are being considered as mere things, i.e., as "just organs" (1992, p. 207). A market in human organs, they argue, would ignore and undermine the gift exchange dimensions of organ donation, with its obligations of giving, receiving, and repaying. It would undermine our willingness to address common problems with collective resolve (see also Gorovitz, 1984, p. 12). The importance of such gifts to individual recipients as well as for community solidarity is believed to be overlooked by commodification.

Altruistic donation is seen as central to maintaining both public trust and organ availability. The argument is that when organs are donated to the community, they carry "the hopes of the donor's family ... that the organ will be used to the best possible advantage" (Sells, 1994, p. 1017). As Mary Ellen McNally, coordinator for the New England Organ Bank in 1990 emphasized, trust that organs are not commodities to be sold underlies public willingness to donate. For example, in one case, "...the father
made perfectly clear ... that donation was a gift by his son to someone else, and the sale of those organs would diminish the goodness of that gift" (Dossetor et al., 'Discussion', 1990, p. 933).

In contrast, some, such as Thomas Peters, advocate a system of death benefit payments to motivate families of potential organ donors on the grounds that "Our concerns must focus not on some philosophic imperative such as altruism but on our collective responsibility for maximizing life saving organ recovery" (Peters, 1991, p. 1305). Yet others, such as Edmund Pellegrino, rebut these proposals as "logically, ethically, and practically flawed" (Pellegrino, 1991, p. 1305). Since such proposals appear to reject the centrality of the gift relationship to organ donation, or to consent to donation they are criticized as endorsing values which are antithetical to the altruistic, community oriented, culture of donation.11

While the purchased organ is conceptualized simply as a commodity, coerced from the individual by poverty, need and market forces, altruistically donated organs are understood as binding persons to their community, family, and as fostering "warm satisfaction" in the minds of donors or their bereaved families. in the case of cadaveric donation (Sells, 1994, p. 1016; Sadler and Sadler, 1984). While couched in somewhat rhetorical terms, the process of organ donation is regarded as giving something intrinsically valuable back to the donor or his family. In
short, opponents of organ sales argue that commercialism treats persons as individuals in isolation from family and community, coercing some through the offer of money into parting with their organs; however, altruistic donation fosters the expression of important personal values as well as family commitments and social solidarity and thus is consistent with free voluntary consent (Beauchamp and Childress, 1994; Simmons, 1981).

B. Organ Markets are Exploitative. Morally Repugnant and Violate Human Dignity

The practice of buying organs from living vendors for transplantation arouses in many a feeling of gruesome horror. Such commercial schemes are viewed as intrinsically exploitative. They are seen to be incompatible with human dignity and morally repugnant. The historical precedent for such a market, according to Russell Scott, is chattel slavery in which the human body becomes mere property (1990, p. 1003). For Childress, these concerns are grounded in basic ethical principles, such as “the dignity of the individual” and “respect for persons” (1989, p. 88; see also OTA, 1983, pp. 130-132). For Ramsey, behind the repugnance is a real danger that such practices “will only erode still more our apprehension that man is a sacredness in the biological order ... and our respect for men of
flesh who are only to be found within the ambience of bodily existence" (1970. p. 209; see also Scorsone, 1990). Others view an organ market as representing an extreme in human greed (Abouna et al., 1990).

The moral repugnance appears by many to have a straightforward basis. For example, the WHO resolution 'Development of guiding principles for human organ transplantation,' affirms that commerce in human organs is "inconsistent with the most basic human values and contravenes the Universal Declaration of Human Rights ..." (WHA 40.13: 1994. p. 467; see also WHO 1991). The WHO resolution 'Preventing the purchase and sale of human organs.' similarly asserts that the commercial sale of organs is exploitative and incompatible with human dignity (WHA 42.5). This resolution argues that prohibition is necessary to prevent the exploitation of human distress, particularly in children and other vulnerable groups, and to further the recognition of the ethical principles which condemn the buying and selling of organs for purpose of transplantation ... (p. 467).

Organ selling, purportedly exploits the distress of those in need.

Consider as an example of a commercial venture, that of physician H. Berry Jacobs, founder of International Kidney Exchange Inc., who asked 7,500 hospitals if they would be willing to participate in his plan to broker human kidneys. He proposed to offer the poor in Third World
countries and the United States whatever price would induce them to sell a kidney, and then negotiate acquisition, for a profit, by Americans who could afford to pay for the organs. Jacobs' plan aroused cries of moral indignation in the United States Congress, and was denounced by the National Kidney Foundation. The Transplantation Society, and the American Society of Transplantation Surgeons. Professional organizations resolved to expel members who were involved in such dealings (Fox and Swazey. 1992, p. 65). As the U.S. Task Force summarized the objection: "We are alarmed that ... certain transplant centers are reportedly brokering kidneys from living unrelated donors. We find this practice to be unethical and to raise serious questions about the exploitation and coercion of people, especially the poor" (p. 98). The argument is that the rich exploit the fact of poverty to encourage the poor into selling their organs, which given better circumstances the poor would not have done (Abouna et al., 1990. p. 919: see also Dossetor and Stiller. 1990).

The potential for exploitation and violation of human dignity, which is perceived to underlie commerce in human organs, is held to trump the possibility of increasing life sustaining transplants. As the Nuffield Council Report argues, certain uses of human tissue are morally unacceptable because they "fail to respect others or to accord them dignity ... they injure human beings by treating them as things, as less than human, as objects for use" (1995. para 6.7). Morally acceptable uses
are those which protect "...a central element of the undefined, yet widely endorsed, demand for respect for the human body and for respect for human dignity" (para 6.4). The distinction between morally acceptable and unacceptable uses of parts of the human body is drawn with a judgment regarding whether or not such uses properly respect human dignity (Meyer, 1995; Grubb, 1995; Walsh, 1995). As Keyserlingk argues, even though such requirements may make kidney procurement inefficient, this is not a sufficient reason to override society's commitment to prevent exploitation and to preserve human dignity:

Assuming and adopting as we do the Kantian injunction that persons should always be treated as autonomous ends and not merely as means to the ends of others, a morally justifiable policy will be one which is likely to provide the largest number of ... organs ... without violating the human dignity of potential donors. As for a policy permitting the sale and purchase of human organs, it may well be in some respects the most efficient approach. at least for those in a position to buy and sell. and it can provide direct and full control to buyer and seller; but because it so badly fails the other tests, it should be rejected (1990, p. 1005. emphasis added). Efficient and effective organ procurement and transplantation should not
be understood as a good worth pursuing at the price of human exploitation and dignity.

Human organs, Keyserlingk argues, have a special status due to their intimate relation with persons. Furthermore, in life the body as an organic whole is a good, since it is the center and means of awareness and vehicle of communication. It is this link between self and body which grounds bodily inviolability. These characteristics, he concludes, make the body and its parts properly the subject of altruism and gift giving rather than commercial sale (Keyserlingk, 1990, p. 1005). To respect these characteristics of persons is to respect human dignity. Organ sales in contrast, treat the body as a set of spare parts, independent of the person and of there intimate relationship to the lives of persons; it thereby violates human dignity. As Bob Brecher summarizes the objection:

however much the Turkish peasant who sold a kidney may have needed the money he was paid: however genuinely he may have wished to exercise his autonomy in this enterprising venture ... however sincere his wish to benefit his family with the proceeds, and however great their need; nevertheless what he did was wrong” (1994, 1001-1002).

Insofar as commercial vending of human organs violates human dignity, is deemed exploitative, and morally repugnant, that more individuals will suffer and die than on a for-profit scheme of organ vending is judged to
be an insufficient reason to justify the creation of such a market.

C. Equality and Justice

Building on the assumption that organs are a common resource to be utilized for the public good with an independent assumption of social egalitarianism, an additional argument levied against a market in human organs is that equal access to organ transplants is the only distribution consonant with the equality of all candidates. Justice, it is argued, requires equality of opportunity through redistributing property and forbidding the private purchase and sale of better basic health care. As Childress notes "the individual’s personal and transcendent dignity ... can be protected and witnessed to by a recognition of his equal right to be saved" (1970: see also. 1989. p. 88; 1986. p. 4).\textsuperscript{15} The Transplantation Society’s statement contends, for example, that allowing the purchase of organs for transplant would lead to an inappropriate level of inequitable health care outcomes between the rich and the poor. If wealthy individuals from other countries are placed on transplant lists ... they compete with local patients for scarce cadaver kidneys ... private hospitals in Europe now perform kidney transplants for foreigners who can afford the substantial fees ... The unacceptable consequence of this is that kidneys go only to patients who can pay (1985. p. 460).
The concern is that a market in human organs will lead to a situation in which the poor sacrifice their bodies for the health of the rich, while the rich gain unequal, and therefore unfair, access to a scarce medical resource (Dickens, 1990; Jonsen, 1987; Blumstein, 1990; 1992).

This conclusion resonates with that of the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, which held that "In light of the special importance of health care, the largely undeserved character of the differences in health status, and the uneven distribution and unpredictability of health care needs, society has a moral obligation to ensure adequate care for all" (1983). From this viewpoint, society as a whole owes a duty to sustain the existence of each individual. Moreover, this duty extends not only to providing basic health care, but also, if necessary, to organ transplantation (Ignatieff, 1984; Daniels, 1985).

The U.S. Task Force similarly concluded that patient financial status should not limit availability of transplantation. They argued that "All transplant procedures recognized as medically effective should be made available through reimbursement mechanisms for the care of patients who have no other source of funds ..." (1986, p. xxi. see also pp. 9-11). The Task Force equated equitable access to transplantation with proscribing organ sales: "... implementation of equitable access prohibits any elements of commercialization in the distribution of organs"
Insofar as there exists a social commitment to provide all with equal access to adequate health care, including organ transplants, equitable access means access regardless of wealth (Task Force, p. 105).

Indeed, as the Massachusetts Task Force on Organ Transplantation elaborates this point, rationing human organs based on the ability to pay is viewed as sending the message that we do not believe in equality and that a price can and should be placed on human life and that it should be paid by the individual whose life is at stake. Neither belief is tolerable in a society in which income is inequitably distributed (1984, p. 233).

Each policy stresses equality as a moral constraint on public policy in health care (Townsend and Davidson, 1982).

Rather than recognizing the guarantee of property rights and free collaboration to be core to human respect and dignity, despite inequalities, opponents of an organ market reflect a vision of social justice which brings into question the good fortunes of those who have more opportunities, wealth, and resources to purchase more extensive health care, such as organ transplantation (Engelhardt, 1987, pp. 339-353; 1984). In part, the argument is over which values ought to weigh more in the calculation of the costs and benefits of public health care policy. In part, it is also a debate over which values may be sacrificed for
others (Cantarovich, 1990, p. 927; Pauly, 1987). Allocation and rationing decisions are inevitable (Evans, 1987a; 1987b).

For example, one might argue that losses in equal access to expensive health care may be compensated at the level of social policy by gains in individual liberty as well as greater organ availability, and thus less total human suffering. However, many assess the value considerations otherwise. As Anns argues, a market in human organs places a very high value on individual rights and a very low value on equality and fairness (1987, p. 332; see also, Anns, 1983: Basson, 1979). Similarly, Caplan argues that

Allocating lifesaving organs by the ability of those in need to pay what the market will bear is blatantly unfair to the poor ... To argue that the sale of organs as a business is motivated by humanitarian concerns for the well being of those in need simply flies in the face of the fact that selling organs can only increase the cost for those who now receive them for free (1983, p. 23; see also Caplan 1984: 1992).

In short, equality is seen as an essential element of social justice and as able to trump important liberty interests. Moreover, the additional costs of providing more organs to save the lives of more people is considered unjustifiable.

If one assumes that organ donation is a gift to society, and that
the state has moral political authority to regulate procurement and distribution. It is plausible to raise concerns on grounds of equality that "It seems unfair and even exploitative for society to ask people to donate organs if these organs will be distributed on the basis of the ability to pay" (Task Force, p. 104). If rich and poor alike donate, but only the rich receive transplants, a significant social class of those who donate will not benefit from transplantation. Thus, opponents conclude, donated organs should be distributed to medically eligible recipients regardless of their ability to pay for the transplant.\textsuperscript{17} On these grounds a for-profit market is argued to lead to unequal health care outcomes, and therefore, as being unfair and unjust.\textsuperscript{18} Medical suitability and severity of illness are viewed as consisting of more objective data appropriately weighed in allocation of services. They appear to satisfy the requirement that "Criteria for organ placement must be objective, medically sound, and publically (sic) stated" (U.S. Task Force, p. xxi).

D. Health Care Outcomes

An additional concern is that a market in human organs would harm the health of donors and recipients. Consider the Transplantation Society's assessment:

Normal safeguards which protect family donors and recipients are threatened by brokerage arrangements, when otherwise
unacceptable donors may become acceptable if the price is right. Similarly, one can argue that less than ideal kidneys could be sold more cheaply than organs of good quality. Even if motivation of both donor and recipient is correct, the sale of organs essentially forces the donor to have an operation ... Indeed, as a practical example, it could be argued that the buying and selling of blood for transfusion ... has led to a less safe and more expensive service (p. 462).

It is important to note the special health care costs the Transplantation Society identifies: first, that a market in human organs would likely lead to procuring lesser quality organs. Second, that this could lead to lower life expectancies for recipients, and third, that vendors would incur inappropriate surgical harms, including possibly death.

Many share the first concern. As Caplan makes the point, medicine cannot morally allow "itself to be used by those who would risk their own health out of greed, desperation or ignorance" (1983, p. 23). Frier and Mavrodes similarly conclude that the profit motive would likely reduce care and caution in the selection of suitable organs (1980; see also Jonsen 1997: Kennedy, 1979). So too Abouna et al. argue that an organ market would lead to inferior quality of medical care with higher complication rates (1990, p. 918). The concern is that, if profit is the primary objective then "normal standards of medical screening may well not
be exerted: postoperative deaths from HIV transmission at the time of transplantation have been reported" (Sells. 1990. p. 931; see also Fox and Swazey. 1992. p. 208). Moreover, relatives may not be inclined to donate genetically well matched organs, if it is possible instead to purchase the needed organ.

The second criticism resonates with general anxiety regarding graft survival. Some argue that the long term survival of transplants may be superior when organs are procured from living relatives rather than from unrelated donors (Abouna et al., 1990 p. 919: see also Cook and Terasaki. 1987). In one study, the patient survival at one year for transplants utilizing purchased kidneys from unrelated donors was 81.5%, compared to 97.8% using living related donors (Daar et al., 1990). However, other studies rebut this conclusion. One study in India suggested that graft survival from live unrelated donors at one year appeared to be moderately superior than from live related transplants (84% verses 81% respectively). They acknowledged, though, that they did not view the difference as statistically significant (Thiagarajan et al., 1990. p. 913: see also Reddy. 1990). Regardless, if poor transplant results lead to an increased number of transplants per patient, this will be an inefficient and ineffective use of scarce health care resources, presuming that the market does not sufficiently increase the supply of organs to more than
compensate for any inefficiencies.

The third criticism identified by the Transplantation Society is often phrased in terms of the Hippocratic constraint "not to do harm" (Epidemics, book I, chapter XI; see Edelstein. 1967: Jonsen. 1977). Organ vendors receive operations for which there is no medical indication. "Operations should be performed for therapeutic reasons: a financial reward does not represent a therapeutic indication for surgery" (Sells. 1990. p. 931; see also Cantarovich. 1990. p. 927; Kilbrandon. 1968). An additional difficulty is that if the vendor is poor once his organ is removed and he is discharged from the hospital, there is no protection or guarantee that there will be adequate follow up. He can ill afford any future hospitalization for possible complications of the operation (Aboua et al., 1990). While some have argued that there is no morally relevant difference between selling one's time and selling one's own redundant organs, this is argued to be a minority view (Jonsen. 1997. p. 242; see also Blumstein and Sloan. 1989).

Additional criticisms are that legitimating a market in human organs would indirectly lead to a decrease in the number of kidneys available for transplant as well as an unacceptable rise in the financial costs of procuring organs. The first concern is tied to the view that "Making organs available only to those who can afford them will only feed
preexisting suspicion and paranoia" (Youngner, 1990, p. 1015). There are three primary possibilities. First, if organ sales are permissible this may so inflame public response as to turn the public against the organ transplant system. As a consequence fewer people would be inclined altruistically to donate. Second, if patients purchase organs there is less incentive to create and promote local donation programs. Third, an organ market may also impact living donor related transplantation. For example, in Kuwait "Several well-matched relatives of potential recipients ... withdrew their offer of donation after they learned that their relatives [could] go to India and buy a kidney in the market place" (Abouna et al., 1990 p. 919; see also Dossetor et al., 'Discussion', 1990, pp. 933-934). If such a decrease in altruism becomes widespread, and if the number of organs available for purchase does not increase to meet the shortfall, there may be fewer organs available (Skelly, 1987).

The Office of Technology Assessment Report identifies two types of additional financial costs which would be incurred if donors are financially compensated for their organs: the actual cost of compensation and the costs of administering the exchange, i.e., additional transaction costs (1987, p. 116). Transaction costs would likely include advertising for potential vendors, screening for tissue compatibility, as well as the cost of negotiating between patients and vendors, or third parties, over contractual conditions for the transfer of property rights in the organs.
Insofar as a market would add significant financial barriers to transplantation, this would further limit the ability of many to gain access to such health care, thereby producing worse health care outcomes than the current system of donation (Baily, 1988).

In short, it is argued that a market in organs would lead to harms to organ vendors, inefficient and ineffective use of scarce health care resources, decrease the number of available organs, raise health care costs and procure lower quality organs for transplantation. Such health care costs if realized may outweigh the potential benefits a market in human organs may possess.

IV. Prohibition: Philosophical Arguments and Background Assumptions

While the focus of debate framing the global consensus has been on the ways in which a market in human organs may undermine consent, exploit the poor, and violate human dignity, create greater inequality between rich and poor, and lead to worse health care outcomes than the current system of donation. more analysis is required adequately to evaluate such concerns. There are grounds for suspicion that such a consensus, while pervasive, fails to be sufficiently justified. Consider, for example, the following argument, addressed by a nephrologist to the International Transplantation Society at a conference on the permissibility of a market in human organs. He argued that:
When I first became aware of commercialization as a possibility in organ transplantation, I, like most everybody here ... was very opposed to it and thought it a terrible thing. More recently, I am not so sure. I think the issue is much more complex than it appears to be at first and, perhaps, even more complex than its presentation [at this conference]...

He questioned the moral grounds as well as the extent of the “consensus”:

I wonder who decided that it was morally wrong. ... Who is it that sits on these boards and makes these decisions? How many people from the public have been asked if we think its morally wrong?

Indeed, while apparently possessing evidence that nearly half of the individuals he had polled in the United States did not agree with the assessment of the Transplantation Society’s Committee on Morals and Ethics that selling human organs is morally repugnant, he feared professional reprisal if such data was published.

...[I]n a survey which I did — that I have never really put together yet for fear of what people would think of it — in which I asked every day Joe Blows what they think about selling their organs ... somewhere between 40 and 50% of people did not think it was morally wrong (Dossetor et al.)
Similar concerns have been expressed by surgeons in India. Thiagarajan et al. argue against those who have allocated to themselves the right to sit in judgment, based on their own environment and prejudices, and to exclude from scientific discussion those observations that come to alternative and controversial yet acceptable, practices prevailing in other less fortunate areas of the world (1990, p. 914).

While pointing to the success of their transplantation program in terms of graft survival, lack of donor mortality, return of patients to productive lives, and assistance in resolving the great financial need of donors, Thiagarajan et al. lament that the greatest value lost is professional and academic respectability.

Similarly, the question which Reddy et al. are faced with is “Do we buy or let die?” (p. 911). Acknowledging that in India money often changes hands even among related living donors and recipients, they rebut the purported moral repugnance which appears to be foundational to the “consensus”. Organ selling is not mere utilitarian spare parts medicine. Rather, they argue, it focuses on basic human values, community connectedness and fundamental social goals.
To dismiss the idea of paid donors as the ethics of expediency is to deny these patients the right to live. We serve only the corrupt and the unscrupulous if we deny the patient benefit of a transplant that is medically indicated because of our fear that the paid donation process is too complex to be regulated (p. 911).

Purchasing human organs for transplantation, they conclude, is in keeping with ethical values, as well as understandings of social consensus and medical reality.

The response of the Transplantation Society to such criticisms appealed to the authority of superior information and expertise. Nicholas Tilney stated, for example, that "We felt that we had the knowledge and expertise to create these guidelines, knowing some of the facts and innuendoes ..." (Tilney, in Dossetor et al., 'Discussion'. 1990. p. 935).

The criticism of the nephrologist as well as the Indian surgeons, though, remains unaddressed: more careful analysis is required before one should pass judgment against a commercial market in human organs. Before pointing to a global consensus, more voices ought to be heard. As Johny et al. point out, while the buying and selling of organs is condemned internationally, this doctrine is largely based on sensational press reports concerning the involvement of unscrupulous middlemen, as well as
the concern to protect desperate recipients and needy poor from exploitation (1990, p. 917). Insofar as such concerns can be appropriately dealt with, legitimate objections to a market in human organs will be diminished.

In the following chapters, I assess the moral, ontological, and political theoretical concerns at issue in an organ market. The various advantages and disadvantages of such a market are explored. In each chapter, I mark out the grounds for holding that the global consensus to proscribe organ sales does not have the force usually assumed. For example, in chapter two, I assess the conditions necessary and sufficient for a market in human organs to be morally licit. This analysis involves exploring basic foundational issues regarding the relationship between persons and their bodies, the senses in which organs can be property, the distinction between justified and unjustified moral repugnance, as well as the limits of society or governmental moral authority to interfere in consented to exchange of body parts. It considers, in addition, the standard of proof which must be met either to prohibit or permit an organ market, as well as who should bear that burden of proof. Given the salience of particular constellations of factors, the moral licitness of an organ market will range from prima facie permissibility to the position that it clearly ought not be forbidden. The result of this analysis is a geography of considerations which in different constellations may be
sufficient to render a market in human organs morally permissible or to give grounds for its proscription.

Chapter three turns to a more detailed evaluation of an organ market's costs and benefits which tend to tip the balance in terms of one or another conclusion. The advantages and disadvantages are assessed in terms of the market's impact on health care, the efficient and effective use of scarce resources, as well as whether such a market would lead to greater liberty, equality, and altruism. It considers, in addition, the impact of such a market on regard for human dignity, respect for sanctity of life, the exploitation of persons, social solidarity, and the pursuit of scientific excellence. The task of this chapter is to deepen the conceptual geography of chapter two, to consider particular instances of the foundational issues, and to determine under which circumstances a market in human organs advances health outcomes, as well as other special values and goals, more successfully than alternate organ procurement and allocation strategies. For example, I consider whether an organ market would likely erode a sense of community, lower scientific standards, or limit individual freedom. Given certain constellations of factors, the analysis will show that such values and goals are more successfully supported through an organ market.

In chapter four, I consider the historical and philosophical roots of the crucial moral intuitions, ontological considerations, and political
theoretical premises, as well as understandings of special moral concerns, such as permissible uses of the body and its parts, which frame the global "consensus". I address the influential positions of Thomas Aquinas, John Locke, and Immanuel Kant which would usually be interpreted as foreclosing a market in human organs. I consider, as well, the arguments of Robert Nozick’s Anarchy, State and Utopia, which would likely support such a market. Aquinas’s principle of Totality is the locus classicus of the view that preserving the body as a whole is a natural good, which may prohibit transplantation from living donors. The principle of Totality has been widely influential in the West as forbidding the removal of healthy organs from living vendors. Locke’s account of natural duties to oneself and others places constraints on the freedom one has to use one’s body. Kant’s arguments that selling one’s body parts uses oneself as a means merely, rather than protecting oneself as an end, underlie many of the concerns that organ selling violates human dignity.

The concluding chapter brings these three sets of analyzes together to show why the apparently strong consensus against the selling of human organs appears to be misguided. It fails adequately to appreciate the phenomenological and psychological distinctions among different body parts, the relative strength of ownership rights, as well as the general significance of forbearance and privacy rights. The emerging consensus
fails as well to take adequate account of the closeness of the analogy between dominion/possession/ownership of one's body and dominion/possession/ownership of other types of things, or the ground and extent of moral political authority. Moreover, as I will argue, maximizing health care benefits, promoting equality, liberty, altruism, and social solidarity, protecting persons from exploitation, and preserving regard for human dignity are more successfully supported through permitting a market rather than through its prohibition. The profit motive offers motivations to maintain both scientific excellence and moral virtue which do not exist under other procurement and allocation schemes. Finally, with regard to Aquinas, Locke and Kant, in each case the arguments on closer examination do not unequivocally preclude the selling of redundant internal organs. If certain critical premises are reexamined and recast in plausible ways, then their general positions can support the permissibility of organ sales.

While not offering a definitive conclusion regarding the permissibility of organ sales, on balance the analysis supports a market in human organs, rather than its prohibition. Indeed, given many constellations of factors such prohibition causes more harm than good.
Notes

1. The term 'market' is ambiguous. Picking out a cluster of related practices, ranging from highly state regulated systems of production and exchange to libertarian free-markets. Along this range the Oxford English Dictionary presents markets as including the meeting or congregating together of people for the purchase and sale of provisions, the time during which such goods are exposed for sale, the action or business of buying and selling, to make an occasion of bargaining or profit, sale as controlled by supply and demand, to bring an enterprise to the notice of the public by interesting dealers in it, or the particular trade or traffic in the commodity specified in the context.

   The related terms, 'sale' and 'payment', are also ambiguous. On the one hand, 'sale' may refer to the action or act of making over to another for a price, the exchange of a commodity for money or other valuable consideration, or the disposal of goods for money or other valuable consideration. On the other hand, 'payment' includes remuneration of a person with money or its equivalent, the giving of money or other valuable consideration in discharge of a debt, including the act or rendering to a person anything due, deserved or befitting, or in discharge of an obligation, or the giving of reward or satisfaction.

   For the purposes of this study, I will adopt a broad understanding of such terms so as to include both present and future markets, regulated
and free markets, as well as sales and payments in the form of barter, financial income, reward, or other valuable consideration.

2. For a discussion of such proposals see, for example, Matas and Veith, 1984; Caplan and Welvang, 1989; Sells, 1979; Roles et al., 1990; and Monaco, 1990.

3. UNOS allows patients to be listed with more than one transplant center, and thus the number of registrations may be somewhat greater than the actual number of patients.

4. About 613 hemodialysis machines were imported into India between 1971 and 1988; assuming that all are in working order all the time, an average of 1500 dialyses may be carried out each day; with individual dialysis frequency of bi-weekly and an average period of hemodialysis of three months, the maximum number of patients that can be treated each year in India would be 18,000 or 22.5% of those who require such care (cited in Reddy et al., 1990, p. 910).

5. The following chart summarizes the median waiting time for various organ types (UNOS, 1998).
<table>
<thead>
<tr>
<th>Type of Organ</th>
<th>Median Waiting Time in Days</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1988</td>
</tr>
<tr>
<td>Kidney</td>
<td>400</td>
</tr>
<tr>
<td>Liver</td>
<td>33</td>
</tr>
<tr>
<td>Pancreas</td>
<td>189</td>
</tr>
<tr>
<td>Kidney-Pancreas</td>
<td>383</td>
</tr>
<tr>
<td>Heart</td>
<td>117</td>
</tr>
<tr>
<td>Lung</td>
<td>281</td>
</tr>
<tr>
<td>Heart-Lung</td>
<td>824</td>
</tr>
</tbody>
</table>

As obtained from the UNOS 1998 Annual Report, the kidney data represents 1988 and 1994, the last year in which wait time was computed; heart-lung data are for 1988 and 1995, the last year in which wait time was computed; and the kidney-pancreas data are for 1991, the first year wait time was computed, and 1996.

6. For example, in one study of thirty-five patients there were no operative deaths or serious post-operative complications for patients who underwent hepatic resection for tumors (Singer et al., 1989).

7. These prohibitory laws include: Algeria: Law No. 85-05, dated 16 Feb 85 'On Health Protection and Promotion.' Journal official de la République algérienne démocratique et populaire. 17 Feb 85. No. 8 pp. 122-140.

Australia (Northern Territory): Law No. 121 of 1979 'An Act to Make Provision for an In Relation to the Removal and Use of Human Tissues, for Post-mortem Examinations, for the Definition of Death and for Related Purposes.' Prohibition of Trading in Tissue. Part V. paragraph 24(1)-24(5).


Australia (South Australia): 'The Transplantation and Anatomy Act of 1983.' Part VII. 'Prohibition of Trading in Tissue.' section 35(1)-35(6).

Australia (Tasmania): 'The Human Tissue Act of 1985.' Part IV. section 27(1)-27(5).


Austria: Federal Law of 1 June 1982 (Serial No. 273) 'Amending the Hospitals Law.' Bundesgesetzblatt für die Republik Österreich. 18 June 82. No. 113. pp. 1161-1162. Chapter F: 'Removal of organs or parts of organs
from the bodies of deceased persons for transplantation purposes.' section 62a(4).


Canada: 'The Uniform Human Tissue Donation Act of 1990.' section 15(1)-15(3).

Canada (New Brunswick): 'An Act (Chapter 44) to Amend the Human Tissue Act.' date of assent: 18 June 86 Acts of New Brunswick. 1986. section 8(3).


Ecuador: Law No. 64. dated 26 May 87 'Reforming the Health Code.' Registro Oficial. 15 June 87. No. 707. section 1: 'Declaration of death and the transplantation of parts. tissues. and organs of the human body.'


Greece: Law No. 1383. dated 2 Aug 83 'On the Removal and Transplantation of Human Tissues and Organs.' Ephemeris tês Kybernēseōs tês Hellēnikēs


Italy: Law No. 64. dated 2 Dec 75 'Regulating the Removal of Parts of Cadavers for Purposes of Therapeutic Transplantation and Prescribing Rules Governing the Removal of Pituitary Glands from Cadavers with a View to Producing Extracts for Therapeutic Purposes.' Gazette Officiale della Repubblica Italiana. 19 Dec 75. No. 334. Part I. pp. 8869-8871. sections 19-20.


Spain: Law No. 30. dated 27 Oct 79 'On the Removal and Transplantation of
Organs.' Boletín Oficial de Estado, Gaceta de Madrid, 13 March 80, No. 63, Serial No. 5627, pp. 5705-5707, chapter 1. section 5.


Switzerland (Ticino): Law of 18 April 89 'On Health Promotion and Coordination in the Health Sector (The Health Law).' section 15.


Council of Europe: Resolution (78) 29 'On Harmonisation of Legislations of Member States to Removal, Grafting and Transplantation of Human Substances.' 11 May 78. Article 9.


10. The American Medical Association admits the moral possibility of purchasing organs from cadaveric sources. They require that adequate safeguards be in place to ensure that the health of donors and recipients is not jeopardized and the quality of the organs procured is not degraded. For example, "By entering into a future contract, an adult would agree while still competent to donate his or her organs after death. In return, the donor's family or estate would receive some financial remuneration after the organs have been retrieved and judged medically suitable for transplantation" (1994/95, pp. 26-27).

11. See also, Caplan, 1987; Cooper, 1987; Evans and Yagi 1987; and Callender, 1987; Brecher 1991; 1994.
12. For a thought-full analysis of the importance of religion to health care policy and bioethics see McKenny. 1997.

13. The Universal Declaration of Human Rights adopted by the General Assembly of the United Nations in Paris on December 10, 1948 combined forbearance rights (e.g., "Everyone has the right to life, liberty and security of person" (article 3)) and procedural rights (e.g., "No one shall be subjected to arbitrary arrest, detention, or exile" (article 9)) with claim rights (e.g., "Everyone ... has the right to social security and is entitled to realization ... of the economic, social and cultural rights indispensable for his dignity and the free development of his personality" (article 22)). The only clear statement of human dignity appears in the "Preamble": "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world..." Therefore, it is unclear which particular articles of this Declaration the WHO believes are contravened by selling organs.

15. For religious accounts of organ donation see May, 1985; McCormick, 1978; Rabinovitch, 1979; and Rosner 1979: 1980.


17. For a detailed discussion of justice related issues and organ distribution policies see Kamm, 1993, part III; see also, Daniels, 1988; Menzel, 1982.


19. The President’s Commission reminded policy makers that a reasoned judgment must be concerned "not only about impact of the condition on the welfare and opportunity of the individual but also about the efficacy and the costs of the care itself in relation to other conditions and the efficacy and cost of the care that is available for them ... and the cost of each proposed option in terms of foregone opportunities to apply the same resources to social goals other than that of ensuring access [to health care]" (1983, pp. 36-37). The effects of particular policy
decisions can both directly and indirectly impact health care outcomes.

20. Veatch discusses a similar possibility with regard to directed donation (1998, p. 461): “Occasionally, a sophisticated utilitarian may oppose directed donation claiming that the overall transplant enterprise could be jeopardized if a dramatic directed donation case such as that of the Ku Klux Klan member or donation limited to a gay recipient turned the public against the organ transplant system.”
CHAPTER TWO

A MARKET IN HUMAN ORGANS:
Ontological, Moral, and Political Theoretical Presuppositions

I. Introduction
Before exploring the justifications for a market in human organs, it is important to appreciate what would have to be granted regarding the relation of persons with their bodies, the ownership of body parts, and the limits of societal and governmental authority in order for such a market to be morally licit. This chapter will lay out the basic foundational conditions that would have to be granted in each of these areas for a market in human organs to be morally acceptable. The chapter will not advance arguments to show that these conditions can be met. As the analysis proceeds, the task will also be to indicate what ontological, moral, or political theoretical conditions, if any, are necessary for such a market to be morally licit. There may be no particular conditions that are necessary. It may instead be the case that various constellations of understandings of the relation between persons
and their bodies, the ownership of organs, and the limits of state authority will be sufficient to render a market in organs morally acceptable.

The constellation of conditions required to legitimate a market, though, is itself complex. An initial set of considerations regards standards of moral evidence and the burden of proof. Conceptions of moral licitness can be placed on a continuum beginning with the position that an organ market is morally permissible ranging to the position that it may not rightfully be forbidden. Intermediary positions describe organ markets as *prima facie* allowable unless there are sufficient contra-indicating considerations. Among the factors which specify the relative position of *prima facie* allowableness along the continuum are the general significance of ownership rights and whether they include rights of exclusive use and alienation. The place on the continuum is influenced as well by the force of privacy and forbearance rights; i.e., rights to be left alone and protected from battery. Relative standard of proof to defeat the *prima facie* allowableness of the market will increase as the strength of these rights increases.

This analytic point is similar to the shift in the standard of proof in United States law which increases as the matter at stake becomes more significant. Standards of evidence begin with "preponderance of the
evidence" for civil cases, which involve loss of property, but not findings of criminal fault, then move to "clear and convincing evidence" for the long term commitment of persons for psychiatric reasons, or legally to effect the removal of children from the custody of their parents. Since the rights at stake are more significant, the proof must be stronger. Finally, the test of truth as "beyond a reasonable doubt" is employed in criminal cases which involve the possibility of loss of freedom and life. These standards are generally understood as the minimum weights of evidence required to support the plaintiff's case to find against the defendant: often thought of as 51%, 75%, and 90-95% respectively. As the general significance of the matter at stake increases so too does the burden of proof to justify interference with the defendant's property, family, or person. Similarly, as the general significance, or strength, of the ownership, privacy, and forbearance rights increases so too should the burden of proof which must be met rightfully to interfere in persons' use of their property or free interaction with consenting others.

As important as the consideration of the standard of proof is the issue of who bears the burden of proof. Different understandings of property rights, as well as of the authority of the government to intervene in market transfers, will shift the burden of moral justification to the shoulders of either the one who wishes to forbid a
market or the one who wishes to engage in a market in human organs. For example, the more one can establish moral content which canonically binds, such as special goods, the more there will exist moral authority to regulate the conduct of persons to promote the creation and maintenance of those goods. Such an account shifts the burden of proof away from institutions which promote or regulate social creation or maintenance of the good, to individuals who would act independently. It is presumed that moral authority exists to utilize the time, talent, and property of others to promote the good. Concomitantly, the more one can show that moral authority is created by and thus limited to the free agreements of persons, the more the burden of proof will be on those persons and governmental institutions who presume to interfere with free consensual interactions to show that they do so with moral authority.

These two axes, the standard of proof and the bearer of the burden of proof, express the initial complexities of the conceptual geography of conflicting rights and moral concerns underlying a market in human organs. Each axis can be considered as displaying conditions which if granted would make an ever stronger case on behalf of a market in organs. On the one hand, certain considerations would by more clearly establishing the plausibility of a market in organs shift the burden of proof to those who would oppose such a market. On the other hand, certain considerations will in addition increase the burden of proof on those who would oppose an
organ market. In short, given certain conditions a market for organs becomes *prima facie* allowable. Moreover, depending on which conditions are satisfied, the burden on those who would proscribe a market increases. This chapter is not designed to establish the correctness of any particular position. It offers an analytical or geographical portrayal of the presuppositions in which the debate is cast and of the conditions which shift the standard as well as the burden of proof. The result will be a multi-dimensional geography of factors which in different constellations may be sufficient to render a market in human organs morally permissible, displaying the relative strength of the *prima facie* allowableness of a market in organs, and therefore of the counter-indicating conditions which would be required to defeat its moral acceptableness, including those constellations of factors which together would establish that such a market could not be rightfully forbidden.

II. Not All Body Parts are Created Equal

What ontological, moral, and political theoretical premises would one have to grant regarding the relation between persons and their body parts to sustain the claim that a market in human organs is licit? To address that question, we must begin with an account of what it is to be alive as a person regarding whom a market in organs would be of
importance. Consider the ways in which persons are central for the market. Participation in the market requires that persons be beings with certain cognitive characteristics. Only persons are concerned to enter the market and to negotiate with others for fun, beneficence, or profit. It is persons who are self-conscious, self-conspicuously rational, and free to choose. Only persons claim dominion, possession, or ownership over things and self-consciously choose to cooperate with others. The most plausible characteristics for picking out those beings who are in principle capable of participating as agents in an organ market are cognitive capacities. Even to be able to have concern for ownership of or trade in human organs, much less concern for its licitness or limitations, requires that persons be the sort of beings who are able to experience self-conscious, self-conspicuous moral agency. If we grant this understanding of personhood, then beings or physical items which fail to possess these cognitive capacities cannot be affirmed as persons within the general secular context: they are things.\(^1\) Moreover, once beings permanently lose such capacities, they are things which have the character of being former persons.

Such an account carves out the phenomenologically experienced world into the moral and ontological categories of persons and things. It is persons for whom there is a possibility of self-conscious, rational stewardship, dominion, or property ownership. It is persons who are self-
consciously and self-conspicuously harmed when they experience a violation of their bodily selves or other property. Only persons are able to reflect on the relative injustice of the violation. Common law, for example, understood property as essentially conveying the rights of persons to exclude others from things (Hogue. 1966).² It expressed the rights of persons in and over things. The nature of such rights, their character, scope and form, was drawn from the nature of persons as beings who reason and will. Property has been understood as an extension of the person: this is Me, this belongs to Me, and is an extension of Me. and is protected as I am against battery, unauthorized touching (Matthews. 1995. p. 251). Indeed, under the traditional law of torts the person included any part of the body as well as anything attached to it and practically identified with it. Violation of the person included unconsented to contact with the individual's "... clothing, or with a cane, a paper, or any other object held in his hand..." (Prosser. 1971. p. 34). Interest in the integrity of the person includes his body and all the things which are in contact or connected with it. The concern is with the significance of personal integrity. As this significance increases in relevance for market decisions regarding one's personal integrity, so too will the grounds for placing the burden of proof on those who interfere with persons, and their use of their bodies, to show that they do so with moral authority.

If we grant that personhood in general secular terms requires self-
conscious, self-conscious moral agency. Then sustaining the life of a person requires only that one maintain the necessary cognitive capacities, mental and psychological, for the embodiment/existence of that particular self-conscious, self-conscious moral being. Consider the different ways in which self and body are both distinguishable and separable. One can distinguish but not separate those parts of the brain necessary to sustain the life of persons. One can distinguish the higher brain as physical tissue from the existence of living persons; however, one cannot separate these parts from the person. Removal of the higher brain demonstrably destroys the necessary conditions for the existence/embodiment of the person. In general secular terms persons are distinguishable from all of their body parts; however, they are only separable from most. This implies that in general secular terms a person's body can be regarded as a collection of things with which the person is more or less intimately associated.

But not all things are created equal. Unlike other types of things which can be protected as part of my personal integrity (e.g., hat, cloak, or boots), body parts are experienced as me. Yet one must make distinctions even among body parts. Some parts are necessary for embodiment/existence (e.g., the higher brain); other parts are necessary for adequate human functioning (e.g., the heart); and, there are those parts which are neither (e.g., the appendix). Moreover, some parts are
directly experienced (e.g., hands) while others are not (e.g., hair) (Leder, 1990, pp. 107, 111, 115). Like other types of things, though, body parts which are not necessary conditions for embodiment/existence can be replaced at will. What makes such things parts of us is being able to experience them as such.

Consider, for example, the case of a person who requires a cane to walk. When that individual purchases an improved model, or merely a new cane which suits his fancy, he replaces a thing intimately associated and experienced as part of him. He replaces a thing which is an integral part of his human functioning. Why would anyone be disturbed by the purchase of a new cane? Compare such a case with a cyborg, whose only non-human part is his left hand. The hand is experienced much like any human hand would be, with artificial nerves incorporating the extremity into his phenomenological world. If asked, he replies that he does not experience a significance difference in terms of bodily incorporation between his left and right hand. "It is my hand," he says. "I experience it as me." If he decided one day to shop for a new and improved hand, a stronger more adroit one, he would be seeking to replace a thing intimately associated and experienced as part of him. The hand is a body part. Why would anyone be disturbed by the purchase of a new cybernetic hand? The artificial hand is experienced as part of him, however, it can non-the-less be alienated and replaced.
Similar considerations apply to xenographic organs. If we were to bio-engineer a pig to grow internal organs which have sufficiently close DNA for the organs to be transplantable into humans, the organs could be harvested and sold to persons in medical need of a transplant. The new organ would replace the defective human part, eventually incorporating into and sustaining the biological life of a person. Is there a significant moral difference between the xenographic organ and the cybernetic hand? Each is engineered, artificial, and non-human in material. Both are things which we can use to replace parts of our bodies at will. Presuming adequate functioning, the organ, much like the hand, will be experienced as me once it is implanted. What ground could be advanced against a market in transplantable xenographic organs? The sale of such organs ought to be no more controversial than the sale of any other pork product. What would be the moral difference, if any, between the harvesting and selling of xenographic organs and human organs? This philosophical, fictive case is constructed in order to raise the issue of the relationship between persons and their body parts. The more the moral distance between persons and their body parts is increased, the more body parts become like other objects in the world to be possessed as well as sold. A xenographic organ as fully exchangeable provides no obvious grounds against such sales. Yet is it its non-human, manufactured character that makes its sale seem plausible? The specially developed
xenograft is living, but not human. Moreover, the organ is in a real sense produced or manufactured. Given these considerations, one can re-appreciate the status of those human organs not essential for life or consciousness. Such organs would appear more plausibly to be considered as property rather than as integral to persons. As a consequence, those arguments against organ transplantation which are based on a reluctance to allow persons or their components to be sold would be weakened insofar as those organs are distanced from the persons who possess them. The harvesting, selling, and replacing of such parts does not harm the living experiential nature of the person.

Such considerations shift the burden of proof. Given certain understandings of body parts the permissibility of an organ market becomes more plausible. Just as one can distinguish between the sale of self and the sale of property intimately connected to oneself, which is not identical with oneself, but still experienced within the sphere of the self, one can distinguish between sale of self and sale of most body parts. Body parts which are experienced within the sphere of the self, as intimate parts of one’s bodily experience, but which are not necessary for embodiment/existence in this world can be regarded as things intimately connected to oneself, although not identical with oneself. Therefore, it would be an error in reasoning to believe that one must justify a market in body parts which are needed for either
embodiment/existence or adequate human functioning in order to justify a market in organs which are neither. It would similarly be an error in reasoning to object to an organ market which trades only in organs which are neither on grounds which are only concerned with embodiment/existence or adequate functioning. Equally, it would be an error in reasoning to conflate an argument for an organ market which trades only in organs which are required for neither embodiment/existence or adequate functioning into a market for all body parts. If the self is different from organs that are both separable and distinguishable from the self, then while the self could not sell some organs, it could sell others. For example, selling one's kidney is different than selling one's brain. While it is caught up in the life of a person, the removal and sale of a kidney will not necessarily affect either the individual's existence or embodiment as a person, or the conditions for adequate biological functioning. Unlike kidneys, the higher brain is a necessary condition for the possibility of being incarnate in this world. It is the seat of human consciousness, memory, and the cognitive capacities which sustain general secular personhood. The burden of proof is on those who oppose an organ market to show that objections are cogent regarding the applicable parts and the character of the part's association with persons.

Given the temporal nature of persons (i.e., they are born, live, and die), organ markets include both present and future interests. Unlike
present markets in which exchange of the commodity from a living vendor takes place within an agreed time period. Futures markets would allow persons to contract now for the right to harvest their organs upon death, if any remain usable. It would be an error in reasoning to presume that objections which are telling against harvesting and selling organs which are required for embodiment/existence or adequate human functioning from living donors are equally cogent against a futures market. Futures markets do not violate any constraints against killing. Moreover, willing one's organs as part of inheritance would allow the heir to profit materially through the sale while others profit physically from transplantation. Death defeats any need to sustain the conditions for either embodiment/existence or adequate human functioning, which is why much of the debate has focused on the necessary and sufficient conditions for the death of a person. At death body parts no longer sustain the life of a person: they are things. The burden of proof is on those who oppose an organ market to show that the objections are cogently focused on the characteristics of the particular market.

These reflections disclose the possibility of driving a conceptual wedge between persons and their body parts. Insofar as persons are self-conscious, rational, embodied beings with a view of the good, their integrity depends on some but not all of their organs. Those organs that are necessary conditions for their being embodied in the world will
possess a unique status. Selling them will be tantamount to selling or killing persons. Insofar as arguments against the sale of organs depend on a respect for persons, these arguments will govern; however, they will not hold over those organs which are not essential for the continued life of persons. The more the organs involved can be replaced without a loss in the range of embodied function usual to humans, the less plausible will there be a claim that they should be considered as different from other property that can be given or sold. The more body parts are like other replaceable objects (glasses, canes, and crutches), the more it becomes plausible that they should also be open to being bought and sold in the market. A necessary condition for the legitimacy of a market in organs will be that the organs bought and sold are not integral to persons but can be conceived of as outside of the essential core of their embodiment.

III. Owning One’s Body and Owning Things

If we grant that persons are separable from at least most of their body parts, that parts which are separable and distinguishable from the person can be replaced without destroying either the person or the necessary conditions for embodiment/existence, and that the characteristic which makes body parts distinct from other things is that they are experienced as part of the person, then we must further assess what it would mean to own body parts as property. What does it mean to maintain that a body
part is "mine" as a claim regarding dominion/possession/ownership rather than as a claim assessing the phenomenology of the lived body? This exploration of ownership will examine both the justification for different senses of ownership, as for example, in deontological right-making conditions or in certain goods or goals to be realized, as well as different senses of what it is to own an object, such as to have a steward's control over it or absolute dominion. Certain accounts of ownership, of the rights one has over one's property, will be more compatible with the view that one is at liberty to dispose of one's body parts as among the things one owns. The stronger, i.e., less contingent, such rights are, the more one will be forced to move along the continuum from the mere permissibility of a market in organs to the position that such a market fully enjoys a prima facie justification. Intermediary positions will differ according to the relative strength/contingency of ownership rights, which will in turn establish the relative burden of proof which contra-indicating considerations must meet to defeat the prima facie allowableness of such a market.

The range of issues can be situated along three inter-related conceptual grids. First, the closeness of the analogy between dominion/possession/ownership of one's body parts to dominion/possession/ownership of other types of things. The burden of
proof to defeat the *prima facie* allowableness of an organ market will vary directly with the closeness of the analogy. Second, certain accounts of ownership will be more compatible with an organ market. Rights to exclusive use and to alienate one's property vary with the ground of ownership. Ownership can be freedom based, where alienation is licit as long as it is freely chosen and persons have rights to exclusive control of their property: benefit based, where alienation and exclusive use are licit only if they are integral to prudent practices or choices, conveying a benefit to oneself or others; or, special considerations based, where claims to promote special goods (e.g., equality) may defeat claims to exclusive use while alienation is illicit if it is negatively associated with the production of this special good and mandatory if alienation will positively promote it. Third, examination of necessary features of dominion/possession/ownership to which one must appeal to grant that body parts may be licitly given away, as in organ donation, while also denying the licitness of a for-profit organ market.

Consider the analogies that could be developed between dominion/possession/ownership of one's body parts and dominion/possession/ownership of other types of things that would make a market in organs possible. Ownership is rarely understood as forever forbidding one to rid oneself of one's property, although rights to alienate, through abandonment, donation, or sale, may be only *prima*
facie. It would be an inadequate conception of property to hold that while one owns the item and has exclusive use, it may never be alienated. Forbidding alienation through abandonment, donation, or sale, requires sufficiently weighty considerations to defeat the prima facie claims of autonomy over against possessions. Typically, such rights are fairly strong. For example, persons may generally licitly sell food and medicine, which are necessary for life, to further goods which the owner holds to be important. If owning body parts is analogous to owning other types of things, then we must look to the general secular significance of that property to persons to set the standard for justifying interference in the use of it. Insofar as the relation between persons and their body parts is held to be of greater significance than other types of person/property relationships, interfering with private use of the body must meet a higher burden of proof than interfering with private use of other owned things. As the right to be protected from interference in one's body increases, the question then arises, is it more plausible that one's right to dispose of one's body increases, or is it more plausible that it decreases? Absent further considerations, it would appear that the right not to be interfered with should increase one's property rights in one's body.

How one proceeds further to determine what would support a market in
organs depends on numerous and complex considerations. If one may sell oneself, then one may sell one's organs. For example, if one can join the military and set one's life at risk, does it follow that one can set one's body slightly at risk through the sale of body parts? Even if we discount voluntary slavery and donation/sales that would involve a loss of life, if the self is different from the organs that are separable and distinguishable from the self, though the self may not sell some organs, it may sell others. Just as one only requires sufficient food and medicine to sustain life, rather than any particular piece of food or dose of medicine, of those body parts which are both distinguishable and separable from the self one only requires a sufficient set of body parts, rather than any particular parts or replacements, to sustain the biological life which in turn sustains personal existence/embodiment. Even replacing one's heart or liver with an adequately functioning equivalent will preserve the existence/embodiment of the person. Indeed, body parts which are distinguishable and separable may be the best example of body parts which can be most easily understood on an analogy with external possessions. Such organs are things which can in principle be exchanged.

This suggests that of all the things persons own, they have the strongest rights for exclusive use, and thus for alienation, in their body parts, which in turn sets the standard of proof for interference with personal use higher than other types of property. Here, more must be said
regarding what circumstances might make certain possessions inalienable beyond transfer or sale. Here, too, one will need to explore what conditions would forbid the sale of an organ when it could be given as a gift.

The significance, or strength, of rights to exclusive use and to alienate one's property also vary with the ground of ownership. If ownership is grounded on autonomy based rights, for example, then alienation, through abandonment, donation, or sale, would be *prima facie* licit as long as freely chosen. Along with association and occupation, economic freedoms are fundamental elements of total freedom (Friedman, 1982, p. 77). Owners have exclusive use of their property and among the pursuits to which it may be put is the creation of profit. Things which one owns, including body parts, would then be open to being sold as long as both vendor and purchaser freely agree to the transaction. Other values or special considerations, such as benefits to others or feelings of moral repugnance, may not easily meet the burden of proof licitly to forbid sales. Considerations of benefits to others may not defeat autonomy based rights. Coercion by need or other external circumstances may similarly fail to meet the burden of proof to nullify the agreed to transaction. As external conditions are admitted to defeat the claim freely to have sold or purchased property they will also destroy the possibility of a market in any product, must less in body parts. Every
transaction will be subject to mutual reciprocal claims of external coercion. For example, a poor person who sells a kidney to a rich patient may argue that he was coerced into selling by poverty. The rich patient, though, may equally argue that he was coerced into purchasing by kidney failure (Bayles, 1974; Benditt, 1978; Gorr, 1986). Defeating the licitness of the transaction requires demonstrating that one of the parties coerced the other or that the circumstances rendered consent impossible. In this case the parties are not directly in the relationship of coercer and coerced. Nor are there grounds to hold that the circumstances of the external constraints of nature would render either party incompetent to choose. Other values may be offered as reasons peaceably to persuade persons not to enter into certain types of transactions, to motivate different choices, but freedom should in general trump. That is, much more would need to be made out in order to show that valid agreement would not be possible. Ownership based on freedom is compatible with the view that one is at liberty to dispose of one's body parts as among the things one owns: property rights, including exclusive use and alienation, are actual rather than prima facie. Such an account would be sufficient to support the position that a market in human organs could not be rightfully forbidden.

If ownership is benefit based then rights to exclusive use or to alienate property is licit only if prudent. Rules regarding property
rights are only justified insofar as they convey benefit to oneself or others. One manner in which to understand prudence is as maximizing overall benefits while minimizing harms. Consider utilitarian property theory. For example: a system of ownership is only justified if it maximizes the good (Singer, 1981). Or, as with John Rawls, when it maximizes the greatest good for the greatest number (1971: 1993). As David Hume pointed out, scarcity of resources may cause societal friction and violence as individuals compete for resources. A carefully designed property system ought to promote social stability and peace, minimizing violent competition for the same resources, thereby maximizing personal and social good. Everyone will be better off because each will be left in the peaceful enjoyment of those items acquired through luck or hard work. Moreover, private ownership may be a necessary condition for efficient resource usage. Without rights to exclusive use and alienation there is no reasonably assured reward for incurring the costs of developing materials and investing time and labor. For example:

A farmer plants corn, fertilizes it, and erects scarecrows, but when the corn is ripe his neighbor reaps and sells it. The farmer has no legal remedy against his neighbor’s conduct since he owns neither the land he sewed nor the crop. After a few such incidents the cultivation of land will be abandoned and the society will shift to methods of subsistence (such as
hunting) that involve less preparatory investment (Posner, p. 27).

Parceling out exclusive use and rights to alienate for a profit can cultivate incentives for maximizing the benefits gleaned from available resources. Here, with respect to benefits-orientated understandings of ownership and their implications for markets in organs, one should note two quite different foci in terms of which to calculate benefits: (1) how best to use the particular organs (e.g., will a market lead to a better use of organs), and (2) how best to maximize benefits for persons. The second question will depend on the first. It will always be important, given the benefits of organ transplantation, to examine the first question in order to be able appropriately to address the second.

Exclusive use of body parts, on such an account, is contingent on such rights conveying the appropriate benefit, such as efficient use of resources or maximizing the good. This means that the distribution and use of internal organs is fixed neither by birth, nor by gift or sale, but in terms of an a posteriori calculations of benefits. Such an account of property is in certain ways compatible with an organ market. Insofar as such a market maximizes benefits over harms it is allowable, indeed commendable. Confirming rights to exclusive use of one's body parts may efficiently and effectively produce the most beneficial uses of the available organs. Those who would not otherwise donate might be
encouraged to sell their internal redundant organs, thereby saving lives and increasing personal wealth. Forbidding such transactions, though, would only require defeating the claim that it conveys a sufficient benefit. Concerns may be raised, for example, about the sale of poor quality or diseased organs. Such concerns are justified only if no adequate system of personal liability or independent methods to monitor quality can be developed. Moreover, assuming adequate long term functioning, a dying patient may prefer transplantation of a diseased organ to death in the immediate future. Nevertheless, *prima facie* rights to exclusive use and alienation of body parts are straightforwardly defeated by demonstrating that other uses, distributions, or methods of alienation convey greater benefit. Regardless of whether one is calculating across preference satisfaction, wealth, or welfare maximization, the strength of actual ownership rights, and thus the burden of proof to defeat such rights, must be settled by empirical calculation. Depending on the results, alienation of internal organs for redistribution may not simply be permissible but required. If a policy of redistributing working kidneys from those who have two to those with kidney failure would produce sufficient benefits then this would constitute sufficient grounds to redistribute. While forced redistribution is incompatible with the buying and selling of organs, in itself it commodifies organs as resources to be utilized to maximize
benefits. Here, it is important to review the different senses of commodification at stake: commodities are not just items which are bought and sold for money. They may also be resources traded among persons to produce conditions or social circumstances which are valued, which can be understood in terms of the production of maximum overall benefits, or of the greatest benefit for the greatest number of persons. On such a foundation, persons will only have ownership rights in body parts insofar as it is prudent for society to support such rights. The outcome of such empirical calculations may or may not support the view that one is at liberty to dispose of one's body parts as one may the things one owns.

Accounts of ownership which focus on special considerations argue that certain goods have a trumping character when determining licitness of ownership rights to exclusive use and alienation. Consider, for example, egalitarians who argue that to be just society must be structured, including personal holdings and the private use of property, so that it promotes fair equality of opportunity. To justify even private transactions one must demonstrate that they do not violate the necessary conditions for fair equality of opportunity (e.g., Daniels. 1976: 1996). For example, if it is claimed that fair equality of opportunity requires substantively equal legal and political liberty, which in turn is dependent on a sufficient level of economic equality, then insofar as actual distribution of property fails to be adequately equal, there must
be further redistribution. Depending on how conditions for fair equality of opportunity are specified, citizens may be entitled to substantively equal material or economic conditions, educational opportunities, or health care. Providing for such positive entitlements requires taxation and redistribution of the time, talent, goods and resources of other people, defeating claims to have exclusive use of oneself or one's property. Such ownership rights will tend to be much weaker and more contingent than those based on freedom depending on whether considerations of free choice establish inviolable side-constraints as well as how highly freedom is valued.

Arguments which appeal to the trumping character of equality, or some other special good, attempt to defeat claims of exclusive use of property. The idea of property is recast in terms of a social benefit to be redistributed. Such a theory moves the burden on proof away from governmental and other authorities, who would continually interfere with owners' freedom, placing it on those persons who would freely utilize private property with consenting others. Rights to alienation, for example, are defeated if exercise of such a right is detrimental to the production or maintenance of this special good. Consider, for example, Nozick's case of "Wilt Chamberlain":

...suppose that Wilt Chamberlain is greatly in demand by basketball teams, being a great gate attraction ... He signs
the following sort of contract with a team: In each home game, twenty-five cents from the price of each ticket of admission goes to him ... The season starts, and people cheerfully attend his team's games; they buy their tickets, each time dropping a separate twenty-five cents of their admission price into a special box with Chamberlain's name on it. They are excited about seeing him play; it is worth the total admission price to them. Let us suppose that in one season one million persons attend his home games, and Wilt Chamberlain winds up with $250,000, a much larger sum than the average income .... Is he entitled to this income (1974, pp. 161-162)?

If the special good which underlies ownership rights is equality, then, in this case, the free alienation of the $.25 per person is illicit since taken as a group such activity is negatively associated with the production of equality. Importantly, however, alienation may be mandatory if abandonment, donation, or sale will positively promote the good.

Egalitarian political theory, for example, is often concerned with correcting inequalities created by natural and social circumstances (see, Rawls, 1971, p. 74). Such considerations, though, implicitly commit these theories to a market in body parts. Among the most prevalent and pervasive inequalities, which also lead to social and economic inequalities, are those created by the differences in the health status of one's body parts.
Indeed, such considerations refocus concern away from whether to commodify internal redundant organs to an account of the fair distribution of body parts (e.g., redistributive justice of physical resources) and the fair distribution of economic and social burdens to pay for acquisition, allocation, and transplantation (e.g., redistributive justice of social and economic resources). Concerns to promote fair equality of opportunity may entitle persons with organ failure to governmentally supported transplant surgery, including follow-up care and provision of a new organ. Even if mechanisms for distribution of internal organs are strictly regulated, non-capitalistic, non-profit driven, governmentally financed markets, organs are non-the-less socially traded commodities, utilized for production or maintenance of the special good. These considerations might lead to a blending of egalitarian and liberty-oriented concerns with respect to the development of a state-controlled market in body parts. For example, one might imagine a circumstance under which the price of body parts in the market would be fixed by the government, and the poor provided with body part vouchers. Such a circumstance would not allow the rich to outbid the poor in the market. There would be the additional virtue of the poor having vouchers at their disposal to act as an incentive to bring individuals to sell organs to those in need. Other regulatory impositions could be fashioned toward the goal of serving other societal interests.
IV. Moral Repugnance: Adjudication Among Intuitions

Regardless of the grounds of ownership rights, some will insist that the analogy between dominion/possession/ownership of body parts and dominion/possession/ownership of other things breaks down at the point of for-profit transactions. The argument is that it is precisely because of the general significance and intimate connection with persons that organs ought not to be sold. The body is part of the basic dignity of the human person, therefore, trade in the body and its parts is morally repugnant and ought to be limited.

As a report from the Hastings Center stated:

The view that the body is intimately tied to our conceptions of personal identity, dignity, and self-worth is reflected in the unique status accorded to the body within our legal tradition as something which cannot and should not be bought or sold. Religious and secular attitudes make it plain just how widespread is the ethical stance maintaining that the body ought to have special moral standing. The powerful desire to accord respect to the dignity, sanctity, and identity of the body, as well as the moral attitudes concerning the desirability of policies and practices which encourage altruism and sharing among the members of society produced an emphatic rejection of the attempt to commercialize organ
recovery and make a commodity of the body (1985). Similarly, Leon Kass argues that there is a general repugnance at the notion of owning living nature \textit{per se} (1985). As Paul Ramsey holds, the human body has a sacredness in the biological order. "In terms of our vision of man and his relation to community, there may be little to choose between the blood and soil, organic view of the Nazi and the technological, '(spare parts)' mechanistic analogies of the present day" (1970. p. 168). In each case it is an appeal to a moral repugnance apparently felt by some in the case of organ sales.

Here, however, one must adjudicate among moral intuitions. One must distinguish between justified and unjustified moral repugnance. For example, many have deep intuitions regarding the moral repugnance of abortion, contraception, and homosexuality. Yet these are practices which society permits. Is such repugnance justified? If so, should such practices be prohibited? In the case of organ sales, one must determine whether generalized feelings of moral repugnance are justified, prior to presupposing that such intuitions ought to carry any weight in meeting the burden of proof, or lowering the standard of proof, to proscribe organ sales.

Moreover, insofar as such theorists want to allow for morally licit organ donation from living or deceased donors, they must appeal to some special value regarding human organs to support this normative claim.
Such values must appeal to "concerns about the inappropriateness of commerce in vital human organs, concerns about justice, a feel for the awesome nature of such gifts, and some uneasiness about shutting families out of the process" (Murray. 1996. p. 111). or other similar interests. Yet, not all share such unease. Feelings about the inappropriate nature of commerce in human organs can be countered by equally strong but contrary feelings. Deep intuitions regarding the awesome nature of the "gift" beg the question regarding the meaning, significance, and importance of internal organs (Kahan. 1996; Barkan. 1996). The nature and outcome of the "gift" are no less "awesome" if money changes hands. Those who are concerned about the "dirtiness" of such transactions need not participate. Vigorous searching for donors need not cease merely because a for-profit market is licit. General concerns about shutting out the family must be dealt with regardless of the mechanism for the acquisition of organs.

Finally, all commodify, even donation. That is, on either ground one has specified a market in human organs, albeit a heavily regulated market, with carefully stipulated conditions for bearing the costs and benefits of procurement, distribution, and transplantation. One is not arguing about whether kidneys should be commodified but over who should receive the resources and who should bear the costs of appropriation and transfer. Insofar as individuals are prohibited from selling their organs, it is a
constrained market where donors are required to part with their property without material compensation, while others including physicians, hospitals, and procurement agencies benefit financially, and the recipient of the transplant benefits physically. That organs can only be transferred at a price of zero does not thereby reduce the value of such organs to zero. Rather, it transfers the value of the organ from the donor to other parties (OTA. 1987. p. 124). 9

V. Government, Health Care Policy, and Private Choices
The essence of the licitness of a market in organs must also be explored in terms of the nature and force of societal and governmental authority. The extent and force of political moral authority will shift the standard and burden of proof regarding the licitness of a market in organs. The extent and force of societal authority will determine when and how and to what extent society can constrain such markets. This exploration of political theoretical concerns will examine the moral foundations for different conceptions of political authority as they might bear on markets in organs. Attention will be placed on how deontological right-making conditions would establish canonical moral/legal constraints or how certain goods or goals a society ought morally to realize, as well as how different senses of forbearance and privacy rights place limits on that authority to protect negative freedoms or to create positive welfare
entitlements. Here one must consider the possibility of establishing moral content which canonically binds all. The more one can establish binding moral content, such as the character of special goods or goals, the more there will exist moral authority to regulate the conduct of persons and their interactions to promote those goods.

Certain accounts of the limits of societal and governmental authority, of the strength of persons' rights to forbearance and privacy, will be more or less compatible with the view that the state does not have moral authority to interfere with free interactions among consenting persons. As with rights to ownership, the stronger, i.e., less contingent, forbearance and privacy rights are the more one will be forced to move along the continuum from the mere permissibility of markets in human organs to the position that they can not be rightfully forbidden. Intermediary positions will differ according to the relative strength/contingency of negative rights to be left alone and to be protected from unconsent-to interference, which in turn establish the burden of proof which counter-veiling considerations must meet to justify state authority to forbid such a market. Here one must note the ways in which the relative significance or strength of persons' forbearance and privacy rights may defeat positive entitlements or claims of others. It may be, for example, that individuals have a right to health care, but that significant forbearance and privacy rights defeat the duty to provide
such care. Here also, one must consider the circumstance that even if concerns regarding relations between persons and their bodies, and ownership of body parts, are sufficient to show that a market in human organs should be allowable, analysis of further political theoretical considerations may be sufficient to establish that the moral authority of states is sufficient to meet the standard of proof to forbid such markets.

The conceptual grids which display the geography of political theoretical concerns include: the strength/contingency of forbearance and privacy rights, and the nature and ground of societal and governmental authority. First, the burden of proof to defeat the prima facie allowableness of the market will vary directly with the strength/contingency of individuals’ rights to forbearance and privacy which protect persons from unconsented-to interference with peaceable consensual association and interaction with others. Second, certain accounts of the nature and ground of societal and governmental authority will be more compatible with the view that the state does not have moral authority to forbid markets in human organs; others will be more compatible with the view that the state ought actively to create such a market. Such authority can be freedom based, where moral authority to interfere in the free interaction of consenting persons is created by and thus limited to the actual agreements forged among persons; benefit based.
where moral authority is grounded on prudence, such that social institutions are to be arranged and the interactions of persons organized, so that they maximize benefits while minimizing evils; or special consideration based, where there will exist moral authority to interfere in the free interaction of citizens to promote the moral good or goal to be realized (e.g., equality or liberty).

If societal and governmental authority is freedom based there will be different understandings of the moral content by which the government may limit markets in organs depending on whether freedom is an inviolable right making condition or whether it is a highly valued good. If freedom functions as a side constraint, then the moral limits of such authority will be created, rather than discovered, by the free choices of persons (Nozick, 1974). On such an account, forbearance and privacy rights create strong protections from battery (i.e., unconsented-to touching), defining a sphere in which one is morally immune from interference, protecting self-interest and self-preservation in the private use of person, body parts and other property. Such negative rights prohibiting unconsented-to interference, hold against other persons as well as society and state. Unless persons agree, negative rights defeat claims of others, persons and states, to have positive entitlements to the time, talent, or property of these individuals. On such an account, persons only have rights to their private resources, including body parts, and to
those additional resources which they are able peaceably to convince others to donate or sell to them. The moral authority to interfere with such rights, i.e., the standard of proof necessary to meet the burden of proof, is limited to peaceable consent among persons and communities. Under such circumstances the moral authority of the state to enforce general policies regarding the acceptable use of body parts is limited. Morally authorized statutes are confined to the protection of persons' rights to forbearance and privacy, protection of individuals from battery, and to those additional policies to which actual persons give consent. Persons and organizations of persons may be held responsible for unconsented to acts against others, including acts of violence and breach of contract, since such actions violate the negative rights of persons not to be touched or used without permission.

Governmental authority created by the express agreement of those governed is limited by such agreement. So grounded the state would have the general character of a limited democracy. It would have no general moral authority to forbid a market in human organs. Strong rights of forbearance and privacy make implausible interventions to forbid persons from freely using personal resources, including their body parts, with consenting others for fun, beneficence, or profit. Indeed, insofar as strong rights of forbearance and privacy support the absolute dominion of persons over themselves, along with their body parts and other
property, where moral authority is created with the free agreement of persons. This account would be sufficient to affirm a market in body parts. Those who disagreed could not be forced to participate. The state would have moral authority to protect persons from coercive transactions, including forced donation and failure responsibly to fulfill contractual agreements. Moral authority, however, would not extend to forbid a market in organs.

If authority is benefit based then societal and governmental policy enactment and enforcement are licit if prudent. On such an account, state moral authority extends to arranging social institutions, including the market, so that society's infrastructure abounds to social benefit, including the good of human freedom or liberty. As John Stuart Mill argues, the state ought to be organized under the government which "...combines the greatest amount of good with the least of evil" (1975 [1861], p. 145). Depending on how one understands prudence this requirement can mean structuring institutions so as to create the greatest benefit for the greatest number, maximize net social benefit, or maximize the welfare of the worst off members of society. Utilitarianism, for example, provides a defense of the general moral authority of the state to perform useful functions beyond the protection of its citizens from unconsented-to force and fraud. Extensive welfare rights to adequate nutrition, shelter, education, and health care are typically underscored
as necessary foundations for citizens to be productive members of society (Singer, 1981). Rights of forbearance and privacy, including protections from battery exist only if prudent. Such rights would be contingent upon an a posteriori calculation of the benefits and burdens, on oneself and others, created by negative rights to be left alone. Moreover, even if prudence dictated that forbearance and privacy rights hold against other persons individually, protecting citizens from random rape, murder, and theft, such rights would not hold against the state without further argument. If prudence requires the state to maximize the welfare of its citizens then, insofar as its resources allow, the state should provide for the most important needs of its members. This may require taxation, as well as other forms of redistribution, of the personal time, talent, body parts and other property so as to provide others with welfare, shelter, food, education and health care.

With regard to society's general social system, it is an empirical question as to whether free markets or socialism, or some intermediary position, will in fact maximize benefits, maximize the condition of the worst off, or create the greatest benefit for the greatest number. For example, the best use of scarce resources, such as organs, may be created by enforcing strict forbearance and privacy rights including the liberty to alienate one's body parts in the market. Or, it may require recasting all available redundant organs as public resources for prudent
redistribution. As a redundant internal organ, kidneys could be redistributed from those with two healthy kidneys to those in need. It would be an error, though, to think of the social allocation of public health care resources solely in terms of redistribution from the rich to the poor utilizing economic criteria. If society is prudently to allocate resources to meet the basic needs of its citizens, this implies redistributing internal redundant organs from those with redundant healthy organs to those with organ failure, regardless of economic status of either donor or recipient. On such health related issues redistribution would conceivably flow from the poor to the rich. Organs and other body parts would merely form a pool to be distributed among persons according to the possibility of maximizing prudential benefits. On the other hand, with a free market persons would control their body parts until they were interested, or provided with a sufficient incentive, to sell or donate their parts. Individuals would have direct economic incentives to cultivate healthy living habits so as to maximize the value of their body parts on the market. The burden of proof, which must be met for a state to forbid organ markets with moral authority, though, is strictly the results of this empirical calculation. Policy in this matter would be dictated by many considerations, including considerations of equality as well as whether one should first protect the lives of those most likely to contribute to society.
If state moral authority is benefit based, in principle authority extends to all facets of personal and public life. If intrusion is prudent, it extends even to control over one's body parts, as well as one's personal association and interactions with others. State intrusion to forbid organ sales would in principle be morally authorized. However, if a market would provide for the best use of the particular organs or best maximize benefits for persons, then the state ought to support such a market.

Here one must assess the results of a posteriori calculations regarding the best usage of the available organs, as well as the best manner in which to maximize benefits to persons, noting three additional sets of issues: (1) what counts as "available" organs (e.g., organs which persons have voluntarily donated, those which can be harvested with or without consent from deceased persons, or those which are redundantly contained within the bodies of living persons); (2) the benefits and burdens of a market in organs; and (3) the benefits and burdens of forbidding such a market. Here too one must assess which types of benefits and burdens are to be considered as part of the cost/benefit calculation: preference satisfaction, economic wealth, or welfare maximization in terms of both quality and quantity of life, as well as the appropriate discount rate for the passage of time.

If societal and governmental authority is based on special
considerations its character will vary according to the nature of the
good or goal to which special accent is given. Here one may be concerned
to distinguish between positive and negative goods, as well as between the
goods themselves and the social institutions required to create or sustain
particular outcomes. For example, the importance of realized rights to
forbearance and privacy, as well as the protection from battery, will
differ in relative strength and contingency according to the negative or
positive character of the principles and goods with which they must be
balanced. Consider concerns for equal political liberty. Egalitarian
liberals argue that if one is concerned to provide an account of justice
as fair social cooperation, in which governments treat each citizen's fate
as equally important, then concern with equal personal and political
liberty will necessarily turn to the material conditions which sustain
such liberty. Unlike negative liberty which requires state protection of
forbearance and privacy rights, as well as safeguarding against
unconsented to interference, positive conceptions of equal substantial
legal or political liberty are dependent on sufficient levels of economic
equality. As Kai Nielsen argues:

If we want a world of moral equals, we also need a world in
which people stand to each other in a rough equality of
condition. To have a world in which a condition of equal
respect and concern obtain, we need ... a rough equality of
resources. If equality as a right is to be secure: that is. if that is a right that people actually can securely exercise. we must obtain the good of equality of condition (1985. p. 10).

Such considerations are represented as overriding rights to forbearance and privacy, to freedom of association and contract. For example, while universal suffrage grants the wealthy and the poor identical voting rights, the wealthy have a greater ability to select candidates, as well as to influence public opinion and elected officials. In terms of actual impact on outcomes, the wealthy have greater political liberty (Daniels, 1976. p. 256). While both rich and poor have equal liberty, understood as the formal negative conditions of freedom, the rich enjoy greater worth of liberty, expressed through greater social and political opportunities. Insofar as the special goods or goals to be achieved specify positive canonical moral content, one will need to consider appropriate schemes for re-allocating personal time, talent, and property to maintain the material conditions underlying such entitlements.

As a ground for the moral authority of state institutions and policies, special goods and goals, such as fair equality of opportunity, have direct impact on a market in body parts. The healthy, talented and intelligent have natural advantages over those who are sickly, less talented, and less intelligent. Talented and intelligent individuals
often hold higher income, higher status jobs. These in turn are statistically correlated with an increase in the quality and quantity of life (see, for example, Iglehart, 1990; Wilkins et al., 1989). Similarly, healthy individuals spend a less significant portion of their physical resources and personal time on health care, allowing for other opportunities. Disadvantages are even greater with regard to organ failure. These concerns suggest that state policies which create positive entitlements for health care, such as organ transplants, are justified on such an account to the extent that they decrease such inequity. Moreover, it also follows that healthy, well functioning organs are likewise natural advantages, redistribution of which would help to equalize among persons so that each would be able more equally to share in the benefits and burdens of society. The five year survival rate of those who receive a kidney transplant is excellent while life expectancy for donors is not measurably decreased (UNOS, 1998). Redistributing redundant kidneys would be at most a temporary inconvenience for the "donor" which would greatly enhance the recipient's life expectancy, together with his social, personal and political opportunities. On such an account of state moral authority to create and enforce general health care policy, forbearance and privacy rights, which protect persons in the private use of their internal organs and other body parts, are sufficiently contingent to be trumped by the redistributive mechanisms to create and maintain the
necessary conditions to promote the special good or goal to be realized.

VI. Summary
To summarize, an assessment of the permissibility of a market in human organs must consider the various factors which directly affect the relative standard of proof which must be met rightfully to interfere with persons and their use of their body parts as well as other property. This will include: (1) The general significance or strength of ownership rights: the standard of proof for interfering with persons and their exclusive use of body parts and other property varies directly with the strength of those rights. If ownership entails absolute dominion, then rights to exclusive use and alienation will function as side-constraints on other persons and governments. Lesser, more conditional ownership will allow other counter-vailing considerations to overturn claims to exclusive use and at will alienation. (2) The general significance of forbearance and privacy rights: the standard of proof varies directly with the general strength of such negative rights to be left alone. The stronger, less contingent, such are rights are, the more they will fix aspects of the external environment, placing constraints on other persons, social organizations, and states. (3) The closeness of the analogy between dominion/possession/ownership of one's body parts and
dominion/possession/ownership of other types of things: body parts which are distinguishable and separable may be replaced at will and may be regarded as things with which persons are the most intimately related. Indeed, persons utilize their body parts as the embodiment of their will and source of interaction in an inter-subjective domain of common experience. Insofar as the general significance of body parts to persons is greater than the significance of other types of things, this suggests that of all the things persons own, they have the strongest rights to the exclusive use, and thus to the alienation of, their own body parts. The standard of proof for rightful interference would thus need to be set higher with regard to uses of the body than for uses of other types of property.

Consider also the various factors which shift who shoulders the burden of proof, as well as which reasons are relevant for meeting an appropriate standard of proof to allow for the restriction of human freedom in entering markets for human organs. (1) Not all body parts are created equal: some parts are necessary for embodiment/existence (e.g., higher brain). Others are necessary for adequate human functioning (e.g., heart, cornea). Others are neither (e.g., appendix): some parts are experienced (e.g., hands), while others are not (e.g., hair). Like other types of things which are intimately associated with persons, many body
parts which are not necessary conditions for embodiment/existence can be replaced at will without thereby harming the living experiential nature of the person. Those who object to markets in human body parts will need to provide grounds which focus on the particular body parts at issue. For example, selling one’s redundant kidney is not equivalent to selling one’s higher brain. Objections which do not meet this condition will fail to be telling at best, or beg the question outright.

(2) Not all organs are harvested from living vendors: futures markets do not violate any constraints against killing or duties to self. Moreover, death defeats any need to sustain the conditions for either embodiment/existence or adequate human functioning. Burden of proof is on objectors to the market to show that they have not conflated reasons which are telling against harvesting and selling organs from living vendors as equally telling against harvesting and selling organs from deceased donors.

(3) Ontology of general secular personhood: the general secular ontology of personhood allows for the possibility of replacing body parts which are distinguishable and separable at will. Replacing such parts is compatible with the full functioning of persons as moral agents. Moreover, the secular ontology of personhood is neutral with regard to the origin of the replacement part (e.g., human or mechanical, natural or artificial):
it is also neutral with regard to whether money changed hands in the procurement of the part (e.g., charitable donation or for-profit sale). Phenomenological and physical requirements for sustaining particular persons are satisfied with adequate human functioning and minimally sufficient incorporation of the part into the experiential lived world of the person.

(4) The nature and ground of ownership as well as the nature and ground of moral authority: The burden of proof shifts with the nature and ground of ownership and moral authority. If ownership as well as societal and governmental moral authority are benefit or special consideration based, authority is founded on the presupposition of canonically binding moral goods, values, or goals. Therefore, insofar as property is understood as a social benefit to be distributed according to the good of society, whether “good” is understood as prudently maximizing benefits over burdens or as promoting a particular special value or goal, concerns with freedom and liberty will shift the burden of proof to those who would interfere with individuals who would utilize their time, talent, body parts and other property independently of other goods. Additionally, state moral authority will extend to all facets of personal and social life. Relevant reasons for meeting the standard of proof vary with the good or goal to be realized. For example, if one is a utilitarian, one
will be concerned to maximize the good; if one is an egalitarian, one will be concerned to organize social institutions so that they treat all persons equally in the respects relevant to the canonical moral good. An additional consequence, though, is that state moral authority will exist only insofar as such canonical moral content can be established. Without such particular content, state authority is merely an appeal to force.

In contrast, ownership and moral authority based on freedom begins with persons as the source of moral authority. Insofar as a unique canonical moral content cannot be established, state enforcement of any particular moral content becomes arbitrary, and thus has the character of force. Avoiding arbitrary appeals to mere force in such circumstances requires moral authority to flow from the agreement of persons. Relevant reasons for meeting the standard of proof will focus only on freedom. If persons act freely with consenting others, then other persons, social organizations, and states do not have general moral authority to interfere. Given this framework the burden of proof shifts away from persons with rights to free association, contract, exclusive use, and alienation of property, to those persons and governments who would presume the right to interfere in the consensual interactions of persons in the market. Access to the market, including markets in body parts, can thus be understood as a basic human right which cannot be rightfully forbidden.

The following considerations would therefore appear to be important
in establishing which constellations of factors are necessary or sufficient to render a market in human organs morally acceptable. (1) First, there is the special status of separable and distinguishable body parts. If persons can sell themselves, then they can sell any of their body parts. However, if we eliminate voluntary slavery from consideration, then persons are able to sell some parts but not others. On such an account a necessary condition for a market in body parts is that the parts being traded are both separable and distinguishable from persons. No other particular conditions appear to be necessary. (2) Then there is the consideration of what policy regarding organ markets will maximize benefits. If an organ market would best utilize the available organ resources, or would best maximize benefits for persons, these factors would be sufficient to render an organ market morally acceptable. Societal and governmental authority would extend to the creation and regulation of such a market. Organs would be commodified as resources to produce social benefit. This may entail creating a governmentally controlled market which taxed the body parts of some for prudential transfer to others so as to maximize possible benefits. Who would pay the physical and economic costs of procurement and transplant would depend on a further calculation of possible benefits and burdens, as would considerations as to whether to limit such a market to body parts which are both separable and
distinguishable. The possibility of such markets will depend directly on (a) how one conceptualizes prudence (e.g., as maximizing the welfare of the worst off, creating the greatest net benefit, or the greatest benefit for the greatest number). (b) on the results of the empirical benefit/burden calculation, together with (c) an assessment of whether the calculation would range across welfare maximization, preference satisfaction, or wealth maximization, among other possibilities. (3) One will need to address the issue of guaranteeing special goods. If ownership and moral authority is based on special considerations, such as social goods, values, or goals, promotion or realization of such goods may require a market in human organs. If the goal to be promoted is free and responsible behavior, then access to such a market should help realize this goal. On the other hand, if the value or goal is equally effective political liberty, this may require transferring the benefits of time, talent, body parts, and other property to those in need of such welfare payments. Sufficient equality of material resources, including adequately functioning body parts, may be a necessary requirement for equal political and social liberty. Equality may be best served by transferring organs from those with redundant internal organs to those in need of such a transplant. On such an account, the argument will focus less on whether to commodify organs as on who pays the physical cost of procurement and
who receives the benefit of transplant (e.g., considerations of just
distribution of physical resources) as on who pays the economic costs of
procurement and transplant (e.g., considerations of just distribution of
economic resources. It may be that this account of ownership and state
moral authority would ground rights of all citizens with sufficient need
to receive organ transplants at society's expense. (4) Finally, there
is the question as to when considerations of freedom will be sufficient.
The constellation of factors which define a freedom based account of
ownership and moral authority are sufficient to render a market in human
organs morally acceptable when freedom is an inviolable side constraint.
Indeed, if freedom is the sole or primary ground of moral authority or
ownership, this would be sufficient to render a market in organs such that
it could not be rightfully forbidden.

Each of these ontological, moral, and political theoretical
considerations is a factor in determining the analytic geography of the
debate regarding markets in human organs. These constellations of factors
specify relative burdens of proof, those factors which are relevant for
meeting such burdens, as well as on whose shoulders the burden falls.
Adjudication among the numerous inter-related factors may require recourse
to a theoretical model of balancing appeals (see, for example, the model
developed in Brody, 1988). However, before these further arguments can be
adequately assessed the next chapter must consider particular instances of such basic foundational issues. including the geography of benefits and burdens associated with a market in organs: (1) the benefits and burdens of allowing a market in human organs: (2) the benefits and burdens of forbidding a market in human organs: and (3) possible independent objections to an organ market (e.g., considerations of exploitation, sanctity of life, and human dignity).

Notes

1. Membership in the species *homo sapiens* is generally appreciated as insufficient for a being to be a person. Cognitive capacities are the most plausible candidates for characteristics which distinguish persons from things. For example, Aquinas stated that "Person signifies what is most perfect in all nature — that is, a subsistent individual of a rational nature" (*ST. I. Q29. a3*). John Locke identified persons as beings with the capacity of self consciousness coupled with a rather rudimentary intelligence. A person is a "thinking intelligent being, that has reason and reflection, and can consider itself as itself, the same thinking thing in different times and places, which does only by that consciousness which is inseparable from thinking, and, as it seems to me, essential to it"
(Essays, book II. chapter xxvii).

Kant marked the distinction as: "A person is a subject whose action can be imputed to him. ... a thing is that to which nothing can be imputed. Any object of free choice which itself lacks freedom is therefore called a thing (res corporalis) (1991 [1797] §223). Similarly, Hegel argued that "person" is a category which captures that group of beings capable of conceptualizing and embodying a self understanding in the world (1967 [1821] §42). In contrast. "Since a thing lacks subjectivity, it is external not merely to the subject but to itself ... i.e., that whose determinate character lies in its pure externality" (§42A). Unlike things. Hegel argued, persons conceptualize themselves, shaping their own actions and characters to a significant extent.


Religious understandings of personhood also often refer to cognitive capacities: "From a Christian perspective the most basic requirement for
'personhood' is the unity of body and soul. However we may define 'soul' it is clearly related to brain function. That is, once brain death occurs, the organism is dead ... The gift of human life depends, rather, upon the cerebrum (left and right hemispheres) and its covering of nerve cells known as the cortex. The cortex enables us to make decisions, organize our lives, remember experiences, communicate with others, and perform various creative activities, such as art and music. It is here as well that our capacity for reflective activities resides, e.g., the ability to philosophize, to speculate, to wonder, and to pray (Breck, 1995, p. 332; see also. Ramsey, 1970; Crosby, 1996).

For an account which attempts to reject cognitive capacities as the mark of personhood see Meilaender, 1995.

2. For example, the protection of possessions was at the center of Henry II's legislation between 1164 and 1179 (Hogue, 1966, pp. 161-163). The common law of the 12th and 13th centuries was in large measure the law of property rights (p. 112). In the 19th century, Blackstone, reflecting on the common law of England, argued: "There is nothing which so generally strikes the imagination and engages the affections of mankind, as the right of property: or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe" (Blackstone, 1803, book

3. Or as Puccetti put it, where the brain goes, there too goes the person (1969, p. 65).

4. Currently, xenographs have not been very successful. For example, in 1984 a surgeon transplanted the heart of a baboon into an infant whose heart lacked a left ventricle. The girl died several days later (Altman. 1984; see also Jonsen. 1997, p. 253; Sells. 1994).


6. Samuel Pufendorf, for example, characterizes ownership as "a right, by which what one may call the substance of a thing belongs to someone in such a way that it does not belong in its entirety to anyone else in the same manner (1991 [1672], p. 85). It follows, he adds, that "we may dispose as we will of things which belong to us as property and bar all others from using them, except insofar as they may acquire a particular right from us by agreement" (1991 [1672], p. 85), see also Becker. 1980; Honoré. 1961.
7. "...[W]hen they have observ'd that the principal disturbance in society arises from those goods, which we call external, and from their looseness and easy transition from one person to another: they must seek a remedy...this can be done after no other manner, than by a convention enter'd into by all the members of the society to bestow stability of the possession of those external goods. and leave everyone in the peaceful enjoyment of what he may acquire by his fortune or industry (cited in Buckle, 1991, p. 489).

8. See Cohen (1977) for an argument concerning the ways in which enforcing such patterning of economic distribution preserves liberty.

9. The Office of Technology Assessment considered the following case in their report on the ownership of human tissues and cells: "Suppose, for example, that a market for transplantable kidneys existed. There are three parties to the transaction -- the donor, the surgical/hospital team, and the recipient -- and they are able to accomplish the transaction at prices agreeable to all. The amount required by the family of the kidney donor to proffer the kidney is $50,000, the amount required by the surgical/hospital team to bring forth its services is $100,000, and the kidney recipient is willing to pay $150,000. Suppose further that a law
is passed requiring all transactions in kidneys to be gifts. thereby prohibiting the kidney donor's family from selling the kidney and reaping its economic value of $50,000. Who will now realize this value? The intent of the legislation was that the value of the kidney be transferred as a gift from the kidney donor to the recipient, with the transplant ultimately costing the recipient only $100,000. Yet, because nothing is done to ensure this outcome, a different outcome is possible. Depending on the conditions of the transplantable kidney market, it may be possible for the surgical/hospital team to realize the value entirely by charging the recipient $150,000" (1987, p. 124).
CHAPTER THREE

A MARKET IN HUMAN ORGANS:

The Costs and Benefits, Vices and Virtues

I. Introduction

The previous chapter assessed the understandings of embodiment, property, and political authority under which a market in human organs would be morally allowable. The conditions necessary and sufficient for such a practice to be morally licit were assessed by exploring (1) the relationship between persons and their bodies, (2) the senses in which organs can be property, (3) the distinction between justified and unjustified moral repugnance, and (4) the limits of societal or governmental moral authority to interfere in the exchange of body parts. As the chapter showed, given different understandings of these crucial issues a market becomes more or less morally plausible, thereby increasing or decreasing the moral burden of proof in the creation of public policy restricting organ sales, as well as establishing who should bear that
burden in determining the moral licitness of a market in human organs. The goal was to show under what understandings of embodiment, body ownership, and political authority a market in human organs, all else being equal, would be morally licit.

But all else may not in every circumstance be equal. In this chapter, the conceptual geography moves to a more subtle arena. The analysis must consider health costs and benefits of a market, the vices and virtues a market would encourage, thus challenging this ceteris paribus clause, thereby rendering a market more or less morally plausible. Beyond considerations of embodiment, ownership, and morally justified political authority, there are various other moral concerns regarding health care benefits, the use of scarce resources, the encouragement of free and responsible behavior, liberty, equality, and altruism which should bear on the moral judgments one may advance regarding a market in organs. In addition, there are special concerns of social and personal welfare, as well as human dignity and sanctity of life issues, often captured under the general rubric of exploitation that are advanced in discussions of the moral licitness of a market in human organs. Here one must attend to counter-balancing interests which when gauged against one another balance, curtail or defeat arguments against the market. Here also, one must attend to the ways in which normative assessments of costs and benefits vary with theoretical accounts of which consequences and
special considerations are held to be intrinsic or instrumental to the
good of persons or society.

Assessing the costs and benefits of a market in human organs
requires laying out an analytic geography of underlying values, and
special moral considerations or goals, as well as assessing the ways in
which such factors balance against one another. Such considerations will
also determine who shoulders the burden of proof. If a market in human
organs supports the realization of significant personal or societal values
and goals, the burden of proof will be on those who would forbid the
market to provide equally significant counter-balancing considerations.
all else being equal. In addition, other concerns, which prima facie
might be taken to defeat the allowability of the market, such as human
dignity and exploitation, may be better protected with a market in human
organs, than through alternative procurement and allocation strategies.

This chapter will not attempt to settle the matter of the permissibility
of an organ market. Rather, the focus is on determining under which
circumstances a market in human organs advances health benefits, the
effective use of scarce resources, as well as other special values and
goals, more successfully than alternative organ procurement and
allocation strategies.

For example, unlike the market, some systems of voluntary donation
are based on the implicit assumption that organs are a community health
care resource and as such procurement and allocation strategies must take into account community based moral and health care outcomes. One might argue that a market in human organs would corrupt organ procurement and transplantation protocols. that the possibility for quality medical care and scientific research will be sullied by greed. leading to significant harms to both organ vendors and recipients. Consider Richard Titmuss's claims regarding commercialization of the blood supply. Titmuss argued that the existence of a for-profit market in blood and blood products leads to less blood available for transfusions. a greater likelihood of distributing blood contaminated with disease. inefficient management of the available supply. imposes social costs on the poor as well as leading to a significant increase in price per pint of blood (1971. p. 246; see also Hagen. 1982; Office of Technology Assessment. 1985).¹ His conclusions. while couched in somewhat rhetorical language. advance important criticisms:

... the commercialization of blood and donor relationships represses the expression of altruism. erodes the sense of community. lowers scientific standards. limits both personal and professional freedoms. sanctions the making of profits in hospitals and clinical laboratories. legalizes hostility between doctor and patient. subjects critical areas of medicine to the laws of the marketplace. places immense social
costs on those least able to bear them – the poor, the sick and the inept – increases the dangers of unethical behaviour in various sectors of medical science and practice, and results in situations in which proportionately more and more blood is supplied by the poor, the unskilled, the unemployed, Negroes, and other low income groups and categories of exploited human populations of high blood yeilders. Redistribution in terms of blood and blood products from the poor to the rich appears to be one of the dominant effects of the American blood banking system (pp. 245-246).

It is important to note the special moral costs Titmuss identifies: (1) a decrease in altruistic sentiments, (2) an erosion of a sense of community, (3) a lowering of scientific standards, (4) limitations on personal freedoms, (5) limitations on professional freedoms, as well as (6) the legalization of hostility between patients and physicians. In addition, his criticisms presuppose that (7) making a profit from hospital services or (8) from laboratory services is morally suspect, and (9) that the forces of the market bring on more harm than benefit. It is clear that Titmuss does not regard the profit motive as leading to the wise use of resources, nor does he consider the market a place that rewards responsible free decision making, while providing tutelage concerning the consequences of one's choices and the limitations of the human condition.
This chapter provides an overview of direct and indirect health benefits, efficient and effective usage of scarce resources, free and responsible behavior, liberty, equality, and the maximization of social or personal welfare. The next section that follows addresses in particular health care costs and benefits. Here the direct as well as indirect health benefits of a market in human organs are considered, in addition to the efficient and effective use of scarce health care resources. The third section gives accent to the special moral costs and benefits of a market in human organs. Here attention is given to the character of special moral considerations such as equality and liberty, as well as free and responsible behavior. In the fourth section, the issue of exploitation is engaged. One must determine whether a market in organs leads to exploitation, or whether a policy forbidding organ sales is itself exploitative. To gauge this issue adequately, one must assess the market over against alternative possible procurement and allocation systems. The fifth section assesses the impact of free choice on personal altruism and community. Here Titmuss's criticisms regarding the impact of markets on a decrease in altruistic sentiments, the erosion of a sense of community, limitations on personal and profession freedom, as well as the legalization of hostility between patients and physicians are brought to bear on the procurement and allocation of human organs. The following section evaluates the criticism that the market lowers scientific
standards, while the seventh section grapples with the virtues and vices of free choice involved in an organ market. Here Titmuss's concerns regarding the making of profits from hospital and laboratory services, as well as the virtues and vices of a for-profit health care market are addressed. The final section reviews these considerations as well as others in assessing what is at stake in judging the moral allowability of human organ markets.

II. Health Care Costs and Benefits

An initial metric for gauging the acceptability of a market in human body parts is whether it would have better health outcomes, by increasing the quality and quantity of patients' lives, reducing time spent on transplant waiting lists, and avoiding preventable deaths, than alternative procurement and allocation strategies. Alternatively, if the market would lead to inappropriate harms to organ vendors, ineffective and inefficient usage of scarce health care resources, and other more indirect health care costs, such concerns may outweigh the potential benefits. These considerations can be grouped under the general rubrics of direct and indirect health care costs and benefits. Direct health care concerns include whether a market in human body parts would (1) decrease the number of available organs, (2) raise health care costs, thus further exacerbating the health problems created by a constrained health care
budget. (3) procure only poor quality organs for transplant, contributing to poor health care outcomes for recipients. (4) increase the occurrence of unnecessary surgery, thereby contributing to poor health care outcomes for vendors. or (5) ineffectively utilize the available organ pool, transplanting organs into candidates for whom transplantation will not convey a benefit, or at least a benefit of sufficient magnitude or duration.

Such concerns affect the balance of considerations with regard to the acceptability of a market in human organs. On the one hand, if health costs would be significant, because of the availability of fewer organs, the realization of poorer quality outcomes, or the particular surgical harms to vendors, as well as other costs attendant to ineffective and inefficient organ allocation, these costs would tip the burden of proof against a market in organs. Insofar as organ procurement and allocation policies diminish the total number of organs available for transplantation, or otherwise set donors or recipients at jeopardy, such health care costs weigh against the acceptability of the policy. On the other hand, if the market is likely to lead to greater organ availability, with organs of good quality, and more efficient organ procurement for transplantation, while minimizing potential harms to vendors, such positive health consequences tip the burden of proof against those who would forbid the market.\textsuperscript{2} One would need either to deny the value of such
goods, deny that such goods are produced, or argue that the market engenders or involves costs to significant independent moral considerations, which counter-balance the potential health gains, in order reasonably to forbid a market in human organs.

Policies which expand the number of living donors would multiply the availability of transplantable body parts, such as kidneys, bone marrow, and liver grafts. If such a policy also engaged families and other third parties, who are in authority over bodies of deceased and dying patients, to make those organs accessible, this would also increase availability of non-redundant organs, such as hearts, from brain dead and cadaver donors. Expanding the pool of living and cadaver donors would then save human lives and reduce human suffering. The concern remains that a market in human organs might decrease organ availability (Sells, 1996; Kjellstrand and Dossetor, 1992; Morris, 1988). If potential donors sell exclusively to the highest bidder, only the very rich, or those with premiere insurance, would be able to purchase needed organ replacements. Other potential recipients would suffer and perhaps die. Longer terms on waiting lists would develop for the poor who would then be competing for the diminishing number of donated, or less expensive, perhaps inferior organs.

Commercial approaches to procurement and allocation are seen as raising numerous issues of social justice. The concern in part is that
cash payments will attract primarily poor and low income segments of the population, including racial minorities, who will disproportionately bear the health care complications of being vendors, as well as being increasingly subjected to exploitation. Once a market exists, family members may be less inclined to donate to a relative in need. Envision, for example, callous individuals chiding a friend or family member: "George, buy your own organ! If you had saved your money, you could have purchased your own replacement kidney for transplant. Why should we give you one!" One might respond to such concerns by appeal to special moral considerations: part of responsible behavior is accepting the consequences of failing to save monetary or physical resources, or of failing to refrain from organ damaging activities. One might also engage other social or political responses: to blunt such effects social policy might establish a minimum baseline of welfare or health care benefit packages including organ stamps (i.e., federally supported organ purchase vouchers for the poor). Other market based responses ought also to be considered, such as the possibility of trading redundant organs (e.g., a slice of healthy liver might be exchanged for a healthy kidney).

Grounds for such health related concerns, though, are probably unlikely to be justified. Presuming that the willingness to donate body parts is motivated by actual rather than coerced altruism, those who are willing to donate ought to continue to be willing regardless of the
existence of a for-profit market. Though the United States has a market oriented economy, the level of donations to charity are strikingly high, with Americans donating nearly 150 billion dollars annually to charitable and non-profit organizations. As a measure solely of the willingness to part with one's organs, however, those who are willing to donate body parts ought also to be willing to sell parts. Regardless, most organ donations from living persons are to family members or close friends. The motivations supporting such donations are likely to maintain the same force regardless of the existence of a for-profit market: love, beneficence, loyalty, gratitude, guilt, or avoidance of the shame of failing to donate. These are not generally donors whose altruism extends to all possible recipients; rather, willingness stems from their particular relationship with a particular patient. Such transfers are unlikely to change either in general character (i.e., from donation to sale) or in relative number (i.e., become other than driven by the need of a specific relative or friend). However, when someone needs a family member to donate a kidney, it may already have been sold. Also as organs are viewed as the kind of things that people have to purchase, like cars, they may no longer be considered the kind of good that one can acquire through donation. However, the motivations which currently support organ donations to family members are also likely to support family pooling of resources to purchase a replacement organ.
Furthermore, the development of such a market provides no reason to stop asking patients, or their families, to consider donation. Additional strategies designed to increase organ availability, such as required request or directed donation, ought not to be seen as exclusive alternatives to the market. Pursuing multiple parallel strategies may lead to the greatest organ availability. It may be, however, that the goal of increasing organ availability would be more effectively and honestly secured with the existence of an organ market. For example, the concern that an organ market would disproportionately adversely affect health care for the poor, the uninsured, or under insured, ignores numerous possibilities for influencing the market. Various state incentives could be utilized to avoid the need for direct payments from recipients to donors. Here one might consider allowing donors, or their families, to take tax deductions for the fair market value of the organs. In addition, one might utilize a system of tax credits against income or inheritance taxes owed for the organ's value (Mcnaco. 1990; Dossetor et al.. 1990).³ These would be governmentally-managed systems for the purchase and supply of organs. Both policies would ensure that donors were compensated for the market value of their body parts, while actively encouraging an increase in available organs without raising direct health care costs. Many aspects of such a system could be supported through religious and other charitable organizations. There could, for example, be organ drives
supported by particular religious groups.

Here also, one might consider a system of organ stamps, which would create certain welfare entitlements. Organ stamps might function as straightforward healthcare entitlements, where the state, or national health insurance, would purchase needed organs utilizing tax dollars for the poor. Alternatively, such stamps might create a system of entitlements contingent upon personal or family trade in kind. For example, in an English case, a father, who was not a good tissue match to donate to his son, offered one of his kidney’s to the British cadaveric donor pool in exchange for placing his son on the national cadaveric waiting list for a kidney. He offered a cost neutral option for a trade in kind (Sells. 1997, pp. 1392-1393). Indeed, a system of incentives, not unlike those utilized to encourage blood donation, could give organ entitlements, or higher priority on the waiting que, to those who donated organs (see, for example, Perry. 1980. pp. 63-71; Manga. 1987. p. 324).

Churches and other charitable organizations could play a significant role in creating health care resources for the poor. Here one might envision individuals donating rights in organs directly to local churches, which would guarantee high quality health care for surgery and minimize other risks associated with donation. The organs could then be sold to the rich to raise funds to purchase health care, food, and medicine, or be made available for transplantation to the poor. One could imagine, a group
such as "Mother Theresa's Organs for the Poor" attempting to generate resources to provide organs for the impecunious. Such organizations could raise money to provide organs to those who could not otherwise purchase them. One might think of creating "Catholic Kidneys International" to raise funds to purchase kidneys for the poor. Or, one might imagine "Mother Theresa’s Non Profit Organs Inc.", attempting to broker organs from the poor in developing countries to advantage those poor. An organ market creates the social and political space to explore additional opportunities and incentives for organ procurement and allocation, without thereby forbidding other types of incentives and opportunities.

Market incentives encourage persons to raise resources to further personal as well as social interests and goals. With the creation of a market in human organs, organ availability need not be limited to acts of altruism. Profits from organ sales would allow for the private pursuit of business and educational opportunities, or to further more public agendas. Given that social and personal advantage is often tied to education and business success, such incentives may be significant. However, even short term welfare maximization, such as the purchase of housing or health care, may provide some with sufficient incentives to sell redundant internal organs. A market in human organs would create opportunities, which some may view as attractive, in securing resources for pursuing
their own educational, business, political, and welfare interests. It is likely that utilizing the market as a procurement strategy would encourage individuals, who would not otherwise donate, to sell their organs, which would increase the availability of organs for transplantation.

With regard to minority groups, some have at times argued that there is a disincentive to donate organs because donation is perceived as providing a good which benefits primarily the majority establishment. As Arnason argues:

African-Americans have a higher incidence of renal disease but a very low rate of organ donation. Blacks currently receive three times as many kidneys as they donate: although they receive proportionately fewer kidneys than whites. Blacks also have a smaller rate of graft survival than whites. The reasons for this pattern include some unique medical predispositions of African-American potential recipients and donors, socioeconomic factors, and mistrust of a predominantly white medical establishment (Arnason, 1994, p. 242; see also, Callender et al., 1994).

Such disincentives straightforwardly decrease organ availability for transplantation, increase the size of waiting lists, and thus increase human suffering and death.

Directed donation is often suggested as a means to alleviate this
problem. Because minority families may be more receptive to donation if assured that their loved one's organs will benefit another member of their own minority. "Seeking ways to enhance the prospect of a black donor's kidney finding its way into the body of a black recipient would certainly remove a disincentive for black donors ..." (emphasis in original: Arnason. 1994. p. 243). Assuming this is the case, the very directed nature of the market should likewise increase incentives for allowing organ harvesting. Indeed, a market in human organs would add additional incentives. Individuals and families could pursue either private economic goals or social political agendas. Charging as much as the market is able to bear will transfer financial resources to the particular minority. Selling organs very cheaply to fellow minority members would ensure such patients a higher likelihood of receiving an organ. Either course of action could increase the number of organs available and provide direct health benefits. Unlike donation, organ sales are empowering and directed in character. Persons control their organs as private property to be sold or given at will, provided a willing buyer or recipient can be found.

With the creation of an organ market, one is likely to see an increase in the number of living persons willing to sell organs to recipients who are neither family members nor close friends. Market incentives will likely also lead to the willingness of more families to
have the organs of their loved-ones harvested upon death. Even if harvested organs only directly benefit members of a particular racial group, such activity will reduce the number of patients on the general waiting lists, thus reducing waiting time for others. Such a policy would thereby incur health benefits for all those in need of a transplant.4

The primary health risks for living donors are those associated with the operative procedure for harvesting the organ. For example, perioperative mortality for nephrectomy is approximately 3 deaths for 10,000 donors (0.03%), with other major complications occurring in less than 2% of cases. Occurrence of long term morbidity risks, such as increased risk of hypertension or proteinuria after living-donor nephrectomy, are controversial (Ross et al., 1997, p. 1753). Other operations, such as harvesting a liver slice, can be somewhat more risky for the donor (see Najarian et al., 1992, pp. 807-810; Bia et al., 1995, pp. 322-327; Bay and Herbert, 1987, pp. 719-727; and Williams et al., 1986, pp. 1-8). Such mortality and morbidity risks exist whenever living donors are utilized, regardless of whether money changes hands. Therefore, presuming living donors will continue to be utilized, such risks are neutral with regard to the market.

While some may be concerned that individuals will sell poor quality or diseased organs for private gain, such concerns are only valid if an
independent method to monitor the quality of organs is unavailable. In general, the health advantages of transplants from living donors are great. An organ market would allow potential vendors and recipients to "shop" for precise tissue matches. Since the vendor can in advance be evaluated with regard to health, the organ can be stored in the donor with few or no concerns about degeneration of the tissue. Organs procured from living individuals are more viable than cadaveric organs and are far more likely to function well once transplanted. In addition, the transplant can be planned so that both parties are in the same hospital or in the same operating room, to allow the quick transfer of the organ. This is the same procedure which is utilized for living donative transplants (Epstein, 1997, p. 254). Greater likelihood of transplant success equates to more efficient and effective use of the available organ pool and other medical resources.

A market in human organs may lead to other more indirect health care costs and benefits. For example, such a market may increase the financial cost of organ procurement. While historically organ procurement has not been without significant financial expenditure, the organ itself has typically been donated. In the United States, for example, the median organ procurement financial costs in 1988 ranged from approximately $16,000 to almost $21,000 (1991 dollars), with no payment to the donor or donor's family (Evans, 1993; Sloan, 1993). Surgeons do not generally
provide operative services free of charge, nor do hospitals provide space, immuno-suppressive drugs and other operative personnel resources, without fee, nor are all organ procurement agencies supported solely through charitable donations. Each of these products and services adds to the high cost of organ transplantation. The concern is that the additional funds expended procuring organs may reduce the overall funds available to purchase other types of health care. Such costs might further stress a single tier, government controlled, health care system with a fixed global budget for health care expenditures. Within the private insurance market, providers may raise premiums to meet the additional costs.

These potential drawbacks, though, might be blunted in several ways. First, the availability of more organs may lead to reduced overall costs, because timely receipt of a healthy organ may reduce or obviate the need for other types of treatment, such as dialysis (Ross et al., 1997, pp. 1752-1755). Second, currently time and money are expended determining to whom particular organs should be allocated: e.g., setting "match" standards, and debating which social and political concerns, such as the potential for quality and quantity of life, or time spent on waiting lists, ought to play a role in the calculation. With a market based procurement and allocation system, such costs could be reallocated to purchasing organs for persons in need (Epstein, 1996, p. 281). Third, current "altruistic" policies generate hidden charges. For example, one
study which calculated the financial costs generated during the care of potential solid organ donors who fail to donate due to medical complications after consent has been obtained, found that additional costs ranged as high as $33,997 per potential donor (Grossman et al., 1996. pp. 39-43). Such costs are ultimately passed on to patient's families and third party payers. Insofar as the market decreased such costs, such as by increasing the number of healthy living vendors, who are much less likely to experience such complications, it would liberate resources. Fourth, if private persons sell organs this may make available more funds to purchase health care or more extensive insurance. That is, in the private sphere health care is not a zero sum game: total expenditures are not fixed.

Selling organs may not only provide resources for education, training, or starting a business, but also increase the vendor's overall social and economic prospects, in turn having indirect health benefits. Individuals with higher salary, higher status jobs incur advantages: economic, social, and functional. For example, despite universal single tier health care coverage, life expectancy in Canada varies according to income and status. In 1971 the difference in life expectancy in Canada between the highest and lowest earning was 6.3 years for men and 2.8 years for women. This deviation had only reduced in 1986 to 5.6 years for men and 1.9 years for women (Iglehardt, 1990, p. 563; see also Wilkins et al.).
1989). Consider also the Whitehall II study conducted in Great Britain on civil service workers, which demonstrated an inverse association between employment grade and prevalence of angina, electrocardiogram evidence of ischaemia, and symptoms of chronic bronchitis. Morbidity and mortality were both affected by employment grade (Marmot et al., 1991). The reasons cited to account for these differences include: (1) “different attitudes to health” such as “the lower degree of belief among those with lower status jobs that they could take action to prevent a heart attack”; (2) “patterns of social activity differed, with clear indication of less and less satisfactory social support among those with lower status jobs”; and (3) “work environment is perceived differently between grades. Impressive evidence has accumulated that jobs characterized by low control, poor opportunity to learn and develop skills, and high psychological work load are associated with increased risk of cardiovascular disease” (p. 1392; see also, Wright, 1991, pp. 285-287). Low job control was closely linked with position in the employment hierarchy. In a similar study among Czech men, it was also concluded that low job control was related to acute myocardial infarction in middle-age (Marmot et al., 1997; see also, Taylor 1991, p. 70; Goldstein, 1995, p. 397; Fletcher, 1988, p. 27; Monat and Lazarus, 1991a, p. 82; 1991b, p. 184). In addition, mortality from heart disease is higher in manual

Low income has also been consistently related to measures of unfavorable birth outcomes. Within lower income neighborhoods in urban Canada there are higher rates of infant mortality, low birth weight, very low birth weight, prematurity and small gestational age (Wilkins et al., 1991, p. 7). "From 1971 to 1986, infant mortality in urban Canada declined by 50%, but the ratio of rates in the poorest neighborhoods compared to the least poor neighborhoods diminished by only 8%" (p. 8). These statistics point to indirect health benefits for children associated with the income level and job status of parents.

Increase in control over one's occupation, i.e., increase in status as well as increase in salary, leads to economic, social, and functional advantages, which in turn are indirectly associated with increased life expectancy, health, reduced infant mortality, and increased advantages for children. Morbidity costs and mortality risks lower with income level and professional status. Measured solely in terms of health care consequences selling one's internal redundant organs may be a rational strategy to raise one's income, increase one's economic and social prospects, and thereby indirectly benefit the health of oneself and one's family. Insofar as this is true, allowing the poor to market their organs will bring them health, as well as empower them. It will give them control over their own
lives, which, given the foregoing data, should itself provide further health advantages.

III. Special Moral Costs and Benefits: Equality and Liberty

Acceptability of a market in human organs must also be gauged in terms of special moral costs and benefits. Attention must be given to the character of special moral goods and considerations such as equality and liberty, as well as free and responsible behavior. If a market in human organs would promote equality and liberty more successfully than alternative procurement and allocation policies, then this would tip the burden of proof against those who would forbid such a market. Alternatively, if the market would inappropriately restrain freedom, increase inequality, or discourage responsible behavior, such moral concerns may outweigh potential benefits.

For example, one might be concerned that the existence of a market in human organs would increase the economic and social gap between the poor, who sell organs, and the rich, who purchase them. Consider, for example, two alternative human organ procurement and allocation policies. On policy A, 100% of the patients spend an average of 24 months waiting for a suitable organ for transplantation. There is a 5% mortality among patients while on the waiting list. On policy B, 50% of the patients spend an average of 2 months on the waiting list, with less than 1%
mortality while awaiting transplant. The circumstance of the remaining 50% of the patients is exactly the same as with policy A. Of these two policies, B may be worse with regard to equality, if measured solely in terms of the possibility of receiving a transplant and the likelihood of dying while awaiting transplant. However, policy B is better with regard to health care outcomes: waiting time for half of the patients is much less, which reduces human suffering; moreover, fewer patients die while awaiting transplant.

As the Office of Technology Assessment Report pointed out, issues of equality argue in favor of a system of payments to the sources of human tissues (1987, pp. 12). This view incorporates the idea that persons have the right to treat as least some physical parts of their bodies as objects for possession, gift and trade, such that the sources of human tissues and organs are entitled to the value of any benefits ultimately derived from them. Legislating that donors may only transfer organs as a gift does not thereby reduce the value of such organs to zero. Rather, it transfers the value of the organ from the donor to other parties (OTA, 1987, p. 124). “If it is possible to determine or estimate the potential value of biological materials, then as information is distributed, patients, or their agents, will come to know the values of tissues and cells they may possess and they will expect recompense” (1987, p. 115). This view becomes increasingly relevant, the greater the value of the human tissues or
organs to the recipient.

One must also weigh the potential of moral harms to equality and liberty, as well as to free and responsible behavior, resulting from forbidding such a market. For example, if one is concerned that the poor will be induced by their poverty to sell their organs, one must also be concerned that removing what the poor may see as an attractive option, so as to assuage feelings of repugnance on the part of the affluent, itself coercively limits the liberty of the poor autonomously to assess available opportunities to better their lives, thereby engendering inequality related harms. Organ selling may be a means to generate resources for the poor which can be reinvested in personal and economic development, thereby decreasing inequalities.

One might also raise concerns that the existence of a market will curtail personal and professional liberty. Here one must first consider how liberty is to be understood. If liberty is freedom from interference, as expressed in the existence of significant forbearance rights, then a market in organs creates social space for unencumbered personal interaction, which while making no judgment regarding the market, allows it to exist. Alternately, if liberty is appreciated as a right to act on one's abilities, venturing with others while open to the possibility that one's free choices may lead to success or failure, this circumstance will entail outcomes which are materially equivalent to freedom from
interference. It creates social space for persons to venture freely with others in the market. A third possibility is liberty understood as freedom to realize one's abilities and choices. In this case, significant state support may be required to ensure outcomes consonant with individual abilities and free choices. Norman Daniels encapsulates this concern as the need to sustain more than the conditions of formal liberty, as freedom from constraint, but rather to ensure material liberty, as expressed in fair equality of outcomes. For example, while universal suffrage grants the wealthy and the poor identical voting rights, the wealthy have a greater ability to select candidates, as well as to influence public opinion and elected officials. In terms of actual impact on outcomes, political liberty has greater worth for the wealthy (1976. p. 256; see also 1996). At stake in the context of organ procurement and allocation are the ways in which a market in organs, or its prohibition, places limitations on or enhances personal and professional freedom.

Liberty understood either as significant forbearance rights or as freedom to venture with others will support the existence of an organ market. Prohibiting the selling of human organs constrains individual freedoms to use one's body and body parts, fails to respect personal privacy and individual choice regarding lifestyle, and restricts one's ability to venture with others in the creation of contracts from which both parties expect to benefit. Western ideals of freedom from constraint
and individual responsibility typically allow such expressions of liberty. Moreover, insofar as persons are free to venture and fail, the market encourages the development of individual responsibility. It provides tutelage regarding the limits of the human condition and individual ability, as well as the ways in which agreements can constrain future choices.

Indeed, agreements formalized as contracts can be a powerful expression of personal freedom. As Prosser points out, however, since obligations are imposed because of the parties manifesting consent to the agreement, such consent must be autonomous (1971. p. 613). Here one must assess the possibility for autonomous consent to organ vending. One might argue that actual autonomous consent either may not exist, or may in some fashion be invalidated. For example, organ vendors may be precluded from choosing autonomously because they do not fully comprehend the implications and risks of surgery. While ignorance is not generally held to invalidate all contracts, it is possible that failure to understand significant life threatening risks associated with donation may be sufficient to raise the standard of proof for consent.

It is unclear, though, that an organ market would fare worse regarding autonomy than other organ procurement strategies. On the one hand, surgical risks are not a significant concern for harvesting organs from either brain dead bodies or cadavers. Therefore, concerns that
vendors may fail to understand life threatening risks do not defeat autonomous participation in an organ futures market. nor do such concerns bear significantly on families who sell organs from recently deceased or brain dead next-of-kin. On the other hand, ignorance as a barrier to consent does not respect the distinction between living donors and living vendors. Unpaid donors can be equally ignorant of the risks of surgery or of the potential for serious complications. Insofar as ignorance rules out organ selling, it ought also to rule out organ donation. However, as with donors, not all vendors will be ignorant of the risks, nor will all be irremediably so. Opportunities to receive counseling should ameliorate such concerns. Moreover, if the threat of significant harm increases the standard of proof for consent too greatly, this raises the additional concern that other important freedoms will be ruled out as well. Consider, for example, the circumstance where, without a job, one would starve or need to take a job which carries substantial risks (e.g., home roofing or oil-platform construction). Would autonomy be impossible in such circumstances? Even if some potential vendors ought to be excluded from selling organs for reasons of irremediable ignorance (e.g., the mentally disabled), blanket prohibitions do not serve the interests of liberty.

Liberty as a right to realize one's abilities and choices only supports an organ market if it would more successfully assist persons in fulfilling their talents and choices than a state mandated system of
donation. One might argue that the circumstances of a human organ market are such that forbidding the buying and selling of organs does not limit liberty; or, that on balance prohibition serves the realization of liberty-based interests more successfully than the market. For example, one might argue that the existence of financial inducements for organ procurement undermines the freedom to donate one's organs. If an organ market is created, while only some will exercise the liberty to sell, the freedom of all to donate will thereby be limited. As Titmuss argued with regard to blood products: the private market

...limits the answers and narrows the choices for all men – whatever freedoms it may bestow, for a time, on some men to live as they like. It is the responsibility of the state, acting sometimes through the processes we have called 'social policy', to reduce or eliminate or control the forces of market coercions which place men in situations in which they have less freedom or little freedom to make moral choices and to behave altruistically if they so will (1971, p. 242).

Importantly, this criticism can be turned on its head. Prohibition of an organ market precludes the freedom of all to sell their organs. Therefore, given that with a general prohibition on organ vending, only some will exercise the liberty to donate, the freedom of all to sell, if they so will, is limited. Freedoms contingent on realization of significant
market-oriented abilities and choices might tip considerations of liberty in favor of the creation of an organ market, even if a state sponsored market. For example, this circumstance would support allowing individuals to take tax deductions or credits for the value of donated organs. If state purchase of organs would realize health-oriented freedoms, this might tip considerations in favor of a government supported organ market, or allowing patients in need to advertise for organ vendors. Alternately, freedoms contingent on realization of significant community oriented solidarity or beneficence interests might support blanket prohibition.

Which institutional system would more successfully realize the abilities and choices of persons, the free market, a state sponsored market, or blanket prohibition, is an empirical question which depends in part on the talents and goals of individuals. For example, insofar as a market in human organs creates social space for unencumbered human interaction, it would not generally preclude the liberties of the altruistically inclined to realize their need to take care of others. Market-based liberties include, but are not limited to, profit-seeking interests. Unless the state prohibits the practice, an organ market could allow private individuals out of charity to sell organs very cheaply to those in need. Social and political institutions which support the free choices of persons to interact with free and consenting others are formally neutral with regard to the expression of charity.
One possible concern is that charitably inclined persons will be intimidated by the market and will thereby view themselves as precluded from giving away organs. As with the problem of ignorance, though, such intimidation will not be universal, and will not usually be irremediable. One might also be concerned that with the creation of a for-profit market there will no longer exist social institutions for charitable donation of organs. While it is unlikely that the existence of a market in organs would preclude the creation of non-profit organ acceptance and distribution agencies, even commercial corporations may accept donations to support impecunious care, or simply to cut costs. Commercial markets in food, housing, education, and medicine exist side-by-side with non-profit charitable organizations.

Forbidding an organ market straightforwardly limits the liberty of vendors and recipients who are inclined to interact with each other in the profitable exchange of goods and services. It limits personal freedoms of choice, privacy, and association, as well as the freedom of physicians to acquire organs to assist their patients. Those in need of organs for transplant are prohibited from advertising for potential vendors, which straightforwardly also limits patients’ freedoms of speech, association, and contract. Prohibition thereby imposes constraints and limits liberties to choose and venture with others. Given that potential recipients are often dying of organ failure, the loss of these freedoms
may be significant. Prohibition will also stifle the realization of market-based abilities and choices, as well as those preferences, which while not directly market-based, rely on the availability of private funds. Moreover, prohibition overlooks opportunities for the poor to raise resources to better their prospects, as well as for the state to encourage organ availability, through tax credits and deductions, thereby addressing both income and health inequalities. Even if certain aspects of the commercial trade in human organs are considered by some to be intrinsically unsavory, the moral harms to equality and liberty caused by forbidding such a market may be worse.

IV. Exploitation: Organ Markets Verses Other Allocation Strategies
One must now assess whether and how the market may exploit persons in greatest need, in particular, or whether forbidding the sale of organs is itself exploitative. The core notion is that to exploit someone is to benefit by taking unfair advantage of that person. For example, A may exploit B when A benefits from a transaction which is harmful to B, or from which A receives disproportionate value (Feinberg, 1983, p. 201; Goodin, 1987, p. 167). In addition, A may exploit B if A benefits from an exchange when B's ability to choose is compromised, even if B's choice is not strictly involuntary (Wertheimer, 1992, p. 213; 1996, pp. 207-277). Market exploitation often works by offering inducements to those who are
vulnerable such that intrinsically unattractive options become, all things considered, the best available.

Regarding organ sales, the concern is that financial incentives will tip the balance of interests, inducing the poor into selling their organs to the rich. Consider the case of a 25-year-old Iraqi who, allegedly, on October 17, 1995 was loitering outside of a hospital in Baghdad in order to find an elusive Libyan who had agreed to purchase one of his kidneys for $500, a small fortune in Iraq at that time (Ibrahim, 1995, p. A1). Similar reports in Great Britain alleged that in 1989 two Turkish peasants had been paid £2,000 each, plus expenses, to travel to London to be live kidney donors in a private hospital (Lamb, 1990, p. 137). Given conditions of poverty, the poor will have significant financial incentives to undergo the risks of surgery.

The possibilities for market exploitation include: (1) harmful exploitation, in which purchasers gain from such transactions while organ vendors are, on balance, harmed. (2) Mutually advantageous exploitation, in which, though organ vendors benefit from the transaction, it is in a way that remains unfair. For example, if purchasers benefit substantially more than vendors, or if offering to purchase organs takes unfair advantage of vendors' impoverished circumstances, then such exchanges may be exploitative. (3) Moralistic exploitation, in which purchasers and
vendors gain from a transaction which, even if freely consented-to, is fundamentally immoral. Here, a primary concern is that organ sales improperly commodify human body parts.

A. Harmful Exploitation

Assessing whether organ sales involve harmful exploitation requires an "all things considered" judgment of the potential for such transactions to cause harm. The question is not whether selling organs has harmful elements, but whether on balance the costs outweigh the benefits. There are, for example, negative elements to most uncontroversial beneficial transactions. Consider the ways in which individuals may prefer leisure to work, or to receiving expensive medical resources for little or no cost. Such circumstances do not entail either that workers are harmed by employment or that patients are exploited by hospitals which demand payment. In each instance, it is presumed (1) that employers and hospitals may permissibly require compensation for the financial or medical benefits one receives, and (2) that the benefits to the individual outweigh the costs. Moreover, adequately to evaluate organ selling as a social practice, the question is not whether any particular individual is harmed, but whether, on balance, the expected value of such exchanges is negative. As Wertheimer points out regarding employment: "If a worker is severely injured on the job, such that employment is a net harm to that worker, we
do not say that such employment is harmful as a practice" (1992, p. 215). In short, the issue not whether an organ market is harmful to any particular individual ex post, but whether it is typically ex ante harmful as a social practice.

As already noted, the impact on the physical health of organ vendors, in terms of long term mortality and morbidity risks, although crucial to consider, are likely not significant. Indeed, a market in human organs would likely lead to positive health benefits. Provided redundant internal organs are procured in a suitably sterile environment, by a competent surgeon, selling internal redundant organs is less risky than many other occupations. Regardless, insofar as living donors will continue to be utilized, such harms are neutral with regard to the market.

Additional harms borne by vendors are primarily psychological. They will, therefore, be difficult to measure and may differ from person to person. Insofar as organ vendors incur psychological distress (e.g., feelings of violation, embarrassment, or loss of dignity), adequate financial remuneration may compensate. It would, however, be an error to presume that donors are not subject to similar psychological harms. While some argue that compensation itself causes increased psychological harm, the value of the compensation to the organ vendor may outweigh increased psychological dis-value, thereby obtaining a net benefit (Wertheimer, 1992, p. 217). Moreover, organ vendors may experience a deep sense of
satisfaction for participating in a life-saving activity. even. perhaps heroically. at some risk to themselves. It begs the question to presume that only unpaid altruistically motivated organ donors would experience personal satisfaction. In short. insofar as psychological harms can be adequately recompensed. or balanced against psychological benefits. it is implausible to view organ sales as benefitting recipients at significant harm to vendors.

B. Mutually Advantageous Exploitation

Organ sales may also be exploitative if one party benefits a great deal from an exchange which only marginally advantages the other. Marxist accounts of market exploitation. for example. often focus on the ways in which exploiters command significantly more value from an exchange than they bring to the transaction. while for the exploited the reverse is true (Roemer. 1985. p. 30; see also Reiman. 1987; Miller. 1987). Similarly. Feinberg argues that an agreement is exploitative if one of the parties receives excessive profit or disproportionate value from the exchange (1986. p. 252). On such an account. organ venders are exploited if they receive significantly less value from the transaction than the worth of the transplant to recipients.

The concern is that the poor will be willing to sell organs for relatively little money. because even such an amount will be advantageous.
This circumstance should be rectifiable, however, by increasing vendor compensation. One possibility is state price controls, which set minimum financial standards for each organ. Minimum wage legislation may help prevent exploitation. These considerations also suggest that organ sellers may face a collective action problem. Most vendors would be able to negotiate an agreement that is less desirable than would be possible if potential vendors negotiated collectively as a group. Here one might also raise the concern that prohibition exploits donors by forbidding them from realizing any value for their organs.

An offer is coercive, on the other hand, if the lure of compensation compromises the voluntariness of the potential vendor's choice. Financial gain, for example, is considered an influence which overwhelms and subjugates the voluntary consent of impoverished potential donors. It may even be the case that the purported exploitee stands to gain more utility from a transaction than the purported exploiter. It is because impoverished vendors stand to gain so much from the sale that their bargaining position appears comparatively weak (Wertheimer, 1992, p. 223). Marxists, for example, have argued that capitalist labor markets are coercive because workers are limited to a choice between unpalatable alternatives, for example, working at low paying jobs or starving (Cohen, 1982, p. 3; see also 1978, pp. 63-77; see also Roemer, 1985; Reiman, 1987; O'Neill, 1985). As Ruth Macklin contends, financial offers "may be
difficult for a person of little financial means to refuse and would, in that case, be coercive" (1990: p. 146; see also. Tong. 1990). This account helps to explain why altruistic donation is not regarded as exploitative: it is not that the exchange of value is more fair, but that the motivation underlying the transaction is perceived as more pure.

If poverty is the difficulty, though, one might reduce the financial incentives by lowering the amount paid per organ (Richards. 1996), or restrict participation in organ markets to those with high incomes (Epstein. 1997. p. 255). Michael Walzer, for example, holds that "...what goes on in the market should at least approximate an exchange between equals ..." (1983, p. 120). While such policies may appear less exploitative, they have counter-intuitive consequences. First, they further restrict options for the poor and second, unlike those better off, the impoverished are prevented from fully utilizing the market for their own advantage. While a poor individual may decide that selling a kidney is more attractive than other options, offers to purchase an organ do not make him worse off if he refuses to sell. Third, as Margaret Radin notes, it is unclear why engaging in market transactions with the poor constitutes the use of coercive power, while doing so with the middle-class or the wealthy is an appropriate expression of personal freedom (1996, p. 47).

One must also distinguish between coercion and peaceable
manipulation. While coercive actions are those which place or threaten to
place others into a disadvantaged state without justification, peaceable
manipulative actions are those which place or offer to place others into
an advantaged state to which they have no prior entitlement. While
coercion violates the free choice of persons, peaceable manipulation does
not (Rudinow, 1978, p.339). Indeed, peaceable manipulations undergird the
very process of negotiation through which individuals fashion consensual
agreements. As long as offers do not make rational choice impossible,
incentives are, in principle, permissible (Engelhardt, 1986, p. 308).

As Nozick and others have noted, though, the line between coercion
and peaceable manipulation is difficult to draw (Nozick, 1969: Rudinow,
1978). What may prima facie appear as peaceable manipulation may under
closer scrutiny be shown to be a hidden form of coercion. If, for
example, a vendor knowingly exaggerates the quality of a kidney in order
to obtain a higher price, or an employer withholds contractual benefits
until an employee agrees to donate, coercion is involved. Each instance
is an example of one individual placing another into disadvantaged
circumstances through a form of unconsented-to force (e.g., deception, or
breach of contract). 14

Opponents of organ sales may argue that such offers, while adding to
one’s list of options and prima facie enhancing individual freedom, are
too good to refuse and in that sense are coercive. If the impoverished individual's status quo is highly unsatisfactory, then an offer to purchase an organ may appear coercive, because it manipulates the victim's preferences, even if it would be rational to accept (Zimmerman, 1981, p. 130). The intent of the offer is to elicit behavior which contradicts the individual's normal operative goals, and in that sense attempts to use him as a mere means (Rudinow, 1978, p. 347). Thus, the choice to sell a kidney in order perhaps to belie the economic status of one's family is typically considered a decision without scruples. However, to be coercive, rather than simply peaceably manipulative, requires showing that making such an offer places potential vendors into unjustified disadvantaged circumstances.

One possibility is that the lure of financial gain may motivate a decision that the vendor would have rejected if he had thought carefully about its full effects on his life. The existence of such miscalculation, however, is an empirical question. If the typical organ vendor agrees to sell because he believes that the expected value of so doing is positive, and the resulting value is positive, then there is no miscalculation and, thus, no coercion on such grounds. Even if the individual is so interested in money that it would given the person's values be irrational to decline the offer, the choice is still plausibly understood as free insofar as he affirms the outcome. Consider the following case. If a rich patient
offered an impoverished philosophy graduate student two million dollars to sell a kidney. One might imagine the student thinking: "Wow! I'm very pleased that he offered me two million dollars. I could never rationally refuse such an offer, and I would never want to turn it down in any case. I'm very glad it was made." To develop Harry Frankfurt's suggestion, if the offer moves the student who is being manipulated so that his first order volitions compel agreement, the action is still plausibly understood as free insofar as it is affirmed by his second order volitions (Frankfurt, 1971, pp. 5-20; see also, 1972, pp. 72-85; 1975, 95-125; Thalberg, 1978, 201-220; Whitbeck, 1978, pp. 221-231).¹⁶

The general difficulty is that the question is not whether the poor are unfree with respect to certain obstacles, but whether financial incentives to purchase redundant internal organs make free choice impossible and thereby coerce potential vendors into complying with the offer. As previously noted, it is unclear that an organ market would fare worse regarding autonomous consent than other organ procurement strategies. It is, therefore, problematic to describe such offers as coercive, since they do not deprive the potential seller of any pre-existing options and rational choice remains possible. While they may be seductive, such offers are not subtle threats (see, for example, Held, 1972).¹⁷ It may be true that the poor generally have fewer options available among which to choose: however, there is a difference between
having limited options and being unable to choose rationally in one's best interests among the options available (Radin. 1986. pp. 48-49).

Perhaps such offers are coercive relative to a normative moral baseline. For example, if there exists a moral obligation to provide assistance, then demanding compensation to fulfill one's duty may be coercive. Consider Nozick's example:

*The Drowning Case*: B is drowning. A proposes to rescue B if B agrees to pay him $10,000. Both A and B know that there are no other potential rescuers (1969. pp. 449-50: shortened for clarity).

Nozick concludes that this is an example of coercion. While A *prima facie* offers to improve B's situation relative to the status quo. A actually proposes to make B worse off if B does not pay the $10,000 relative to what B has a right to expect from A (see also Nozick 1972. p. 112; Goodin. 1987. p. 171). Wertheimer similarly holds that while this case may be properly described as coercive this is not because B has no acceptable alternative, but because A has an independent moral obligation to save B, either for no compensation or for considerably less (1987. p. 207: 1992). Insofar as there exists a right to be rescued, or a duty to help others in need, which sustains such a moral baseline, the offer is coercive (see also. Gunderson. 1979).
It is unclear, however, that this analysis clarifies the case of human organ sales. Patients dying of organ failure would not usually be described as having special moral obligations to provide potential organ vendors with financial income without asking for some good or service in return. Indeed, it may be that it is patients with end-stage organ failure who are analogous to Nozick's drowning man. *Pace* the often cited concern that an organ market will exploit the poor, this analysis suggests that in offering to sell organs the poor may be exploiting the illness of the rich for personal gain. Yet, absent prior agreements or special moral obligations, it is unclear why those with healthy organs have a moral obligation to donate.\(^{18}\) In short, adequately to assess claims of coercive offers one must also inquire as to who is in greater need, and thus in more threat of exploitation: the poor who need financial resources, or the rich who are dying of organ failure.

In general, it is difficult to count a policy as exploitative if, as in the case of legitimizing organ sales, it increases the number of options open to individuals. The Libyan’s (or another’s) life is saved, and the Iraqi, as well as the Turkish peasants, gain the ability to support their families temporarily while looking for other work. In order to see such circumstances as exploitative, one must hold that there is something intrinsically wrong or debasing in selling one’s organs, so that even if one does this freely, one has been brought to so something morally
injurious to oneself.

C. Moralistic Exploitation: Improper Commodification

An additional possibility is that organ markets are exploitive because they cause moral harm. For example, one might argue that human organs should not be exchanged for money. On such an account, a market in human organs is exploitative because it commodifies that which should not be commodified. Insofar as such a view is sustainable, exploitative circumstances do not improve if organs are purchased for significantly more money. Michael Walzer, for example, argues that while the proper sphere of money includes "...all those objects, commodities, products, services, beyond what is communally provided, that individual men and women find useful or pleasing..." certain exchanges ought to be prohibited to set limits on the dominion of wealth (1983, p. 120). This captures the intuition that while some goods are appropriately distributed through the market, others are not. If organ sales improperly commodify human body parts, it is argued, such transactions should be prohibited.

As Radin maps the conceptual geography, commodities are marked by (1) objectification (i.e., "ascription of status as a thing in the Kantian sense of something that is manipulable at the will of persons"): (2) fungibility (i.e., as "fully interchangeable with no effect on value to the holder"); (3) commensurability (i.e., that "values of things can be
arrayed as a function of one continuous variable") and (4) money equivalence (i.e., "the continuous variable in terms of which things are ranked is dollar value") (1996. p. 118). Opponents of organ sales must argue that such transactions inappropriately (1) objectify human organs by treating them as objects rather than as parts of subjects or agents: (2) treat human organs as fungible items, i.e., as exchangeable: presume (3) that the value of the organ to the vendor is commensurable to the value of the organ to the purchaser, as well as (4) that this value can be given a monetary expression. The question, though, is whether organ markets would likely fare better or worse regarding commodification than other strategies of organ procurement and allocation.

An initial challenge for opponents of the market is that organs are in fact manipulable and interchangeable with others of the same kind. This is the reason that transplantation is medically viable. While one may raise the concern that the market will fail appropriately to weigh and compare economic verses non-economic values (Gold, 1996. pp. 147-148), non-market based strategies for procurement and transplantation face similar difficulties. All treat human organs as exchangeable objects.

One possibility is that organ sales involve an exchange of incommensurable values. Incommensurability represents a concern that the values at stake can be relevantly summed and compared (Radin, 1996. p. 10). By itself, though, incommensurability will not establish that organ
sales are illicit. The permissibility of market transactions does not require that the goods exchanged be precisely commensurable, but rather that the parties transact voluntarily, that deception, or other forms of coercion are not employed, and that each is satisfied with the value to be received. This means that what is received in return is worth as least as much to the party as that which was given. For example, one can buy or sell "priceless" Monêts without claiming that the aesthetic or historic value of the painting is "commensurate" with the money that is paid (Wertheimer, 1992, p. 218).

Elizabeth Anderson suggests another possibility. There is a kind of exploitation, she argues, which occurs "when one party to a transaction is oriented toward the exchange of 'gift values', while the other party operates in accordance with the norms of the market exchange of commodities. Gift values, which include love, gratitude, and appreciation of others, cannot be bought or obtained through piecemeal calculations of individual advantage" (1990, p. 89). However, Anderson over-simplifies: at times one party to an exchange may deliberately sell goods for less than market value as a subtle gift. This suggests that gift values can be brought into play in the market. (This argument will be discussed in greater detail in section VI.) Even if Anderson is correct, however, the difficulty is relevant if and only if such a dichotomy of intentions exists. Persons who negotiate regarding the fair market value of human
organs will not likely experience such conceptual dissonance.

One might argue that giving organs a monetary expression is an inappropriate way to value human body parts. Here the concern is that through property discourse and market exchanges individuals are encouraged to value those goods regarded as “property” solely in economic terms (Gold. 1996, p. 17). Ideals which support how certain things should be valued are typically supported by a conception of human flourishing. Life is enriched and elevated by cultivating capacities to appreciate aesthetic and historic values. “To fail to value things appropriately is to embody in one’s life an inferior conception of human flourishing” (Anderson. 1990, p. 89). For example, in Moore v. Regents of the University of California, Justice Arabian argued that treating certain things as commodities may be morally inappropriate. The question before the court was whether body parts are appropriately conceptualized as property. Justice Arabian held that

Plaintiff has asked us to recognize and enforce a right to sell one’s body tissue for profit. He entreats us to regard the human vessel – the single more venerated and protected subject in any civilized society – as equal with the basest commercial commodity. He urges us to commingle the sacred with the profane. He asks much (Moore v. Regents of the Univ of
Arabian concluded that the market norms inherent in property discourse are incompatible with an open discussion and evaluation of nonmarket, non-monetary, values (Gold. 1996, p. 36). Similarly, Sara Ketchem has argued in the context of commercial surrogacy that use of the market recasts the meaning and nature of women's bodies.

Sexual or reproductive prostitutes enter the market not so much as agents or subjects, but as commodities or objects ... Moreover, once there is a market for women's bodies, all women's bodies will have a price, and the woman who does not sell her body becomes a hoarder of something that is useful to other people and is financially valuable (1992, p. 290; see also Ketchem. 1984: Freedman. 1991: Nelson and Nelson. 1987: Sistare. 1988).\"It treats women's reproductive capacities as commodities. The analogous claim for organ sales is that once there is a market in human organs, all organs will have a price, and those who do not sell their organs will become hoarders of something that is useful to other people and is financially valuable.

Such considerations, however, hold equally against systems of donation. As Fox and Swazy point out, as organ transplantation became the standard of care, organs were recast as mere things (1992, p. 207).
Persons who do not donate parts of themselves, or of their loved ones at death, are seen as withholding life sustaining medical resources.\textsuperscript{21} Concerns to avoid recasting persons as collections of spare parts, as well as to encourage non-economic appreciation of human organs, must be addressed under any system of organ procurement and transplantation.\textsuperscript{22}

Perhaps organ selling is exploitative because it involves other types of moral harm. For example, it may be degrading to vendors and thereby violate their human dignity. Consider, for comparison, the example of prostitution.

In commercial sex, each party now values the other only instrumentally, not intrinsically. And, while both parties are thus prevented from enjoying a shared good, it is worse for the prostitute. The customer merely surrenders a certain amount of cash; the prostitute cedes her body: the prostitute is degraded to the status of a thing (Satz. 1995. p. 73; see also Satz. 1992; Anderson. 1993).

This degradation, Satz argues, is also objectification; i.e., a failure to respect in theory and to make space in practice for the human subject as a person (Radin. 1996. p. 155). As already noted, though, in transplantation donors, surgeons, agencies, and recipients alike objectify organs and treat them as fungible. More generally, we do not treat someone merely as a means if he consents to be so treated. Commodification of
human organs is not an obvious violation of the Kantian maxim to treat persons as ends in themselves absent additional arguments showing that even consensual selling of organs is morally injurious. The organ market respects vendors as persons and moral agents. Prohibition, in contrast, may demean the poor by considering them unable to make moral decisions about their own fates.

Such arguments raise additional concerns regarding social exploitation. By forbidding organ sales, are the financially secure and able-bodied exploiting the poor to assuage their own feeling of guilt, so that they can sleep well at night thinking that they have saved the poor from themselves? That is, the rich and able-bodied under this circumstance would be exploiting the poor so as to be able to have the poor not challenge their view of proper moral conduct.

Janet Radcliffe-Richards provides a good encapsulation of how the prohibition of a market can in this fashion exploit the poor.

Prohibition may make things worse for the ... desperate people who advertise their kidneys, as well as for the sick who will die for lack of them; but at least these people will despair and die quietly, in ways less offensive to the affluent and healthy, and the poor will not force their misery on our attention by engaging in the strikingly repulsive business of selling parts of themselves to repair the deficiencies of the
rich (1996, p. 406).\textsuperscript{23}

The rich and able-bodied by forbidding organ sales would be exploiting the poor to support their particular views on moral propriety, improper commodification, or human dignity, denying the poor this opportunity to choose freely on the basis of their own judgments regarding how best to advantage themselves. The outcome would be robustly paternalistic.

D. Some Final Reflections on Exploitation

In part, language regarding exploitation appears to be parasitic on the distinction between autonomous and heteronomous choices. If one argues that \textit{X} is exploitative, this often means that persons are being given inducements to act in a way that is heteronomous so that (1) though they are offered a good, (2) to which they had no independent claim, (3) they are required to engage in activities for which there exists independent grounds for holding that it is immoral (e.g., such actions violate human dignity, improperly commodify the human body, etc.). In that sense, the act involves an heteronomous choice. Therefore, a justified invocation of a view that an offer is exploitative depends on an independent argument to show that the action would (1) illicitly violate the natural good of maintaining the body as a whole, (2) involve a violation of human dignity, (3) improperly commodify the human body, or (4) is justifiably morally repugnant. Therefore, (5) returning the matter to the arguments addressed
elsewhere in this study.

Which is to say that if there are not independent moral grounds to show that the sale of organs is immoral, then the purchase of organs from the poor will be exploitative if and only if either (1) such independent grounds of impropriety can be established or (2) the policy on balance will cause more harm than benefit for the poor. However assessing this latter condition will require recognizing that allowing the poor to choose on their own view of the good both (a) protects the poor from being demeaned by being considered unable to make moral choices about their own future and (b) helps to educate individuals in their faculties of free and responsible choice.

V. Community. Altruism and Free Choice

One might also argue that altruism will be corrupted by the very existence of the market in organs, that philanthropy will be sullied by greed. The concern is that the market would so affect altruistic impulses that it would starkly limit the expression of altruism and thereby lead to far reaching moral costs to community solidarity and social beneficence. Monetary values, it is argued, ought not to be attached to the presence of a spirit of altruism. At stake are (1) the ways in which individual free choice shapes the character of a community, and (2) which strategy will lead to greater altruism and beneficence, as well as sense of community:
the market or commitments to civil duty and social solidarity. Titmuss provides in this regard a good summary of the arguments against the market.

Its role in satisfying the biological need to help—particularly in modern societies—is another unmeasurable element....we have used human blood as an indicator; perhaps the most basic and sensitive indicator of social values and human relationships that could be found for a comparative study...the extent to which commercialism and profit in blood has been driving out the voluntary donor. Moreover, it is likely that a decline in the spirit of altruism in one sphere of human activities will be accompanied by similar changes in attitudes, motives, and relationships in other spheres (Titmuss, 1971. p. 198).

Weakening of the very moral fabric and social solidarity of a society is argued to be the probable cost of an organ market. Thomas Murray's defense of the ban on organ sales follows much the same reasoning. He argues that market relationships minimize moral and social dimensions, while gifts are more open-ended, and as such defy such minimization.

Gifts to strangers affirm the solidarity of the community over and above the depersonalizing, alienating forces of mass society and market relations. They signal that self-interest
is not the only significant human motivation. And they express the moral belief that it is good to minister to fundamental human needs, needs for food, health and knowledge. These universal needs irrevocably tie us together in a community of needs, with a shared desire to satisfy them, and see them satisfied in others (1987, p. 30).

These gifts, Murray concludes, serve as a reminder that not all valuable things, such as love, friendship, and fellow-feeling are for sale; that compassion for others reaches beyond impersonal market relationships, large organizations, and impersonal bureaucracies (1996, p. 122). What we need, he argues, is an alternate interpretation of goods and the principles by which goods are distributed which “captures more faithfully the complexity of our most deeply held ideas about the meanings of those goods and about distributive justice” (1996, p. 117). If sustainable, such moral costs might tip the scale against the market.

To assess such criticisms adequately, one must consider two interrelated issues. First, one must determine whether current organ procurement practices of donation fare better with regard to encouraging altruism, community beneficence, and personal relationships, as well as staving off the depersonalization of modern society, more successfully than the market. Second, one must assess how the ways in which the free choices of individuals, interacting with one another, shape the character
of the community.

It is unclear, for example, that "altruism" accurately describes current organ procurement policies. With the documented success of transplantation procedures and the advent of immuno-suppressive drugs, such as Cyclosporine, that increased long term survival rates, physicians and the general public quickly changed their view of organ transplantation from an experimental surgical procedure to a medically successful therapy (Fox and Swazey, 1992. pp. 8-30). This shift altered medical social reality to the extent that human organ transplantation has come to be regarded as a treatment to be offered whenever medically indicated. Human organs are often construed as a "scarce medical resource." This medical shift, in language, expectation, and practice, placed a greater perceived moral burden on family members and even strangers to make their organs available to others if needed. However, by bringing the considerable legal force of the government to bare against the very possibility of selling one's organs, one legislates the necessity of the "donation," thereby calling into question the "altruistic" character of such transactions. Rather than binding potential donors and recipients, as well as their physicians, in the solidarity of shared social values and caring human relationships, dying patients are disinterestedly recast as "sources" of needed medical resources, and their grieving families as "access barriers" to be overcome. It may be that it is the current system's blanket
prohibition on selling, rather than the market, which in the context of organ procurement legalizes hostility between physicians and patients.

If it is morally important for organ donation to be an expression of altruism, this requirement will curtail any scheme of presumed consent. It will weigh against policies of mandatory choice (see Spital, 1996; Klassen and Klassen, 1996). Presumed consent is a policy which authorizes simply taking one’s organs at death, unless one specially denies permission. While mandatory choice implements the significant force of the state to coerce one into choosing whether or not to “donate.” Neither policy is particularly consistent with “gift giving” as an altruistic expression of beneficence. Consider the structure of such policies given other types of personal property. For example, if the state were to destroy one’s house and all of one’s stock certificates at death, but did allow their conveyance to others designated as in need. It would be implausible to describe the deceased as intending an altruistic redistribution, much less as believing that the state is the appropriate mechanism for such redistribution.

Requirements that organ transplant be altruistically motivated, if taken seriously, might also rule out many donations. Persons who stand to be financially supported by a person needing an organ might have other motivations than “kindness” for donating an organ to a relative. Other donations might be premised on reciprocated love, friendship, guilt, or
concern not to be stigmatized for failing to donate (OTA. 1987. p. 117; Buc and Bernstein. 1984; Eckert. 1985). How pure must one's intentions be so as to transfer organs as an altruistic act? Even if it is true that altruism is a necessary building block of beneficent moral communities, social solidarity, and the development of significant personal relationships, even if such altruism reduces the depersonalization of the modern bureaucratic society, and ministers to basic human needs it is unclear why either legislated "altruism" or a depersonalized national bureaucracy for organ procurement and distribution would necessarily possess or foster any of these goods. Indeed, it is often state bureaucratic legislation, rather than the market, which limits altruistic behavior. For example, physicians who accept Medicare patients are generally forbidden to waive the patient's co-payment as a matter of kindness, even if such cost is borne solely by the physician (see Medicare statute 42. U.S.C. 1320a-7b(b); Department of Health and Human Services, 1994). 24

Moreover, legislated "gift-giving" constrains individual altruism in an otherwise commercial setting, where surgeons, nurses, pharmaceutical companies, and hospitals profit, increasing inequality between highly compensated surgeons and the poor who donate organs. This circumstance raises the additional question of who should bear the burden of fostering altruism. On the one hand, those in need of transplants require care and
support: on the other hand, so too do the families of the dying, brain dead, or recently deceased potential organ donors. Rather than being seen as those in need of kindness and support, the specter of organ donation recasts the bereaved family as gate keepers of a social medical resource. Some might argue, for example, that organ donation inverts those who would otherwise be recipients of beneficence into those who must again sacrifice (Epstein, 1997, p. 260). Those who should be recipients of charity are confronted with the additional burden of organ procurement policies. The commercial market in organs would allow for altruism both for organ donation and allocation.

Rather than eroding a sense of community, the market may enhance and draw together moral communities, opening significant opportunities for developing personal relationships and for charitably providing for the fundamental needs of others. Significant expressions of altruism may exist side by side with for-profit markets in human organs. For example, if it is altruism for a parent to give a kidney to a child to save his life, it is similarly altruistic for a parent to sell a kidney to pay for a life saving operation (see Richards, 1996, p. 392). Forbidding a market in human organs restricts persons from joining together with others to pool financial resources to purchase organs for the impecunious. It prevents altruistic donation of organs to non-profit groups, who could then sell such parts to raise funds to purchase food, shelter, or
healthcare for the poor. A market may open significant new opportunities for the expression of altruistic sentiments, for building a sense of solidarity and community, as well as for charitably providing for the fundamental needs of others. Moreover, instead of encouraging a hostile relationship between physicians and patients, who are potential donors, vendors and physicians would meet on a more equal footing. Indeed, a market in organs may be more successful on each of these grounds than current nationalized bureaucratic procedures, or other proposed policies such as presumed consent, in encouraging altruism and community solidarity.

VI. Scientific Excellence and the Market Place

Among the considerations influencing the acceptability of a market in human organs is the concern that the market will lower scientific standards. The concern is that the market substitutes profit-seeking for truth-seeking behavior. The question, though, is whether the market fares better or worse on such grounds than alternative organ procurement and transplantation policies. At stake is which system will most likely produce high quality organs and develop innovative transplantation orientated products. Titmuss, for example, raises the criticism that for-profit markets in medicine create significant conflicts of interest which encourage deceitful behavior on the part of vendors and physicians.
thereby leading to a lowering of scientific standards in the search of profit maximization.

As freedoms are lost in the blood marketplace truth is an accompanying victim. In studying different blood donation, clinical laboratory and medical care systems we were led to ask ... what particular conditions and arrangements permit and encourage maximum truthfulness on the part of donors – the maximum now demanded by medical science (p. 240).

Moreover.

The paid seller of blood is confronted ... with a personal conflict of interests. To tell the truth about himself, his way of life and his relationships may limit his freedom to sell his blood on the market. Because he desires money and is not seeking in this particular act to affirm a sense of belonging he thinks primarily of his own freedom: he separates his freedom from other people's freedoms. It may be of course that he will not be placed or may not fully realize that he has been placed ... in such situations of conflicting interests. If so, it can only be because medicine in the person of the doctor has failed to fulfil its scientific basis; it is not seeking to know what is true (p. 240).

Titmuss' criticisms can be categorized under two general rubrics: whether
the market fares worse than government supported or non-profit research with regard to (1) fostering conflicts of interest leading to lower scientific standards, and (2) sustaining the development of high quality, innovative transplantation medicine.

It is important to recognize, however, that many of the forces which distort data are independent of the market. Political, moral, as well as other epistemic and non-Epistemic background commitments often play roles in surreptitious or unconscious distortion of scientific data so as to acquire research funding, advance one’s social standing in the scientific community, or further particular socio-political goals. The protection of careers, as well as the furtherance of other goals, may at times take precedence over scientific accuracy (Bell, 1992, p. 143; see also O'Toole, 1991). For example, in 1988 Stephen Bruening, Ph.D., pleaded guilty in federal court to two counts of filing fake research reports on federally funded research projects. These reports had been relied on nationwide for determining appropriate drug therapy for severely mentally retarded institutionalized children (Bell, pp. 105-106). He advocated the use of stimulants rather than tranquilizers for therapeutic treatment of such children. Bruening wrote 24 of the 70 papers published in this field of psychopharmacology between 1979 and 1983, placing him prominently in the field. Under scrutiny, though, it was allegedly unclear how much of his data reflected the results of empirical research. Later research by other
scientists demonstrated that use of stimulants heightened self-injury and other behavior related problems.

In addition, commercial markets are not the only source of profit-seeking behavior. Private non-profit associations often sponsor research protocols which are expected to yield results that are supportive of the organization's goals. For example, if one is a recipient of a grant from the American Thoracic Society or the American Lung Association, insofar as one seeks grant renewal one might be hesitant to publish results which confirm health benefits attributable to cigarette smoking. There exists, for example, significant evidence that the nicotine in tobacco smoke assists in the prevention and treatment of active ulcerative colitis (Pullan et al., 1994, p. 811; Sandborn et al., 1997). Parkinsonism and Alzheimer's disease (Gray et al., 1996); and it has been linked to the recovery of immune response that had been previously suppressed by immobilization stress (Gomita et al. 1996). Cigarette smoking has also been shown to heighten short term and long term learning ability, enhance one's ability to reason under stress, and more generally, to cope with stress (Fletcher, 1988; Folkman and Lazarus, 1991; Gray et al., 1996).25

In some quarters the exploration of such areas of benefits might be politically incorrect.

Moreover, insofar as certain research protocols or scientific
theories are seen as supportive of particular political ideologies or socio-political movements. This may provide sufficient reason for some to fund, given credence to, or politically to support such research. Consider, as an example, the ways in which HIV/AIDS research has been highly politicized. When AIDS was identified in 1981 the homosexual community was deeply engaged in identity politics: i.e., seeking tangible political goals, such as social acceptance, while elaborating an affirmative group identity (Epstein. 1996. p. 11; Slovenko. 1980). Such non-epistemic concerns impacted on the structure and goals of HIV/AIDS research. Activists criticized mainstream scientific research as too slow and anti-gay: as failing to seek causes which were not associated with HIV transmission through sexual behavior; and demanded further governmentally supported scientific investigation (Epstein. pp. 8-9). Public speculation existed regarding whether drug trials for potential therapeutic agents would have been handled differently if the patients had been dying of advanced cancer with no known therapeutic agent (Rothman and Edgar. 1992. p. 204). Activists engaged in research established background knowledge about treatments; occasionally conducted their own drug trials, and declared themselves experts to speak on these issues. Moreover, they claimed the expertise to define public health constructs, such as the practices that constituted “safe sex” (Epstein. pp. 8-9), challenging the linkage between sexual promiscuity and death, and putting forward “sex
positive" programs of AIDS prevention, which asserted as a moral community, however diffuse, the rights to sexual pleasure and sexual freedom. Given the impact of such epistemic and non-epistemic prior commitments on scientific findings, as well as on the structure and goals of science, governmentally supported, rather than market-based, medical research is no guarantee of truth-seeking behavior.²⁶

Indeed, the market may fare somewhat better than governmentally controlled research in that the market preserves and expands niches by providing incentives for developing high quality or innovative products. It is in the interests of profit maximization to produce safer products and procedures as well as to support better access to transplantation. For example, if one is in the business of selling organs, profits would generally be maximized if one provides high quality organs with low rates of rejection. Given these circumstances procuring organs from living persons will usually produce better medical results, and thus higher profits, than cadaveric organs. As already noted, organs removed from living persons are far more likely to be of significant use to recipients. They have greater vitality and can be screened in advance for defects, diseases, or other negative indicators. In contrast, if organs are only procured from the recently deceased, such as accident victims, one loses both vitality and screening opportunities. The main factor jeopardizing an organ's viability is the time during which it is without
oxygen and other nutrients. Damage due to inadequate oxygen, ischemia, begins immediately when the heart stops pumping (Devita et al., 1993, pp. 114-115). As the Institutes of Medicine Report on organ procurement from non-heart beating donors points out, such organs have higher discard rates which leads to increased transplant costs, as well as to the availability of fewer organs. Moreover, transplant survivals, though increasingly competitive, are not quite as good as from heart beating donors (Institutes of Medicine, 1997; see also Herdman, Beauchamp and Potts, 1998). An additional difficulty is rejection by the recipient. Even a well preserved organ can fail after transplantation if it does not have the same genetic markers as the recipient. Such failures can be fatal. In these areas the market will be advantaged scientifically over a system of donation: commercial sale will likely target living vendors, will provide adequate time to screen for organ viability, disease, and potentially deadly immuno-rejections, and will have the flexibility to arrange for quick transference of the organ to avoid significant ischemia.

Additional legal safeguards bearing on product liability and tort gear in with market based organ procurement, transplantation, and research. Consider, for example, the Organ Procurement and Transplantation Act of 1984 which prohibited the sale, for "valuable consideration", of human organs for use in human transplantation, punishing violators with a fine of not more than $50,000 or imprisonment of not more than 5 years, or
both (42. U.S.C.A. § 274e West Supp. 1985). The law prohibits any for-
profit commercial harvesting or sale of human organs for transplantation.
In addition, the Act defined "valuable consideration" as not including
"the reasonable payments associated with the removal, transportation,
implantation, processing, preservation, quality control, and storage of a
human organ or the expenses of travel, housing, and lost wages incurred by
the donor ..." As a result, any transaction with respect to human organ
transplantation is classified as the provision of services rather than
the sale of goods. The statute thereby directly impacts the grounds on
which an individual can base a cause of action for product liability and
tort with regard to organ transplantation.

Ordinarily, an individual who alleges an injury caused by a
defective product can base his cause of action on negligence, breach of
warranty, or strict liability. Negligence can be understood in terms of
a duty of the person of ordinary sense to exercise ordinary care and
skill. The Restatement (Second) of Torts defines negligence as "conductor
which falls below the standard established by law for the protection of
others against unreasonable risk of harm" (1965, §282). Negligence theory
requires that the injured party demonstrate that a specific defendant
failed "to exercise proper care in designing, testing, manufacturing, or
marketing the allegedly defective product and that, as a reasonably
foreseeable and proximate result of such negligence, the plaintiff
suffered injury" (Nolan and Schmidt, 1987, p. 138). Liability predicated on negligence theory is the standard which applies to providers of services, rather than goods. Negligence is the standard which touches physicians. Courts have generally held that the primary purpose of the physician-patient relationship is the performance or rendition of professional medical services rather than the sale of medical products. Thus, suits against physicians for injury resulting from treatment are typically predicated on professional negligence or malpractice: i.e., the failure to exercise the required degree of skill, care, or diligence required by the standard of care in treating the patient.

In contrast, an injured party predicking a cause of action on warranty need only show that the manufacture or seller breeched a promise, whether implied or expressed, that the product was both free from defects and fit for the usual purposes for which such a product is typically used (Nolan and Schmidt, 1987, p. 139). Strict liability in tort applies even stronger standards to the manufacture or distributor of goods. Liability on the part of the manufacturer or distributor follows the defective product. Strict liability is defined as follows:

Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his
property is subject to liability for physical harm thereby caused to the ultimate user or consumer: or to his property.

if

(a) the seller is engaged in the business of selling such a product. and
(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product. and
(b) the user or consumer has not bought the product from or entered into any contractual arrangement with the seller (Prosser. p. 657).

To establish a products liability claim under such standards, the injured party need only show that the product causing the injury was defective and unreasonably dangerous when it left the control of the manufacturer or seller. and that as a result of this defect it caused injury.

The circumstance that any transaction with respect to human organ transplantation is classified as the provision of services rather than the sale of goods, effectively screens out product liability claims predicated on warranty or strict liability. Exposure to liability in this
circumstance is limited to the possibility of the physician's negligence or malpractice. With the creation of a human organ market, product liability based on expressed or implied warranty as well as on strict liability gear in. Individual vendors as well as commercial procurement and transplantation corporations could be held strictly liable for any defects which cause harms to the transplant recipient. The application of such strict product liability standards is likely to motivate the development of high quality scientific procurement, screening, and transplantation techniques. Indeed, quality may be problematic precisely because of insufficient commercialization, and because of the protection from liability that donation affords those who procure and transplant organs. Given such circumstances, the market may fair better than a system of donation with regard to the search for scientific excellence.

VII. The Market and Profit: The Virtues and Vices of Free Choice
One must also attend to the difference in phenomenology of the gift relation and the commercial relation. Gift-giving is generally marked by altruism, personal concern for the other, love, and in some cases intimacy. In contrast, large-scale commercial relations are often anonymous, self-regarding, and unmarked by love or intimacy. They are, however, constrained by honesty and agreement. In a commercial relationship, one gets what one contracts or agrees to. One gets what one
deserves in terms of what one has agreed to. In a gift relationship, one gets what one does not deserve.

The development of gift giving, in short, is core to the development of important areas of character and virtue involved in personal regard and love for others. Gift-giving at the very least requires personal concern for identifiable others or identification with the community to which the gift is addressed. Gift-giving is tied closely with concerns of compassion and charity, including the root notion of caritas, love. As Wuthnow argues: compassion reaffirms that “not all of life depends on efficient, large scale organization and a productive economy. [It helps to] create a space in which to think about our dependence on one another, the needs that can never be fulfilled by bureaucracies and material goods, and the joys that come from attending to those needs” (1991, p. 304). Social policies which encourage gift-giving, altruism or charity, express in part the concern that individuals develop a sense of love and concern for others.

In contrast, the success of the market depends on quite other virtues, including the ability to be honest and to keep promises with moral strangers. The market involves a form of willing, binding persons together freely, in which individuals pursue their concrete goals with consenting others. It is able to establish bonds among persons and across communities. It is therefore anonymous, trans-communal, and supportive of
particular virtues. Private mail services, for example, market the virtues of speed and reliability to patrons who often belong to quite divergent moral communities. As a consequence, if one lives one's entire life within the ambit of the market, one learns only those marks of virtue and character that are beyond particular communities and beyond personal individual relations among moral friends.

The gulf between these two perspectives is bridged in two ways. First, in order to do well in the market, one must often cultivate the virtues of gift-giving, kindness, attention, and personal recognition of the other. The goal of customer satisfaction, independently of the goal to maximize profit, is typically necessary to maintain long-term realization of profits. Achieving a long term successful business generally requires a concurrent commitment to customer satisfaction and to the provision of quality goods and services (Engelhardt and Rie, 1992; Engelhardt, 1991). Virtue can, therefore, be seen as a profit-maximizing strategy. Second, small-scale entrepreneurs, small tradesmen, such as the neighborhood butcher shop, bar, or bakery, in part enter the market in an anonymous fashion and in part do so as the friend who often offers a free drink, a free slice of sausage, a free cookie. The pursuit of self-interest often requires that one advance as well the best interests of others by providing benefits to others in ways other than disinterested commitments to civic duty or generalized solidarity.
Titmuss and others regarding the market see the stark contrast between the personal, loving, community-directed character of the gift relationship and the impersonal business-like trans-communal character of large-scale markets. They then conclude that, if medicine becomes commercial, it will move from being an intimate relationship, or at least from having the character of the mom-and-pop drugstore and bakery shop, to possessing only those points of anonymous regard that characterize large-scale markets. They correctly recognize that patients/customers usually want more. Here one must acknowledge that there are real challenges in moving from small-shop medicine to large scale medicine. It is important to recognize, however, that the anonymity of this charge may be independent of whether the services that are being provided are supported by a capitalist undertaking or a socialist system. For example, in the United States, all organ "gifts" are required by law to be processed through the United Network for Organ Sharing (UNOS), a private corporation which operates the Organ Procurement and Transplantation Network, created under the National Organ Transplant Act of 1984. UNOS manages the national transplant waiting list, matching donors to recipients, monitors every organ match to ensure adherence to UNOS policy, develops policies that utilize the current supply of organs and, according to UNOS guidelines, supposedly gives all patients a chance at receiving the organ they need — regardless of age, sex, race, lifestyle, financial or social criteria;
moreover, it sets professional standards for efficiency and quality patient care. With 440 member organizations as of 1998, including 273 transplant centers, 3 consortium members, 58 independent tissue typing laboratories, 12 voluntary health organizations, 9 general public members, and 29 medical/scientific organizations, the national bureaucracy of UNOS is as impersonal and unconnected from personal relationships and community as any other large scale corporation. This vast national bureaucracy alienates in the sense of creating a significant distance between donors on the one hand and recipients and physicians on the other.

In contrast, the market's need to satisfy customers may in fact paradoxically lead in the end to a more personal medicine than that available through the state. For example, in Sweden concerns regarding poor service, waiting times, long waiting lists, as well as impersonal care and little continuity of care, led to reforms in the state health care system in favor of the private market. The success of privately owned and financed drop-in clinics were directly associated with the attentiveness to personal needs. Marilynn Rosenthal reports regarding one such private clinic:

It is located close to many business offices, in contrast to the public primary health care centers built in the residential neighborhoods. It remains open late, until 7 p.m. and on Saturdays. Its personnel have received special
training in consumer relations and it guarantees a shorter wait than the public hospital outpatient clinics. It provides quick, courteous, efficient care in a convenient location (1986, p. 595).

Here we are back to virtue as a profit-maximizing strategy.

Given this circumstance, reticence regarding the profit motive may involve first, a nostalgia for a past during which medicine functioned more on the model of neighborhood butcher shops or bakeries. Second, it may reflect a failure to recognize that the large scale socialized systems for the provision of health care do not encourage altruism and personal concern for others, even when capitalism or the market are not engaged. Third, there may be a failure to recognize the ways in which virtue is a profit-maximizing strategy, so that the market rewards personal concern and attention to customers. The interests of prospective organ vendors and recipients to have health care choices regarding their body parts respected in a personally attentive manner offers a market that has yet to be adequately explored.

VIII. Summary
To summarize, an assessment of the permissibility of a market in human organs must consider the circumstances in which such a market advances health benefits, the effective use of scarce resources, as well as other
special values and goals more successfully than alternative organ procurement and allocation strategies. The special moral costs of a for-profit market which Titmuss identifies, if sustainable, are significant. If a market in human organs would lead to a decease in altruistic sentiments, an erosion of a sense of community, a lowering of scientific standards, limitations on personal and professional freedoms, as well as the legalization of hostility between patients and physicians, these costs would raise the burden of proof against the creation of such a market. On the other hand, if a market in human organs would support the realization of significant personal or societal values and goals, the burden of proof will be on those who would forbid the market to provide equally significant counter-balancing considerations.

The costs and benefits, virtues and vices, of a market in human organs which should bear on the moral judgments one may advance regarding such a market should include: (1) *Health Care Costs and Benefits*: insofar as the market leads to greater organ availability, with organs of better quality, and with more efficient organ procurement for transplantation, while minimizing harms to vendors, such positive health outcomes would tip the burden of proof against prohibition. Similarly, indirect health benefits incurred through increases in income, or resources to support additional education and training, would be advantages weighing in favor of a market in human organs. However, if such benefits are unlikely to be
realized, or if they would engender significant costs to other important moral considerations, which counter-balance potential health gains. Such concerns would weigh against the creation of a market.

(2) Special Moral Considerations: Equality. Liberty. Exploitation. Community, and Altruism: the acceptableness of a market in human organs will also depend on the ways in which it promotes or restrains special moral goods and considerations. Insofar as such a market promotes equality, liberty, community solidarity, or the free expression of altruism, while minimizing the possibility for social exploitation, more successfully than alternative procurement and allocation policies this would tip the burden of proof against those who would forbid the market. On the other hand, if the market would inappropriately restrain freedom, increase inequality and encourage social exploitation, as well as discourage a sense of social solidarity, while castigating altruistic impulses, such costs would tip the burden of proof against the creation of a market. To assess such concerns, though, one must engage each of the following issues: (A) whether the market would exploit the persons in greatest need, or whether forbidding the selling of organs is itself exploitative of those in need; (B) who is in greatest need: the poor who need financial resources or the rich who are dying of organ failure; (C) whether the market enhances and draws together moral communities, opening
significant opportunities for developing personal relationships and for charitably providing for the needs of others; and (D) whether blanket prohibition on selling recasts dying patients as "sources" of a needed medical resource and their families as "access barriers" to be overcome in pursuit of those resources, thereby legalizing hostility between physicians and patients.

(3) Scientific Excellence, Virtue, and the Profit Motive: Here the concern is whether the market substitutes profit-seeking behavior for truth-seeking or virtuous behavior. At stake is which procurement and allocation policy will more successfully produce high quality organs, develop innovative transplantation products and techniques, as well as encourage the development of virtuous behavior. Four general sets of issues frame the assessment of these concerns. (A) It is important to recognize that such concerns may be independent of the market. Political, moral, as well as other epistemic and non-epistemic background conditions, such as career development or political goals, often play a significant role in the surreptitious or unconscious distortion of scientific data so as to maintain research funding, social standing in the scientific community, or to further particular social political goals. (B) Additionally, legal safeguards from tort liability, especially product liability, may gear in with market based organ procurement, transplantation, and scientific research. Torts predicated on warranty or
strict liability are only possible if the transplanted organ is understood as a good which is being sold to the recipient. Insofar as the transplantation remains only the provision of a professional service, liability is limited to claims of ordinary negligence. Introducing a market in organs may introduce special legal safeguards and benefits. (C) The ways in which the market bridges the gulf between persons and communities includes special moral benefits. (1) In order to do well in the market, one must often cultivate virtues of gift giving, kindness, attention, and personal recognition of the other. (2) Small scale entrepreneurs, small tradesmen, in part enter the market in an anonymous fashion and in part do so as “a friend” who often provides benefits to customers in deeper more personal ways than commitments to civic duty or generalized solidarity would generate. (3) The market preserves and expands niches by providing incentives for developing high quality or innovative products. In short, virtue can be seen as a market strategy which leads to excellence in both personal relationships and scientific research, thereby maximizing profits.

Each of these underlying background considerations identifies important considerations in the analytic geography of the debate regarding the creation of a market in human organs. In considering the moral acceptability of the market, one must assess each factor as well as the ways in which such factors balance one against another. Given different
constellations of factors it will be more or less plausible to place the burden of proof on either those who would forbid a market in organs or those who would allow it. It would as well provide a plausible justification of the burden of proof that should be met in evaluating any particular policy.

Notes
1. As Dr. Wheeler of Kansas city expressed such concerns in 1964: "I take the position that blood obtained from commercial blood banks is, all things considered, more dangerous than blood obtained from non-profit banks ... it is my honest conviction that, all of the above being true, there are more deaths caused by the use of blood from paid donors then from the use of blood from volunteer donors" (1964). While Titmuss's conclusion from such claims is that the professional donor must be eliminated entirely (1971. p. 152), it is unclear that such problems would not be effectively resolved with appropriate screening measures.

2. See, for example, Blumstein (1996), who argues for legalizing payment for transplantable cadaveric organs on similar grounds. See also Radcliffe-Richards (1991) and Gillon (1996).
3. As Monaco makes the point: "... society and the government should consider institutions of further financial incentives to the living-related donor in the form of direct federal grants, tax rebates or credits, tuition subsidies for children, etc." (1990, p. 901).

4. Veatch argues, for example, that a similar case can be made for directed donation on the basis of racial discrimination. All those below the recipient on the waiting list are made better off because of the discrimination. They all move up one on the que and are thereby more likely to receive an organ, or to receive an organ in a shorter period of time (1998). On directed donation see also Fox. 1996; Arnason. 1991.

5. Gillon argues that "Respect for autonomy is also of direct relevance in the moral controversy about sale of organs by donors ... if an autonomous decision to donate a kidney may be respected when a donor is related to the recipient, then I find it hard to understand why the similar decision of an unrelated donor, and/or of one who wishes to sell his kidney for some beneficial purpose, should not similarly be respected as an autonomous decision. The sometimes bruited notion that payment somehow undermines a person's autonomy sufficiently to justify disregard of his or her decision is absurd" (1990, p. 902).
6. The general categories of "harmful", "mutually advantageous", and "moralistic" exploitation are borrowed from Wertheimer (1992; 1996). They have, however, been adopted for application to the particularities of organ sales.

7. Consider, for comparison, commercial surrogacy. Some argue that in addition to the inconvenience and discomfort associated with normal pregnancy, the surrender of the child to the intended parents is psychologically harmful to the surrogate mother (Tong, 1990; Whitehead, 1988).

8. For example, Helena Ragoné reports that in the case of commercial surrogacy, many surrogates view their work as a vocation or calling, an important means by which to fulfill themselves (1994, p. 55; see also Baber, 1987; Deegan, 1987; Ryan, 1987).

9. As Heidi Malm asserts regarding commercial surrogacy: "Poor women ... may feel compelled to enter these arrangements when they would prefer not to do so. Thus we ought to prohibit the arrangements in order to protect poor women from exploitation" (1989, p. 61; see also, Pateman, 1988; Radin, 1987).
10. Marx wrote that capitalism is a system of "forced labor -- no matter how much it may seem to result from free contractual agreement" (1967, vol III. p. 819). As Cohen encapsulates the point: "Marx defined the proletarian as the producer who has (literally or in effect) nothing to sell but his own labor power (on pain of starvation)" (1982, p. 3). Where there is no choice there is coercion (Macpherson, 1973, p. 146). For further discussion see Carver (1987) and van der Veer (1987).

11. Indeed, given state legislated donation, it is more likely less fair since the donor receives no compensation in return for the value of his organ, in a way analogous to thieves and their victims (Steiner, 1984, p. 225; 1987).

12. In 1994 the average family income of married surrogate mothers was $38,700.00, which was above the national average (Ragoné, 1994, p. 54; see also Malm, 1989; 1992; Robertson, 1983; Radin, 1987).

13. Consider, for example, the ways in which "I was coerced" provides one with an excuse for inappropriate behavior, while "I was manipulated" is generally not enough to excuse (Rudinow, 1978, p. 339).
14. For an account of negative incentives see Rudinow. 1978: for a discussion of incentives generally see Gert. 1972, pp. 33-34.

15. Similar questions have been discussed in the context of commercial surrogacy. See, for example, Oliver. 1992; Jeffner. 1984; Annas, 1986; 1987; 1988; Corea, 1985; Keane, 1981; Leibson, 1986; Wilentz. 1988).


17. For a detailed discussion of the difference between seductive offers and subtle threats see, for example, Held (1972).

18. To extend an analysis from Hillel Steiner, a persons' monopoly ownership over his healthy organs is crucially different from monopoly ownership of natural resources. While the second is often secured through a violation of rights, the first is not. Most significantly, intervening in the commerce of the second can prevent exploitation. In contrast, intervening in the commerce of the first brings about exploitation by forcibly preventing others from paying the owner of the organs as much as it is worth to the owner. (See Steiner's discussion of a person's monopoly ownership of skilled services verses monopoly ownership of natural resources (1984, p. 239)).
19. Richard Posner, for example, is often criticized for applying economic criteria to inappropriate circumstances. See, for example, his discussion of a market in adoption services for young children in 'The economics of the baby shortage.' (1978 with Elizabeth Landes); and 'The regulation of the market in adoptions.' (1987).

20. For further discussion of the commodification of women's bodies by surrogate motherhood see Corea, 1985; Holder, 1985; and Radin, 1987; Werhane, 1987; Andolsen, 1987; Burger and Hamlin, 1987).

21. While market transactions may frequently utilize money as a continuous variable of value, as Locke points out, money is only a placeholder for other goods and values. As Locke claims, "And thus came into the use of money, some lasting thing that men might keep without spoiling, and that by mutual consent men would take in exchange for the truly useful, but perishable supports of life" (1980 [1690], §47).

22. Eric Mack notes that the tendency of the market to engage ever wider areas of social life is just that, a tendency. It is not required by the concept or use of the market (1989).
23. Radin echoes these sentiments, arguing that "... we are still left with the problem that to the desperate person the desperate exchange must have appeared better than her previous straits. and in banning the exchange we haven't done anything about the straits. It seems to add insult to injury to ban desperate exchanges by deeming them coerced by terrible circumstances, without changing the circumstances" (1996. pp. 48-49).

24. Such legislation tends to reinforce deceptive practices. For example, prohibition may lead to the circumstance that altruism alone is insufficient motivation to provide enough organs to meet demand; it may thereby encourage black market activity, the very opposite of the desired behavior. to purchase needed organs.

25. In a randomized, double-blinded study, 17 of the 35 patients in the group treated with transdermal nicotine experienced complete remission, as compared to only 9 of the placebo group (Pullan et al.. pp. 811-815). These results were supported by an independent study conducted by the Mayo Clinic. At four weeks 12 of 31 patients, 39%, who received nicotine showed clinical improvement compared to only 3 of 33 patients, 9%, who received placebo. The study concluded that "Transdermal nicotine administered at the highest tolerated dosage (≤22 mg/d) for 4 weeks is efficacious for
controlling clinical manifestations of mildly to moderately active ulcerative colitis (Sandborn et al., 1997, p. 364). Significant evidence exists that tobacco as a delivery system for a measured dosage of nicotine enhances learning and memory, and has a certain amount of success in treatment to prevent the onset of Alzheimer's disease, as well as Parkinson's disease (Gray et al., 1996, pp. 713-716). As Gray et al. point out, "Nicotine obtained from tobacco can improve learning and memory on various tasks and has been linked to arousal, attention, rapid information processing, working memory and long term memories" (p. 713). The likely mechanism for this effect is that the nicotine enhances or induces neurotransmitter release in the hippocampus. The hippocampus, a center for learning and memory, has rich cholinergic innervation and dense nicotine acetylcholine receptor expression. During Alzheimer's dementia there are fewer of these receptors and the cholinergic inputs to the hippocampus degenerate. After a cigarette is smoked, nicotine in arterial blood can be delivered to the brain less than 10 seconds after absorption in the lungs. Stimulated by nicotine, the hippocampus responds with an increased rate of spontaneous miniature excitatory postsynaptic currents. That is, nicotine stimulates an important part of the brain affected by Alzheimer's disease.

26. One might also consider the Lysenko controversy in the former Soviet
Union. T.D. Lysenko, a soviet agronomist led an attack in the 1930s-1950s against classical genetics, arguing against both the gene concept and the theory of natural selection. He favored a vague Lamarckian notion of the inheritance of acquired characteristics, based in part on the principles of dialectical materialism. Both Stalin and later Khrushchev supported Lysenko. Critics were dismissed from their positions, their laboratories were closed, and at times were imprisoned. Researchers at times changed their scientific positions based on such non-epistemic political beliefs. Ernan McMullin cites the example of a geneticist Alikhanian who, at a session of the Lenin Academy of Agricultural Science in August of 1998, denounced the genetics he had formally taught arguing that the support of the Central Committee of the Communist Party for Lysenko must be considered to be valid reason to regard his position as true" (McMullin, p. 81; see also Joravsky, 1970).

For an additional example, consider the way in which in the 18th and 19th centuries the moral offense of masturbation was transformed into a disease with somatic not just psychological dimensions. Chronic masturbation was considered a serious disorder leading to marked debility and occasionally death. It was held to be the cause of "dyspepsia, constrictions of the urethra, epilepsy, blindness, vertigo, loss of hearing, headache, impotency, loss of memory, 'irregular action of the heart', general loss of health and strength, rickets, leucorrhea in women,
and chronic catarrhal conjunctivitis" (Engelhardt. 1974. p. 136). The classification of masturbation as a disease incorporated moral assessments concerning deviancy. developed etiological accounts to explain and treat in a coherent fashion a manifold of displeasing signs and symptoms. and provided a direction for diagnosis, prognosis and therapy. It thereby gave medical and conceptual structure to particular epistemic and non-epistemic values.
CHAPTER FOUR

THE BODY, ITS PARTS, AND THE MARKET

Insights from the History of Philosophy:
Revisionist Interpretations

I. Introduction

The previous chapters had two goals: on the one hand, to assess what understandings of embodiment, body ownership, and political authority would have to be granted for a market in human organs, all things being equal, to be morally licit; and, on the other hand, to assess the costs and benefits which challenge such a ceteris paribus finding, thereby rendering a market in human organs more or less plausible. The advantages and disadvantages of an organ market were assessed by exploring the costs and benefits of such a market on health care, the efficient and effective use of scarce resources, whether such a market would likely lead to increases or deceases in liberty, equality, or altruism, as well as its impact on special moral concerns, such as regard for human dignity.
respect for sanctity of life, the exploitation of persons, social 
solidarity and the pursuit of scientific excellence. In each case, the 
analysis indicated that given many constellations of factors a market in 
human organs would be more plausibly morally licit. Moreover, given 
certain constellations of factors, it would be more plausible to place the 
burden of proof on either those who would forbid a market in organs or on 
those who would allow it.

To extend and deepen this analysis, this chapter turns to the 
history of philosophy. Contemporary discussions about the moral licitness 
of organ sales usually do not seriously engage arguments from the history 
of ethics. However, insofar as contemporary positions for or against a 
market in human organs presuppose moral intuitions, ontological or 
political theoretical premises, or understandings of special moral 
concerns, such as permissible uses of the body and its parts, which have 
a long history of analysis, attention to that history can be rewarding.

This chapter addresses the positions of Thomas Aquinas (1224-1274). 
John Locke (1632-1704), and Immanuel Kant (1724-1804), which would usually 
be interpreted as foreclosing a market in human organs, as well as the 
contemporary philosopher, Robert Nozick, who gives grounds for supporting 
such a market. On the one hand, Aquinas' principle of Totality requires 
that one preserve the wholeness of the human body; Locke's account of 
one's duties to support the natural good of individual liberty places
constraints on the freedom one has to use one’s body: and Kant argues straightforwardly that the categorical imperative rules out selling body parts from living persons. In what follows the analysis focuses on how the arguments are configured. If certain critical premises are changed in ways which, I will argue, are plausible, then the conclusions come out very different. Prohibiting a market in human organs may depend on a single premise, or a cluster of dubious and allied premises, which when examined can not hold. In approaching these texts, I will assume the role of a revisionist who takes seriously the core commitments of these authors while at the same time indicating that one can further develop their attitudes about the body in ways which are both a) supportive of the sale of organs while b) remaining in conformity with the authors’ particular core concerns. On the other hand, Nozick views secular morality and the limits of moral political authority as grounded in permission. A market in human organs would thereby be permissible provided parties to such transactions freely consent to participate.

Why these particular philosophers? The impact of Roman Catholic and Scholastic thought has been significant. When Christianity explicitly articulated its notions of proper medical deportment, it had already articulated its own beliefs and culture. Especially among Western Christianity of the high middle ages, as exemplified by Thomas Aquinas, these moral understandings were incorporated in Christian theological
doctrine. This defended the ability of persons generally to understand natural law: that there is an objective good for human beings (ST. I-II. q. 94, a.2c), which reason can articulate, thus justifying the general canons of moral behavior.¹

Despite significant secularization following the Reformation, Western Christian reflection continued to have considerable influence. There remained in the West an attempt to fashion rational justification for the general lineaments of Christian culture and moral intuitions as well as its fundamental social structures. Though the undertakings of modern philosophy and the Enlightenment were recognized by many as anti-Christian, they were still in great measure attempts to establish the moral commitments of Christianity, albeit without a specifically Christian confession of faith. For example, Locke reflects Christianity's traditional opposition to suicide (1980 [1690], § 6). He holds that the duty not to kill oneself is universal and knowable through the natural law construed as the law of reason: "The state of nature has a law of nature to govern it, which obliges every one: and reason which is that law, teaches all mankind, who will but consult it ..." (1980 [1690], § 6). Locke's account of the limited constitutional state, individual rights, and the free market, has had a significant impact on the general political theory of the modern liberal state.
Kant combined pre-critical, scholastic, Christian moral views regarding the importance of maintaining the body as a whole with critical arguments concerning the necessary structure for the possibility of morality. He regards persons as central to the practice of morality and endorsed the possibility of disclosing through reason canonical moral content that would bind all persons as such.\(^2\) The community of faith was restated as the community of reason. The kingdom of grace became the kingdom of ends:

...in so far as we take account only of the rational beings in it. and of their connection according to moral laws under the government of the supreme good. \textit{the kingdom of grace,} distinguishing it from the \textit{kingdom of nature,} in which these rational beings do indeed stand under moral laws .... To view ourselves, therefore, as in the world of grace, where all happiness awaits us, except in so far as we ourselves limit our share in it through being unworthy of happiness, is, from the practical standpoint, a necessary idea of reason (A812=B840).

While faith in reason made it plausible that rational argument could provide the practical laws of right conduct (A802=B830).\(^3\) Kant continued to incorporate and defend much of Christian moral content, such as the
Western Christian principle of Totality. He argues, for example, that selling one's body parts, such as teeth or hair, uses oneself as a means merely, rather than respecting oneself as an end, and thus is impermissible (1991 [1797], AK 423). Kant's impact on contemporary bioethics can be seen in arguments which hold that there is something intrinsically wrong or degrading in selling one's organs, so that even if one does this freely, one is being used in a morally inappropriate manner, that one has been brought to do something morally wrong.

The more one doubts reason's ability to discover a universal, coherent, content-full moral understanding of organ sales or the justification for political authority to proscribe such sales, the more one must look for alternative foundations. Here particular attention will be given to the implications of Nozick's *Anarchy, State and Utopia*. Nozick grounds secular moral authority in permission. Given such circumstances, the moral authority of an organ market would be created by the consent of those who freely choose to participate.

II. Thomas Aquinas: The Principle of Totality and the Selling of Body Parts

Aquinas' arguments regarding the principle of Totality reflect a commitment to the coincidence between faith and natural theology. He gives an argument which he takes to be binding on all persons as such, even
though it is clear that the character of the argument and the content he engages can only be fully appreciated within a set of Western Christian presuppositions. Aquinas held that it is morally impermissible to remove a part of the body as long as it is healthy and retains its natural disposition (ST, II-II, q.65, a). He argued as follows: The life of a human being as a biologically functioning whole is a natural good. Anything that damages this good, endangering or attacking parts of the bodily whole, is prima facie morally impermissible. Therefore, only insofar as one can show that the intervention or removal of the part is in fact intended to preserve the natural good, can the prima facie impermissibility be defeated. Given such an argument, the challenge for organ donation and sales using living donors is the same: cutting away healthy organs from living persons violates the natural good of the wholeness of the body, and is therefore prima facie morally impermissible.

My analysis of the Thomistic principle of Totality will first show the historical roots of this particular view of moral rationality. It is important to appreciate that Aquinas, and later Thomists, do not recognize that theirs is a particular moral rationality. Instead, Western Christian moral reflections are often posited in terms of general discursive rationality: their conclusions are argued to be justifiable through reason alone. With the development of blood, tissue, and organ
transplantation, as well as arguments pointing to the significant good created by such activities. This commitment to rational discourse led contemporary Thomists to reinterpret the principle as implying an obligation to preserve human biological functioning, rather than anatomical wholeness.

The historical roots of Aquinas' concern for the natural good of human biological wholeness are found in ancient Christian canons bearing on the preservation of men and women as embodied and gendered beings. Certain heretical sects, such as the Valesians, interpreted Christ's statement that "if thy right eye offend thee, pluck it out ... likewise if thy right hand or foot offend thee, cut it off ..." (Matthew 18:8-9) as implying that one ought to amputate parts of the body which incite one to sin (Nicodemus and Agapius, 1957, p. 84). Such sects often encouraged castration to avoid sexual sins and to achieve spiritual purity. In response, the Church promulgated canons prohibiting the practice of voluntary, non-medically indicated castration, holding that persons were to master their sinful passions rather than mutilate their bodies as a physical short-cut. Consider, for example, canon I from the First Council of Nicaea (A.D. 325):

If anyone has been operated upon by surgeons for a disease, or has been excised by barbarians, let him remain in the clergy.

But if anyone has excised himself when well, he must be
dismissed even if he is examined after being in the clergy. And henceforth no such person must be promoted to holy orders. But as is self-evident, though such is the case as regards those who affect the matter and dare to excise themselves, if any persons have been eunuchized by barbarians or their lords, but are otherwise found to be worthy, the Canon admits such persons to the clergy (canon I. First Council of Nicaea. Nicodemus and Agapius. 1957. p. 163).

Apostolic canons XXII. XXIII. and XXIV. considered to arise from first century A.D. moral commitments. tied purposeful self mutilation to moral and spiritual condemnation. Individuals who castrate themselves are castigated as self-murderers. plotters against their own lives, and enemies of God's creation.

Let no one who has mutilated himself become a clergyman: for he is a murderer of himself, and an enemy of God's creation (Apostolic canon XXII. Nicodemus and Agapius. 1957. p. 84).

If anyone who is a clergyman should mutilate himself, let him be deposed from office. For he is a self-murderer (Apostolic canon XXIII. Nicodemus and Agapius. 1957. p. 85).

Any layman who has mutilated himself shall be excommunicated
for three years. For he is a plotter against his own life


On the one hand, castration which results from hatred of being male, or as a physical means to help one control sinful passions, is mutilation which inappropriately rejects the fundamental sexual and gendered nature of God's creation: it thereby constitutes a grave moral evil. On the other hand, as canon VIII of the First and Second Regional Synod, held in Constantinople (A.D. 861), clarifies, castration for medical reasons, such as to prevent the spread of disease, requires no such intention. It, therefore, can be free of moral and spiritual condemnation.

The divine and sacred Canon of the Apostles judges those who castrate themselves to self-murderers; accordingly, if they are priests, it deposes them from office. and if they are not, it excludes them from advancement to holy orders. Hence it makes plain that if one who castrates himself is a self-murderer, he who castrates another is certainly a murderer. One might even deem such a person quite guilty of insulting creation itself. Wherefore the holy Council has been led to decree that if any bishop, or presbyter, or deacon, be proved guilty of anyone, either with his own hand or by giving orders to anyone else to do so, he shall be subjected to the penalty of deposition from office; but if the offender is a layman, he
shall be excommunicated: unless it should so happen that owing to the incidence of some affliction he should be forced to operate upon the sufferer by removing his testicles. For precisely as the first Canon of the Council held in Nicaea does not punish those who have been operated upon for a disease, for having the disease, so neither do we condemn priests who order diseased men to be castrated, nor do we blame laymen either, when they perform the operation with their own hands. For we consider this to be a treatment of the disease, but not a malicious design against the creature or an insult to creation (canon VIII. First and Second Regional Synod. Nicodemus and Agapius. 1957, p. 465).

Castration may licitly be performed as a necessary means to preserve the health or good of the individual's body.

Aquinas recasts these concerns, focused on castration and rejection of one's gendered embodiment, articulating a more general obligation to preserve the wholeness of the body. According to Aquinas, human persons exist as a physical unity, composed of integral parts. Each part exists for and is subordinated to the good of the whole. The body was created as a whole for the natural good of the person. One is obligated to respect the body's integrity and develop its capacities so that it is conducive to moral virtue. Voluntarily maiming or mutilating the body, understood as
the removal, or functional destruction, of parts of the body, violates the natural good of the biological whole, and is therefore *prima facie* morally impermissible.\(^5\)

As Aquinas argues:

Since a member is part of the whole human body, it is for the sake of the whole, as the imperfect for the perfect. Hence a member of the human body is to be disposed of according as it is expedient for the body. Now a member of the human body is of itself useful to the good of the whole body, yet accidentally it may happen to be hurtful, as when a decayed member is a source of corruption to the whole body. Accordingly so long as a member is healthy and retains its natural disposition, it cannot be cut off without injury to the whole body \(...\) (*ST. II-II. q. 65. a.1*).

Insofar as the body is healthy and functioning normally, it is *prima facie* morally illicit to remove or destroy its parts. However, if mutilation is necessary to preserve the health and integrity of the body, the *prima facie* moral impermissibility is defeated.

If, however, the member be decayed and therefore a source of corruption to the whole body, then it is lawful with the consent of the owner of the member, to cut away the member for
the welfare of the whole body, since each one is intrusted with the care of his own welfare. The same applies if it be done with the consent of the person whose business it is to care for the welfare of the person who has a decayed member: otherwise it is altogether unlawful to maim anyone (ST. II-II. q. 65. a.1).

Just as the ancient Christian canons permit castration to treat disease, Aquinas concludes that body parts may be removed to preserve the good of the whole, such as the amputation of a gangrenous limb to prevent the spread of disease and decay.

Three general conditions govern the moral licitness of anatomic or functional mutilation. First, the continued presence or functioning of the organ is causing serious damage or constitutes a menace to the body as a whole. Second, this damage is remediable, or at least measurably lessened, by the surgical removal in question, and there is significant assurance that the operation is efficacious in this regard. Third, the expected positive outcome, in terms of eliminating danger to the whole organism, easing of pain, etc., compensates for the negative effects created by the mutilation and potential harmful side effects of surgery (Pius XII, 'Address to Congress of Urology, October 8, 1953.' 1960, pp. 277-278). It need not be that the amputated organ is itself diseased so long as its continued presence or functioning directly or indirectly
causes a serious menace for that individual's body. The potential harms of surgery are justified in terms of their effect on preserving the natural good of the biologically functioning whole and the overall well-being of the individual. More broadly applied, the principle requires that diagnostic and therapeutic procedures be judged in terms of their efficaciousness for producing the good of the particular patient on whom they are used (Kelly, p. 246).

In itself, the principle of Totality rules out the procurement of healthy blood, tissue and organs from living donors. It therefore in turn proscribes both donation and selling of healthy organs from living persons. Since the principle requires any removal of a part of the human body to be justified in terms of preserving that person's bodily wholeness. one cannot justify the donation/sale of body parts in terms of preserving the wholeness of others. As Gerald Kelly argues, the principle of Totality is only applicable in cases where there is the subordination of part to whole in the natural body. There exists no such subordination between individuals and society as a whole. "Each person is a distinct entity, with a distinct finality" (p. 247). Persons exist neither for the sake of others nor for the sake of society. Citizens may have certain duties to society, but this is quite different from asserting that they are parts of a quasi-social-organism in the same sense as the kidney is part of the body (Kelly, p. 247).
Moreover, donation/sale of body parts cannot be justified by the fact that such parts, including blood, skin grafts, and bone marrow, are restored by the body. In itself, such reasoning would justify the useless letting of blood or the pointless removal of other regenerating tissues. This would violate the natural good of the biological whole for no reason whatsoever.

Instead, moral appeal must be made to a principle of Charity: the donor/seller intends that the body parts be transplanted into another person and thereby wills that other’s good. For such an argument to hold, however, it must be structured more-or-less as follows: (1) Persons are charitable beings and (2) such charity is a good. Moreover, (3) the good of being charitable is often more important than the good of preserving the wholeness of the body. However, (4) directly intending to kill oneself is forbidden (e.g., donating one’s heart while still living). Therefore: often charity is sufficient to defeat the *prima facie* moral impermissibility of removing healthy human body parts, as long as this is not part of an act that intends directly to kill oneself.

For example, Pius XII supports the premises of this argument in his praise of blood donors for their charity, comparing their behavior to the model of Christ:

Model as He is of all charity. He is your model in a special way ... to give one's blood for someone unknown to us, perhaps
someone ungrateful, who will forget or who will not even want to know the name and countenance of his savior: to donate something of one's own strength only to communicate it to others and give them back what they have lost; to restore one's lost energies only to repeat and renew the same gift and the same sacrifice: it is to this that you are generously dedicated ('Address to the Italian Association of Blood Donors, October 9, 1948.' 1960. p. 105).

Pope John XXIII reiterated this view in 1959 saying:

Yours is truly, then, an apostolate. But to achieve its perfection it must be rooted and founded in charity, which is love of God and of brother ... ('Address to the Italian Association of Voluntary Blood Donors, March 8,' 1959. p. 334).

The principle of Charity, whereby one assumes a cost or burden, intending the good of others, provides sufficient reason to defeat the principle of Totality's prima facie moral inappropriateness, and justifies the removal of healthy tissue, blood, and organs.

However, since the principle of Totality still holds, it must be reinterpreted as implying an obligation to preserve only a de minimus standard of human biological functioning. One must distinguish between
the good of the adequately functioning body and the good of the full integrity of the anatomical whole. The principle of Totality must be understood as only strictly requiring the former, not the latter. This reinterpretation of the principle of Totality has significant appeal since transplantation of human tissue, blood, and organs, has considerable potential for helping others, while still maintaining the adequate biological functioning of the donor.

This change, while departing from Aquinas, still plausibly captures the anatomical fact that certain parts of the body serve little role in effective human biological functioning. For example, the healthy appendix serves no known purpose in the human digestive system. Its removal, even while healthy, does not interfere with the integrity of the body: it neither suppresses nor otherwise harms any organic function of the body. As Gerald Healy concludes, insofar as there is sufficient reason to subject the patient to the surgical risks, i.e., if it is already necessary to open the abdomen to perform another operation, the appendix may be excised prior to closing the incision. The relative unimportance of the appendix, the risk of future appendicitis, and the minimal additional risk to the patient together justify elective appendectomy (Healy, p. 125; see also McFadden, p. 267; Gallagher, 1984). Moreover, its incidental removal precludes the possible harms of future surgery if the appendix were ever to become diseased. As Charles McFadden argues,
though, it would not generally be permissible for a person to arrange to have surgery solely for the removal of a healthy appendix. The risks of surgery outweigh the contingent good to be gained given the relatively small possibility that the individual might at some future date have appendicitis, and at that time not have access to medical intervention (McFadden, p. 269; see also Kelly, p. 253; Varga, 1984, pp. 223-224).

With regard to organ procurement, while persons may not capriciously diminish the integrity of their own bodies, not all of one's organic parts are necessary to preserve adequate biological functioning. Insofar as procurement from living persons is limited to redundant organs, such as a kidney, or regenerating tissue, such as a liver slice, the functional wholeness of the body is maintained. The principle of Charity provides a sufficient reason to justify the substantial mutilation and the risks of organ procurement surgery, insofar as the organ is to be provided to someone who vitally needs it (O'Rourke and Boyle, 1993, pp. 217-222; Cummings, 1990, pp. 66-67). As Germain Grisez makes the point "assuming that donating one kidney for transplant does not lessen kidney function, with detriment to one's health generally, a person may do so, even though accepting a risk to health in the event he or she contracts a kidney disease later" (1993, vol. 2, p. 544). It is morally licit voluntarily to give up an organ, or other body part, which is not needed and assume the risk that the one remaining kidney will continue normally to function
(see McFadden, p. 268; Kenny, p. 163; Kelly, pp. 251-252; Finney and O’Brien, p. 233; Healy, pp. 139-142).

Note, however, that this reinterpretation of the principle of Totality is neutral with regard to whether one donates or sells the organ. If one can give away an organ with sufficient reason, one ought to be able to sell it for sufficient reason, unless one has some view that accepting payment intrinsically involves a wrong. As I argued in chapter three, however, forbidding organ sales may demean the poor and sick, closing off options for improving their lives (i.e., the one by procuring funds by selling a kidney, the other gaining health by transplantation). Indeed, Pope Pius XII specifically allowed that for-profit selling of human body parts could be consonant with the principle of Charity.

Moreover, must one, as is often done, refuse on principle all compensation? This question remains unanswered. It cannot be doubted that grave abuses could occur if a payment is demanded. But it would be going too far to declare immoral every acceptance or every demand of payment. The case is similar to blood transfusions. It is commendable for the donor to refuse recompense; it is not necessarily a fault to accept it (Pius XII, ‘Address to a group of eye specialists, May 14, 1956,’ 1960, pp. 381-382).

Removal of a healthy human organ would be permissible even if one accepts
or requests monetary compensation, or other valuable consideration, provided that one does not exploit those in need by demanding too great a fee; although, presumably, a poor individual could ask for greater compensation from a rich recipient.\textsuperscript{11}

Presuming that one sells a healthy organ to a well matched recipient, the requirement of a sufficient reason for removal of an organ may be satisfied with (1) the expected good to the recipient of the organ of an increase in quality and quantity of life, and (2) the good which the income will provide for the vendor. The vendor may, for example, have morally compelling charitable reasons to sell an organ, such as to purchase medicine, food, or shelter for the vendor’s family. Insofar as the principle of Totality is satisfied in the case of organ donation it is satisfied in the case of organ vending. As long as one markets only redundant organs, or regenerative tissues, the \textit{de minimus} standard of adequate biological functioning is satisfied.

Insofar as one’s intention in removing the organ is not because one is attempting to destroy the natural good of biological wholeness but because one wants to engage in a market transaction to (1) help others through the market and (2) to assist one’s family through the provision of resources otherwise not available, the sale of redundant internal organs is not an example of mutilation which the canons contemplated, nor is it forbidden by the recast principle of Totality. In removing the redundant
organ. the natural good of the individual's bodily functional wholeness is not set at risk. Moreover, it is an instance of an individual cooperating with others in society to provide for the needs of others, as well as for himself. Given such conditions it should not be considered a mutilation which offends the Deity or as destroying, or reducing, the natural human good of biological functional wholeness. On such grounds, the organ market may be morally permissible. Indeed, given appropriate circumstances in which the charity of the sale is apparent, it may even be commendable.

III. John Locke: The Limited State and Natural Duties
There are two primary foci in Locke to forge moral political authority for the state to prohibit a market in human organs: the first considers Locke’s contractarian account of the derivative and artificial nature of state authority, while the second appreciates the political implications of his natural theology. First, in the state of nature persons are in authority over themselves and their possessions. While political authority, according to Locke, is limited, apparently significant aspects of one’s natural liberty are surrendered when one leaves the state of nature for civil society. Here the question is whether one alienates sufficient liberty such that the state has moral authority to forbid the selling of one’s own organs. Second, Locke held that persons have duties,
such as not to kill oneself, which he secured through a natural theology. In this fashion, Locke limited moral political authority as well as established limits on personal liberty which the state may enforce. Such constraints place in principle limits on the freedom one has to use and dispose of oneself at will. Here the question is whether Locke's natural theological constraints rule out the selling of human organs.

Consider the argument concerning moral political authority. One might argue that within civil society persons cede sufficient liberty over themselves such that it is within the moral authority of the state to forbid the consensual selling of human organs. There are, however, considerable exegetical as well as conceptual difficulties in sustaining such an interpretation. For example, Locke affirms that "...every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say are properly his" (1980 [1690]. $27). This natural authority of persons over themselves and their property is expressed within the state of nature as a "...state of perfect freedom to order their actions, and dispose of their possessions and persons as they think fit, within the bounds of the laws of nature. without asking leave, or depending upon the will of any other man" (1980 [1690]. § 4). Such authority includes private legislative rights (e.g., the liberty to act however one believes is
necessary for self-preservation) as well as executive rights (e.g., the liberty to punish violators of the natural law) (1980 [1690]. §§ 128-129): "the execution of the law of nature is. in that state. put into every man's hands. whereby everyone has a right to punish the transgressors of that law to such a degree. as may hinder its violation" (1980 [1690]. § 7). Prior to entering civil society. all men are at liberty to preserve person and property. as well as to act in judgment of those who violate these natural goods.

All political authority, according to Locke is derivative. It must be explained in terms of and grounded on the more basic forms of natural authority which persons have over themselves and their property. States obtain authority only through voluntary alienation of rights by the right-holders. i.e.. persons. themselves: "For no government can have a right to obedience from a people who have not fully consented to it ..." (1980 [1690]. § 192): "The only way whereby any one divests himself of his natural liberty. and puts on the bonds of civil society. is by agreeing with other men to join and unite into a community for their comfortable. safe. and peaceable living ..." (1980 [1690]. § 95). Only political consent. in which persons surrender those aspects of their natural liberties necessary to form a civil union. binds individuals together in a state.12

The reason for forming such a civil society is the effective
preservation of our property, life and liberty (1980 [1690]. § 123). Individuals, therefore, surrender to the political authority only those rights “so far forth as the preservation of himself and the rest of society shall require” (1980 [1690]. § 129). such that the government may achieve these ends (see also Simmons. 1992. p. 311). Generally, this includes private legislative and executive rights regarding the natural law, but not extensive authority to create, without consent of the citizens, laws which further limit personal freedom. Basic political authority is limited to the enforcement of the duties and rights of the natural law, securing persons lives and property holdings:

For the political society is instituted for no other end, but only to secure every man’s possession of the things of this life... Thus the safeguard of men’s lives and of the things that belong unto this life is the business of the commonwealth: and the preserving of those things unto their owners is the duty of the magistrate. And therefore the magistrate cannot take away these worldly things from this man or party and give them to that: nor change propriety amongst fellow subjects (no not even by a law). for a cause that has no relation to the end of civil government... (1947 [1689], 1947. p. 153).

De jure political authority is a fiduciary power which continues only
insofar as the state pursues the particular ends for which it has consent, eschewing others for which it does not have consent. In short, while persons must surrender to the society sufficient individual liberty to accomplish the "ends for which they unite into a society" (1980 [1690], § 99), such "ends" (1980 [1690], § 99) are limited, which in turn constrains the moral authority of the state.

The general character of the Lockean state is a limited constitutional democracy. Such a civil society cannot act arbitrarily over the lives and fortunes of the people (1980 [1690], § 135). It must rule by established and promulgated laws (1980 [1690], § 137) and cannot take from any person any part of their property without individual consent (1980 [1690], § 139). Without consent the political authority cannot tax for the maintenance of society (1980 [1690], § 140), transfer the power of government to any other state or organization (1980 [1690], § 142), or otherwise enact additional legislation with regard to conduct not specifically required or prohibited by natural law. With such authorization the political authority can create laws for the good of society as a whole, including those necessary to support effective functioning, such as taxation, as well as national and civil defense: "it is fit every one who enjoys his share of the protection, should pay out of his estate his proportion for the maintenance of it" (1980 [1690], § 140); each "engages his natural force. (which he might before employ in the
execution of the law of nature, by his own single authority, as he thought fit) to assist the executive power of society" (1980 [1690]. § 130); see also Simmons. 1993, p. 60).

Insofar as the state asserts more authority than that to which its citizens have consented, they have the natural right forcefully to preserve their lives, liberties, and possessions.

... there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative power given with trust for the attaining an end, being limited by that end, whenever that end is manifestly neglected, or opposed. the trust must necessarily be forfeited, and the power devolve into the hands of those that gave it ... (1980 [1690]. § 149).

The community retains a "supreme power of saving themselves from the attempts and designs of any body, even of their legislators, whenever they shall be so foolish, or so wicked, as to lay and carry on designs against the liberties and properties of the subject ..." (1980 [1690] § 149). Indeed.

Should a robber break into my house, and with a dagger at my throat make me seal deeds to convey my estate to him, would this give him any title? Just such a title, by his sword, has
an unjust conqueror, who forces me into submission. The injury and the crime is equal, whether committed by the wearer of a crown, or some petty villain (1980 [1690] § 176).

A state or sovereign who asserts and enforces unconsented to authority, is conceptually not much different than a thief (1980 [1690]. § 17-18) or a villain (1980 [1690]. § 176).

Consider the force of such arguments for the licit prohibition of a market in human organs. Procuring and selling internal organs is a consensual transaction involving private property through which both vendor and recipient expect to benefit. For those external to the exchange, the transaction is in Lockeian political terms benign: it touches neither their personal security nor their property holdings. Thus, it is implausible that the surrender of the liberty to sell one's redundant internal organs can be understood as necessary to the ends for which persons unite into civil society. Therefore, unless there are natural theology based duties which constrain the selling of human organs, absent consent, prohibition of a market in human organs would not appear to be within the derivative contractual authority of the state.

Locke's natural theology grounds the natural good of individual liberty. It also places significant in principle constraints on the moral uses to which persons may put themselves. While such constraints ground limits in principle on the moral authority of the state, they also create
natural duties which the state must enforce. One might argue that such restraints also prohibit the procuring and selling of human organs.

For example, Locke held that persons have natural duties not to commit suicide (1980 [1690]. § 6) or to harm others in their "life, health, liberty, or possessions" (1980 [1690]. § 6). Such natural theological constraints are grounded not only as correlatives to the rights of persons, but also, as correlatives to rights that the Deity has in creation.

... for men being all the workmanship of one omnipotent, and infinitely wise maker: all the servants of one sovereign master, sent into the world by his order, and about his business; they are his property, whose workmanship they are, made to last during his, not one another's pleasure (1980 [1690]. § 6).

While such duties constrain the ways one may utilize oneself, they also define a sphere in which persons, vis-à-vis other persons, have natural rights to be left alone. In the state of nature, individuals are at liberty to dispose of their person and possessions; however, they are not at liberty to destroy themselves (1980 [1690]. § 6). While vis-à-vis other persons one has a "right of freedom to his person, which no other man has a power over. but the free disposal of it lies in himself" (1960 [1690]. § 190), with respect to natural theology, one's person and body are not
one's own without restriction (see Simmons, 1992, pp. 260-264; 1993, pp. 115-117). The rights of persons over themselves end at the limits of the natural law. Thus "no body has an absolute arbitrary power over himself .... to destroy his own life" (1980 [1690]. § 135). Only God has such absolute dominion.

Locke attempts similarly to ground his argument against slavery. Insofar as one does not have absolute authority over oneself, one cannot transfer such power to another:

... for a man, not having the power of his own life, cannot by compact, or his own consent, enslave himself to anyone, nor put himself under the absolute, arbitrary power of another, to take away his life, when he pleases. No body can give more power than he has himself; and he that cannot take away his own life, cannot give another power over it (1980 [1690]. § 23).

Just as the rights of God constrain one's liberty to exercise absolute dominion by suicide, they also constrain one's freedom to give others such authority over oneself. Despotic political authority is essentially mass slavery of the citizenry, and is ruled out on similar grounds. Since absolute dominion over life and death belongs only to God, it cannot licitly be ceded to or usurped by other persons or civil institutions.
It is unclear that such natural theological constraints prevent one from selling one's own redundant organs. One might argue that since certain personal freedoms must be infringed, such as rights to commit suicide and to sell oneself into slavery, to support more important liberty-based natural goods. Forbidding the sale of organs similarly enhances such goods. However, such an argument is implausible. First, in the case of an organ futures market or of selling organs procured from cadaveric donors more generally, one neither kills oneself nor places oneself in the despotic dominion of another. Therefore, there is no analogy to suicide or slavery, which might justify constraints against such practices on similar natural theology grounds. Second, in the case of living organ vendors, insofar as one only sells redundant internal organs (e.g., a kidney or a liver slice) and the risks of surgery are sufficiently minimized (e.g., organ removal is accomplished by a competent surgeon in a sterile environment) procurement for commercial exchange is not equivalent to suicide. Moreover, the negotiated for-profit transaction gives each party only limited contractual rights, rather than absolute dominion, in the body of the other. Again, there is no analogy to either suicide or slavery. Third, as I argued in chapter three, it is implausible to construe the prohibition of organ sales as augmenting individual liberty.

Insofar as Locke regards his use of natural theology as a
theoretical bar, in principle, against the unlimited authority of the state. It is unlikely that he would have interest in duties to God which forbid the sale of organs. As Locke makes clear, persons have natural liberties to engage in market transactions. Private agreements can transfer property ownership as well as create enforceable duties and rights pertaining to the goods and services of others.

For it is not every compact that puts an end to the state of nature between men, but only this one of agreeing together mutually to enter into one community, and make one body politic; other promises, and compacts, men may make one with another, and yet still be in the state of nature ... for truth and keeping of faith belongs to men, as men, and not as members of society (1980 [1690], § 14).

One's actual rights, duties, and possessions may be expanded or compressed as the result of private contract. Prohibition of a market in human organs would straightforwardly limit the natural liberty of persons to engage in market exchanges. It is plausible to see licit market transfers as extending to parts of the body, provided that such sales are limited to redundant organs or regenerative tissues, and adequate medical precautions are taken to preserve life.

Insofar as Locke envisions natural theology based duties as far-reaching and greatly intrusive into individual freedom, moral political
authority will also become far-reaching and intrusive. As the number of personal duties under natural theology increase so too does the moral authority of the state to support and enforce such duties. Given Locke’s general commitments to limited government as well as to individual freedom and responsibility it is unlikely that he would support natural goods, which would in turn justify the moral political authority of the state to prohibit the selling of human organs. In any event, his position does not require such a proscription.

IV. Immanuel Kant: The Categorical Imperative and One’s Obligation Not To Use Oneself as a Means Merely

In the *Metaphysics of Morals: The Doctrine of Virtue*, Kant straightforwardly denies the moral lictiness of either donating or selling parts of one’s body. He argues, first, that such mutilation constitutes partial self-murder and thus involves the same contradiction in will as suicide; and second, that it uses oneself as a means merely. The Kantian challenge for these practices is the same: to show that donation/sale of organs can be appropriately universalized, such that it is compatible with the material existence of the moral community both in oneself and in others, and that it supports the respect of moral agents.

An analysis of Kant’s arguments may begin with his three formulations of the categorical imperative.
Act only on that maxim through which you can at the same time will that it should become a universal law (1990[1785]. AK 421).

Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means merely (1990 [1785]. AK 423).

...the third formulation of the principle, *viz.*, in the Idea of the will of every rational being as a will giving universal law (AK 432).\textsuperscript{15}

Persons as rational beings are not subjective ends whose existence has worth because we value it, but are beings whose existence embodies reason which is the ground of the moral law. As he clarifies the second formulation in the *Doctrine of Virtue*:

Man, however, is not a thing and thus is not something to be used merely as a means: he must always be regarded in all his actions as an end in himself. Therefore I cannot dispose of man in my own person so as to mutilate, corrupt, or kill him (1991 [1797]. AK 429).
One may not, for example, use one's body to satisfy mere inclination, but only to discharge duties to others or to oneself. "We may treat our body as we please, provided our motives are those of self-preservation. If, for instance, his foot is a hindrance to life, a man might have it amputated. To preserve his person he has the right of disposal over his body" (1979, p. 149). In contrast, removing healthy parts of the body treats the person as a means merely and is likened to partial self-murder.

Man cannot renounce his personality as long as he is a subject of duty. hence as long as he lives ... disposing of oneself as a mere means to some discretionary end is debasing humanity in one's own person (homo noumenon) ... To deprive oneself of an integral part or organ (to main oneself) – for example, to give away or sell a tooth to be transplanted into another's mouth, or to have oneself castrated in order to get an easier livelihood as a singer, and so forth – are ways of partially murdering oneself (1991 [1797]. AK 423).

Removing a part of the body, such as an organ, for donation or sale is supposed to involve the same contradiction in will as suicide. It is important to appreciate that the donate/sell distinction makes no difference to the argument offered in the text. Either donation or sale of one's healthy body parts, according to Kant, treats one's own person as a means merely.
It is clear that Kant is introducing much of Western Christian morality unexamined into his critical work. For example, he holds that masturbation is equivalent to self-murder (1991 [1797]. AK 425).16 Here he appears similarly to be uncritically adopting the Western Christian principle of Totality. Not even those parts which are not necessary to one's biological functioning may be permissibly donated or sold: "cutting one's hair in order to sell it is not altogether free from blame" (1991 [1797], AK 423). However, the principle of Totality can be understood in a principled fashion for Kant if and only if it can be put within the formulation of the categorical imperative.

The donation/sale of organs violates the categorical imperative only if at least one of three arguments holds: First, that it puts life in danger (and therefore cannot be universalized compatible with Kant's view, which requires taking into account the material existence of the moral community: although this requires some de minimus condition of allowable risk to take account of occupational hazards that people incur in the discharge of their duty). Second, that parts of the body are equivalent to oneself as the subject of morality in one's own person. This premise is necessary for Kant's argument that removing healthy parts of the body involves the same contradiction in will involved in suicide, beyond the considerations of the first argument regarding threat to life. As he argues, "[t]o annihilate the subject of morality in one's own person is to
root out the existence of morality itself from the world. as far as one can ..." (1991 [1797]. AK 423). Or. third. that donation/sale of organs is not associated with the discharge of a duty (i.e.. one ought to donate/sell one's organs not simply to satisfy inclinations. but to discharge obligations to others).

Rather than ruling out the donation/sale of organs. the first argument at most requires that adequate precautions be taken during procurement surgery to satisfy the de minimus danger condition of acceptable risk. In such terms. the argument is telling against the selling of non-redundant organs which are necessary to maintain embodiment/existence or adequate human functioning of the person. Given a sufficiently qualified surgeon. an adequately sterile environment. etc.. the argument fails to be telling. Such use of the self is no more dangerous than many other occupational activities. such as volunteering for the army. which Kant allows as consonant with one's duty (1991 [1797]. AK 346). The second argument appears unintelligible on its face. The extension of Kant's argument to the removal of parts of the body as partial self-murder. as being morally equivalent to suicide. only goes though insofar as particular parts of the body can be identified with oneself as the subject of morality. As I argued in chapter two. however. not all body parts are necessary for embodiment/existence of the person.
or adequate human functioning.\textsuperscript{19} Therefore, insofar as one only removes parts of the body for donation/sale which are separable from the embodiment/existence or adequate human functioning of the person, one would not destroy the subject of morality in one's own person. Moreover, removing such parts can be universalized as compatible with the material existence of the moral community. Redundant internal organs and regenerative tissues meet such conditions.

The final argument turns on whether one donates/sells one's organs out of obligation or inclination. For example, if persons have a moral duty to be charitable in protecting life this may include a duty to provide organs. At least, there may be a moral duty to do so if one does not find the transaction morally disrupting. As one is obliged to seek happiness insofar as this aids in the discharge of one's duties, this duty may bind only if not morally burdensome (Herman. 1984). As a consequence, it may be permissible to sell one's organs for responsible reasons. The presence of payment may outweigh aversive inclinations and responses so that one can act charitably. One ought to be able to donate an organ to a family member to whom one had a duty, or to sell an organ to obtain the material means to satisfy a duty. In principle, Kant should not have an objection to selling organs when the risk to life is \textit{de minimis} and when it is to discharge a duty, such as to care for one's family.

Moreover, insofar as the argument advanced in chapter three
regarding the potential health benefits of an organ market goes through (i.e., that such a market would likely lead to greater organ availability, with organs of good quality, more efficient organ procurement, and more effective transplantation, while minimizing potential harms to vendors) creation of a market in human organs advantages the health and integrity of persons as ends in themselves. This is not merely a utilitarian point. The end can be categorically willed, since one wills the health and respect of moral agents as such.

While never speaking directly to the concept of a free market in health care. Kant generally endorses private initiative.

For a being endowed with freedom is not satisfied with the pleasure of life's comforts which fall to his lot by the act of another (in this case the government): what matters, rather is the principle according to which the individual provides such things for himself (Conflict of the Faculties. AK 87 note).

As Klaus Hartman has argued, this affirmation can be seen as plausibly extending to a market in health care, albeit with certain restrictions: ...while duty in Kant could be seen as a non-economic device to ensure performance, commercialism and the market might prove a perfectly satisfactory vehicle to ensure performance without regard to duty. Even medical standards might be
assured by the market principle through the competition of physicians in the interest of profit: they might have an interest in tendering service under the aegis of a higher-ranking insurance or medical company. Only ethical questions concerning allocation or distributive justice would remain unanswered (1991. p. 315).

Kant's support of the market, however, was not unqualified. He argued for some measure of public welfare to care for the impecunious. "The general will of the people has united itself into a society in order to maintain itself continually, and for this purpose it has subjected itself to the internal authority of the state in order to support themselves" (1965 [1797]. AK 323).20 It is plausible that such support would include a basic minimum of health care, including, possibly, some organ transplants.

If a market in human organs is limited to redundant organs (e.g., a single kidney) and regenerative tissue (e.g., a liver slice) the Kantian elements for morally permissible action are present. First, the vendor does not will to destroy himself and the procurement and selling of such organs is not incompatible with the health of moral agents. Second, the practice can be universalized at the level of individual and social risks. The increased personal risks associated with procurement surgery and having sold a redundant organs are lower than many other aspects of day to day life. Third, selling an organ is a plausible manner in which
to discharge a duty of charity, or to gain the material means to discharge such a duty. Fourth, the practice of saving others supports the respect of moral agents. Since persons are always to be treated as ends in themselves, it is plausible that Kant could endorse the moral licitness of organ selling as helping others to maintain that personhood. It would support the special dignity of persons as central to morality. Fifth, given his support of basic welfare rights, plausibly extended to include a basic package of health care, Kant could have supported the state purchase of organs for the impecunious.

IV. Robert Nozick: The Moral Authority of Consent

As the discussions of Aquinas, Locke and Kant illustrate, one of the difficulties for resolving moral controversies, such as the permissibility of a market in human organs, is that all do not appeal to the same background assumptions to guide a resolution. Given different presuppositions regarding the nature of the right and the good, the character of virtue, as well as the consequences endorsed or eschewed, rational argument will support disparate conclusions. Even if one appeals to natural law one must specify how to interpret and rank findings about nature. For example, the permissibility of procuring healthy organs from living persons depends on whether one assumes, with Aquinas, that the life of a human being as a biological anatomical whole is a natural good
which must be unconditionally supported, or whether it is a good to be pursued, balanced with the pursuit of other goods. For example, for contemporary Thomists it is morally sufficient to preserve the natural good of the human body as an adequately functioning whole, while also responding to the principle of charity by donating an organ. On the one hand, to follow the view of Aquinas' text, organs may only be removed if diseased, or would otherwise constitute a direct or indirect threat to the body, so as to preserve the good of the whole. On the other hand, contemporary Thomists allow additional significant reasons, such as charitably intending the good of others, as being sufficient to justify the removal of healthy organs. Such background moral assumptions in turn bear on one's assessment of the permissibility of a market in human organs.

Similarly, following Locke, background assumptions concerning (1) the extent of the personal liberty one surrenders to political authority and (2) the character of natural law duties, will lead one to conclude for or against the moral authority of the state to prohibit a market in human organs. For example, as individuals cede a greater amount of freedom to the government, it becomes more plausible that political institutions have moral authority to prohibit the selling of human organs. Additionally, insofar as individuals surrender the legislation and enforcement of the natural law to civil society, as the requirements of natural theology
increase so too does the moral authority of the state to enforce such duties. If selling human organs significantly infringes natural goods, there may exist moral authority for the state to forbid such activity. In contrast, if one appeals to the natural good of individual liberty, the benefits of market freedoms, respect for the authority of persons over themselves, and the limited reasons for which persons form civil society, it will be much less plausible within a Lockean framework that the state may licitly forbid such a market.

Aquinas and Locke each engage a particular content-full morality with specific understandings of natural goods, duties, and liberties, virtues and consequences, which when defended in a rational framework give their arguments force. If one could through reason secure a particular moral content, there would in principle be a unique canonical rational morality to provide the terminus ad quem for the reasoned search for proper moral deportment and the justification of its enforcement (Engelhardt, 1997, p. 260). The more one doubts that through reason alone one can discover or secure a universal, coherent, content-full moral understanding of the morality of organ sales or a justification for political authority to proscribe such sales, the more one must look for alternative foundations. One possibility, which Nozick endorses in Anarchy, State, and Utopia, is to ground secular moral authority in
freedom as permission: i.e., freedom as a side constraint. Resolution of moral controversies regarding organ sales in such a framework will turn on whether the parties to the transaction have given consent.

Nozick's account of legitimate moral authority requires a distinction between the secular rights of persons and what may be virtuous, good, or proper to do. This contrast derives from his distinction between freedom as a side constraint and freedom as one value among others. For Nozick, one may not use other persons without their consent, even if a significant good will be achieved. Even if using some would be a good thing to do (e.g., in the sense that it would save lives), no one has a right to do it. This appeal to the moral inviolability of persons is a variation on the Kantian insight that if one is obligated to respect persons as ends in themselves, one is obligated to respect their freedom. Insofar as freedom is not merely one value among others, or a good which may be valued more or less along with other goods, but rather is a side constraint which captures a general secular moral obligation to respect the separateness of persons, one may not injure, steal from, defraud, or otherwise coerce unconsenting others, even to produce good consequences, without using them merely as a means to one's own ends. This would violate their status as free and responsible agents. Such an argument provides significant force to forbearance rights as well as rights to be protected from battery. It does not, however, create any
content-full duties to others aside from those to which persons freely agree. One needs the actual consent of actual persons before using them in order to respect individuals as free persons. The rights of persons may morally foreclose many worthwhile goals.

Nozick encapsulates this position as treating persons as individuals with separate lives, where one may not be sacrificed to achieve another’s particular understanding of the good.

Why not ... hold that some persons have to bear some costs that benefit other persons more, for the sake of the overall social good? But there is no social entity with a good that undergoes some sacrifice for its own good. There are only individual people ... Using one of these people for the benefit of others, uses him and benefits the others. Nothing more. ... Talk of an overall social good covers this up ... (1974, pp. 32-33, original emphasis).

This is the case whether one seeks beneficently the good of others or paternalistically the good of individuals themselves. As Nozick argues:

A line (or hyper-plane) circumscribes an area in moral space around an individual. ... Voluntary consent opens the border for crossings. ... My nonpaternalistic position holds that someone may choose (or permit another) to do to himself anything, unless he has acquired an obligation to some third
party not to do or allow it (pp. 57-58, original emphasis).

Respecting the freedom of persons constrains one to allow individuals to choose freely in their own best interests, even if they choose in ways one considers unwise (see, for example, Mack. 1981. p. 288).

Given freedom as a side constraint, political authority is derivative of the permission of persons. As Nozick states "The rights possessed by the state are already possessed by each individual in a state of nature ... the state has no special rights" (p. 118): rather, governmental institutions may legitimately exercise only those rights which persons freely transfer to them. By consenting to political authority, persons convey moral authority to social structures. Insofar as persons consent to transfer protection of particular rights to state institutions, such governmental authority gains moral legitimacy.

Consider, for example. Nozick's presumption that individuals actually already own things prior to any particular society. There is no particular a priori distribution of wealth and resources which represents the just allocation; as long as the history of acquisition and transfer has been without coercion, the final disposition of property is just. "There is no central distribution, no person or group entitled to control all the resources, jointly deciding how they are to be doled out" (p. 149). Therefore, the principles of justice are those of just acquisition, just transfer, and retribution for past injustice in acquisition and
transfer. Persons receive resources from others who give to them in exchange for something or as a gift. "There is no more a distributing or distribution of shares than there is a distributing of mates in a society in which persons choose whom they shall marry" (p. 150). Diverse individuals control varying resources, and new distributions arise out of the exchanges and actions of persons (see also Paul, 1981). For example, absent actual permission, it would be unjust to remove a kidney from an individual with two healthy kidneys for transplantation, even if another person would thereby significantly benefit.

Nozick captures this circumstance in terms of a distinction between freedom-based justice and goals-based justice. Goals-based justice is concerned with the achievement of the good of individuals in society. In contrast, freedom-based justice is concerned with licit institutional moral authority and the distribution of goods made in accord with the consent of actual persons. Beneficence, including the philanthropic use of human organs, may only be permissibly pursued within the constraints set by permission (pp. 265-267). Morally licit strategies to eliminate the disparity between organ availability and patients who could benefit from transplantation will not include compulsory redistribution, presumed consent, or coercive donation. Particular acts of kindness, such as donation of one's redundant kidney, or all of one's organs at death, are premised on the permission of individual persons who wish to make their
organs available. Proponents of compulsory redistribution schemes, presumed consent, or governmental control over organ allocation, should instead attempt to persuade people to donate organs voluntarily, according to an account of just distribution of organs, and to ignore those who offer organs for sale. Absent agreement, however, it would violate moral constraints to compel people who are entitled to their organs to donate against their will, to control to whom they may freely donate, or coercively to prohibit those who are inclined to buy and sell organs from doing so.

Nozick's account has special force with regard to ownership, distribution, and transfer of human organs. Human organs are not social resources which are grown, harvested, and distributed independently of actual persons. Rather, they come into existence already part of and owned by individuals.\(^{21}\) On a goals-based account of distributive justice, one only has entitlement to things, including one's organs, insofar as such title is consistent with the promotion of the particular social goals or goods at stake.\(^ {22}\) In contrast, on Nozick's freedom-based justice, human organs are preeminent examples of "Things [that] come into the world already attached to people having entitlement to them" (p. 160). If one really owns things, such as one's internal organs, there will be freedom-based limits on distributive justice as well as on moral political authority to regulate one's use of such property. One may not claim title
to the bodies of others without prior permission. The needs of others to
organ transplantation will not erase the rights of some to utilize their
organs as they see fit: to possess and enjoy or to transfer through
donation or sale. On such an account, controversies regarding the moral
authority of a market in human organs are settled by the giving of
permission of those who freely choose to participate in such a market.

V. Summary
To summarize, while Aquinas, Locke and Kant each argue for positions
which, if taken at face value, would foreclose a market in human organs,
on closer examination their positions do not unequivocally preclude the
selling of redundant internal organs. If certain critical premises are
reexamined in ways which are plausible, then their positions can support
the permissibility of organ sales. It is important to note, however, that
while these divergent moral accounts would in particular circumstances
endorse the same conclusion regarding the permissibility of organ sales,
they will not agree in all instances. Moreover, the significance or
theoretical force of the conclusion is in each case different.

For example, while the recast principle of Totality and Nozickian
libertarianism both allow one to utilize market institutions to create
beneficence based goods, they differ regarding when such appeal is morally
acceptable as well as the significance of charity. The reinterpreted
principle of Totality requires that one maintain the biological functional integrity of the donor when procuring organs or other body parts and tissues for donation or sale. While one can through charity take burdens upon oneself, and seek to help others through the market, one cannot seek directly to kill oneself. Nozick requires no such restrictions. Moreover, Thomists recognize the importance of charity as a good in its own right. For Nozick, the market merely creates social space for persons to express philanthropy should they wish; the market neither endorses such beneficence as a good, independent of the ways in which persons value it, nor does the market value beneficence based transactions more than other types of for-profit ventures. Philanthropy is an instance of persons cooperating with others in society to provide for themselves as well as for the needs of others.

Similarly, if one assumes with Locke that moral political authority is derivative of the consent of persons then, as Nozick is aware, licit social prohibition of an organ market will depend on the ends for which persons form a polity and whether they freely alienate sufficient liberty over themselves to societal institutions to authorize such proscription. Locke makes clear that individuals have natural liberties to engage in market transactions. However, Locke also limits the authority persons have over themselves through natural law based duties. Nozick’s account fully endorses freedom as a side constraint, as defining a sphere in which
persons *vis-à-vis* others, including political institutions, are morally inviolable. Absent natural law constraints which would forbid the selling of human organs, Locke would likely agree with Nozick that the moral authority for prohibiting a human organ market must be created by the consent of persons. Absent prior agreements the permission of those who freely choose to participate is sufficient morally to authorize the creation of such a market.

However, Locke's constraint against suicide would likely limit such sales to redundant organs and regenerative tissues. In this his conclusion would resonate with that of the recast principle of Totality. However, while contemporary Thomists require an appeal to the good of others to justify the removal of the healthy organ, Locke would likely embrace the natural good of individuals having the freedom and responsibility to make such choices over their lives. The significance of the conclusion thus varies from the importance of charity to the structure of individual liberty.

While Nozick argues that the rights of persons forbid, in principle, coercing some beneficently to seek the good of others, he acknowledges that persons may consent to philanthropy contracts, in which one agrees to protect the life and health of others. Such agreement can create obligations to sell body parts. Past agreements can constrain future choices. As the examination of Kant illustrated, selling an organ is a
plausible way in which directly to discharge a moral obligation or to raise funds to satisfy one's duties, which would otherwise not be available. For Kant, insofar as the vendor does not will to destroy himself, the procurement and sale of the organ is not incompatible with the health of the individual as a moral agent, and the action is undertaken out of duty rather than inclination. Selling healthy human organs should be compatible with the categorical imperative. Nozick requires no such special conditions to be met morally to justify organ sales. Insofar as the parties to the transfer give permission, the sale is permissible.

The context in which the moral decision to sell one's organs is made shapes the significance of one's choices and actions. The recast arguments of Aquinas, Locke, and Kant lead to conclusions similar to Nozick's position regarding the permissibility of selling redundant organs and regenerative tissues. However, each engages quite different premises, moral constraints and presumes a different moral theoretical context, including a) the nature of liberty and responsibility, b) the significance of acts of beneficence, c) the moral importance of granting permission, d) the ways in which seller intent shapes the permissibility of actions, and e) the limits of moral political authority.
Notes

1. Aquinas argues that "Consequently the first principle in the practical reason is one founded on the notion of good, viz., that good is that which all things seek after. Hence this is the first precept of law, that good is to be done and pursued, and evil is to be avoided. All other precepts of the natural law are based upon this: so that whatever the practical reason naturally apprehends as man's good (or evil) belongs to the precepts of the natural law as something to be done or avoided. ... Because in man there is first of all an inclination to good in accordance with the nature which he has in common with all substances: inasmuch as every substance seeks the preservation of its own being, according to its nature: and by reason of this inclination, whatever is a means of preserving human life, and of warding off its obstacles, belongs to the natural law. Secondly, there is in man an inclination to things that pertain to him more specially, according to that nature which he has in common with other animals: and in virtue of this inclination, those things are said to belong to the natural law, which nature has taught to all animals, such as sexual intercourse, education of offspring and so forth. Thirdly, there is in man an inclination to good, according to the nature of his reason, which nature is proper to him: thus man has a natural inclination to know the truth about God, and to live in society: and in this respect, whatever pertains to this inclination belongs to the natural
law: for instance, to shun ignorance, to avoid offending those among whom one has to live, and others such things regarding the above inclination” (I-II. q94. a2).

2. Kant argues that the moral law is a rational imperative: it is *a priori* and objectively valid for all persons (Walker, 1988; Hardwig, 1983). As Rawls makes the point, the moral law gives objective, although only practical, reality to the idea of freedom (1989).

3. For example, Kant tells us that we are commanded by reason to seek to realize the highest good (Beck. 1960. p. 244: Silber, 1959).

4. For a modern Thomistic defense of this view see John Finnis, who argues, for example, that biological life is a natural basic good: “A first basic value, corresponding to the drive for self preservation, is the value of life. The term ‘life’ here signifies every aspect of the vitality (vita, life) which puts a human being in good shape for self-determination. Hence, life here includes bodily (including cerebral) health, and freedom from the pain that betokens organic malfunctioning or injury” (1980. p. 86). See also Finnis, Boyle, and Grisez (1989).

5. The relationship persons have with their bodies, according to
contemporary Thomists, is inappropriately classified as a form of absolute "ownership". While an owner of a thing may use or destroy it at will, so long as he does not conflict with the rights of others, persons do not own their bodies in such a fashion. "Above all, he must conserve his body and his life, for they do not belong to him, but to God; man may not destroy needlessly his body or any part of his body" (Finney and O'Brien. 1956. p. 207). Persons possess a stewardship or useful, rather than absolute, dominion over their bodies and its parts. See, for example, Pius XII, who states: "As far as the patient is concerned, he is not absolute master of himself, of his body, or of his soul. He cannot, therefore, freely dispose of himself as he pleases. Even the motive for which he acts is not by itself either sufficient or determining. The patient is bound by the immanent purposes fixed by nature. He possesses the right to use limited by natural finality, the faculties and powers of his human nature. Because he is the beneficiary, not the proprietor, he does not possess unlimited power to allow acts of destruction or of mutilation of anatomic or functional character" (1960. pp. 198-199). Maiming the body is, therefore, morally impermissible.

6. As Pius XII argued: "The decisive point rests not in the fact that the organ which is amputated or paralyzed be itself infected, but that its continued presence or functioning cause either directly or indirectly a
serious menace for the whole body. It is quite possible that in functioning normally a healthy organ could cause harm to one which is unhealthy, in such a way as to aggravate the evil and the repercussions of this last on the organism as a whole. Or it can happen that the removal of a healthy organ and the paralyzing of its function remove from the evil – cancer, for example – the possibility of extending further, or else change the effect of this evil on the body. If there is no other alternative available, in both cases a surgical operation on the healthy organ is permissible” (1960, p. 278).

7. There is some dispute over whether the surgeon may simply remove the healthy appendix during the course of another abdominal procedure, or whether to justify the incidental appendectomy, he must judge that the appendix’s presence after an abdominal operation constitutes a probable danger from adhesions that may render the second operation necessary (Finney and O’Brien, p. 229). See also Shiners, 1958, pp. 37-38; Nolan, 1963, pp. 28-44, 290-324; Regan, 1965, pp. 320-361; Connery, 1954, p. 603; 1956, p. 561; Kelly, 1963, pp. 628-629.

8. McFadden points out that in unusual cases where it is evident that surgical aid will not be available in the future, it may be permissible, but not obligatory, to undergo elective appendectomy: e.g., missionaries
who will be venturing into primitive areas without significant contact with modern medicine (p. 269; see also Kelly, p. 254).

9. As Pope John Paul II stated to a group of blood and organ donors August 2, 1984: "Above all I appreciate the purpose which has united and mobilized you: namely, to promote and encourage such a noble and meritorious act as donating your own blood or an organ to those of your brothers and sisters who have need of it. Such a gesture is the more laudable in that you are motivated, not by a desire for earthly gain or ends, but by a generous impulse of the heart, by human and Christian solidarity—the love of neighbor, which forms the inspiring motive of the Gospel message, and which has been defined, indeed, as the new commandment" (1985).

In 1991, while acknowledging the benefits of organ transplantation, the Pope also encouraged caution: "... Among the many remarkable achievements of modern medicine, advances in the fields of immunology and of surgical technology have made possible the therapeutic use of organ and tissue transplants. It is surely a reason for satisfaction that many sick people, who recently could only expect death or at best a painful and restricted existence, can now recover more or less fully through the replacement of a diseased organ with a healthy donated one: We should rejoice that medicine, in its service to life, has found in organ
transplantation a new way of serving the human family, precisely by safeguarding that fundamental good of the person ... Love, communion, solidarity, and absolute respect for the dignity of the human person constitute the only legitimate context of organ transplantation. It is essential not to ignore the moral and spiritual values which come into play when individuals, while observing the ethical norms which guarantee the dignity of the human person and bring it to perfection, freely and consciously decide to give a part of themselves, a part of their own body, in order to save the life of another human being" (1992; see also Michejda, 1992).

10. For discussion of the ways in which contemporary theologians have understood proportionate good to outweigh harmful effects, see Hoose, 1987; McCormick and Ramsey. 1978; Cahill. 1984. For a more traditional account of the doctrine of double effect, see Boyle. 1984.

11. One could view this possibility as consonant with the reflections of certain theologians on the priority one should give the poor. See, for example, Haas, 1990; Hobgood, 1997; Finn, 1997; Beckley, 1997; Robb, 1997.

12. Simmons identifies two classes of consent: explicit consent, in which persons enter permanently into society, and tacit consent, which grounds

13. Locke is concerned to protect the natural property with persons brings to society: “to avoid the inconveniences which disorder men’s properties in the state of nature, men unite into societies, that they may have the united strength of the whole society to secure and defend these properties” (1980 [1960], § 136). As Simmons points out, unless the term ‘property’ changes meaning in this sentence. Locke cannot mean that individuals must surrender their natural property to receive society’s distribution of legal property (however politically determined) on entering society (1992, p. 311; see also, Waldron, 1984; Gough, 1950).

14. Locke levies two additional arguments against slavery: First, that licit despotical power cannot be derived from aggression or unlawful conquests. The illegitimate use of force creates a state of war between the aggressor and those he seeks to place under his power. Locke reasons that persons are at liberty to destroy that which threatens them; moreover, “when all cannot be preserved, the safety of the innocent is to be preferred” (1980 [1690] § 16). The natural law permits one to act in defense; this is a right of war, which includes a liberty to kill unjust
aggressors. Therefore, rather than yielding new rights of dominion, the aggressor forfeits those rights he has: "... because such men are not under the ties of the common law of reason, have no other rule, but that of force and violence, and so may be treated as beasts of prey, those dangerous and noxious creatures ..." (1980 [1690] § 16). These considerations may not forbid taking slaves in a just war.

Second, that licit despotical power cannot be derived from nature: "... there being nothing more evident, than that creatures of the same species and rank, promiscuously born to all the same advantages of nature, and the use of the same faculties, should also be equal one amongst another without subordination or subjection" (1980 [1690]. § 4). Persons are by nature free and equal. Locke's arguments against slavery may only forbid unlimited chattel slavery which includes the power senselessly to kill one's slaves. After all, in Locke's time there was in England indentured servitude.

15. For accounts of the ambiguities among Kant's various formulations of the categorical imperative, see Bamford. 1969; Schneewind. 1993; Korsgaard. 1996. pp. 77-131.

16. Kant's indebtedness to the content of Christian mores is striking. For example, he argues with regard to the moral evil of masturbation: "That
such an unnatural use (and so misuse) of one’s sexual attribute is a violation of duty to oneself, and indeed one contrary to morality in its highest degree. occurs to everyone immediately ... [such] use of one’s sexual attribute is inadmissible as being a violation of duty to oneself (and indeed, as far as its unnatural use is concerned, a violation in the highest degree). The ground of proof is, indeed, that by it man surrenders his personality (throwing it away), since he uses himself merely as a means to satisfy an animal impulse. But this does not explain the high degree of violation of the humanity in one’s own person by such a vice in its unnaturalness, which seems in terms of its form (the disposition it involves) to exceed even murdering oneself. It consists, then, in this: That a man who defiantly casts off life as a burden is at least not making a feeble surrender to animal impulse in throwing himself away; murdering oneself requires courage, and in this disposition there is still always room for respect for the humanity in one’s own person. But unnatural lust, which is complete abandonment of oneself to animal inclination, makes man not only an object of enjoyment but, still further, a thing that is contrary to nature, that is, a loathsome object, and so deprives him of all respect for himself” (1991 [1797], AK 425).

Here Kant follows Aquinas, who similarly held that masturbation is an unnatural immoral act. Indeed, Aquinas held that incest, fornication and rape were lesser sins than masturbation because at least these
actions accomplished sexual intercourse in a natural manner. "Therefore, since by the unnatural vices man transgresses that which has been determined by nature with regard to the use of venereal actions, it follows that in this matter this sin is gravest of all. After it comes incest, which, as stated above (A.9), is contrary to the natural respect which we owe persons related to us. With regard to the other species of lust they imply a transgression merely of that which is determined by right reason, on the presupposition, however, of natural principles. Now it is more against reason to make use of the venereal act not only with prejudice to the future offspring, but also so as to injure another person besides. Wherefore simple fornication, which is committed without injustice to another person, is the least grave among the species of lust. Then it is a greater injustice to have intercourse with a woman who is subject to another's authority as regard the act of generation, than as regards merely her guardianship. Wherefore adultery is more grievous than seduction. And both of these are aggravated by the use of violence. Hence rape of a virgin is graver than seduction, and rape of a wife than adultery" (ST II-II, Q 154).

17. The prohibition of suicide asserts an a priori connection between the will of a finite being and actions intended arbitrarily to destroy his life. It is also a claim about the respect owed the subject of morality
in one's own person (Gregor, 1960).

18. With regard to volunteering to serve in the army and waging war, Kant argued: "For they [the citizens of a state] must always be treated as colegisitating members of a state (not merely as means, but also as ends in themselves). and must therefore give their free assent, through their representatives. not only to waging war in general but also to each particular declaration of war. Only under this limited condition can a state direct them to serve in a way full of danger to them."

19. Kant acknowledges that certain types of distinctions exist among body parts: "... to have something cut off that is a part but not an organ of the body. for example. one's hair. cannot be counted as a crime against one's own person" (1991 [1797]. AK 423).


21. Even if Onora O'Neill (1981) is correct in her assessment that Nozick's arguments fail to show how individuals can become entitled to
full control over previously unheld resources, such criticism would appear inapplicable to organs. Human organs, unlike other goods, exist initially as part of individual persons (see also Ryan, 1981; Davis, 1981; Kirzner, 1981).

22. Peter Singer, for example, argues that "Utilitarianism has no problem justifying a substantial amount of compulsory redistribution from the rich to the poor. We all recognize that $1,000 means far less to people earning $100,000 than it does to people trying to support a family on $6,000. Therefore in normal circumstances we increase the total happiness when we take from those with a lot and give to those with little. Therefore that is what we ought to do. For the utilitarian it is as simple as that" (1981, p. 50; see also 1993, pp. 1-54).
CHAPTER FIVE

CONCLUSION

This study has critically assessed the possible ontological, moral, and political theoretical foundations of a market in human organs. It has examined what ontological and moral conditions would need to be met to legitimate the selling of human organs for transplantation. This work has considered what it means to own an organ, the circumstances in which governments have moral authority to regulate how persons dispose of their own body parts, as well as the costs and benefits of a market in human organs. It has evaluated not only the likely moral and other costs and benefits of such a market, but also the probable costs and benefits of its prohibition. In so doing, it has explored the arguments and assumptions cited in support of the emerging moral "consensus" which frames the nearly global prohibition on selling human organs for transplantation. This "consensus" holds that, unlike altruistically motivated donation, (1) offering financial incentives undermines consent, coercing the poor into selling their organs, and that (2) a market in human organs exploits the
poor, violates human dignity, and is morally repugnant. Moreover, opponents argue that such a market would lead to (3) greater inequality and injustice between the rich and the poor as well as (4) worse health care outcomes than the current system of donation.

The results of this study suggest that there are significant grounds for suspicion that such a consensus against payment for organs, while pervasive, fails adequately to be justified. For example, the "consensus" does not adequately consider basic foundational concerns regarding those factors which shift who shoulders the burden of proof as well as which reasons are relevant for meeting that burden of proof. These include (1) physiological and phenomenological distinctions among body parts (i.e., not all parts are necessary for embodiment/existence or even for adequate human functioning, nor are all parts experienced as part of oneself): (2) the ontology of personhood understood in general secular terms (i.e., replacing body parts which are distinguishable and separable from the existence/embodiment of persons is compatible with the full continued functioning of persons as rational moral agents); and (3) the closeness of the analogy between dominion/possession/ownership of one's body and dominion/possession/ownership of other types of things (e.g., it is implausible to presuppose without further argument that human organs are a social, rather than private, resource). Moreover, the consensus tends to gloss over (4) distinctions between future and present markets, (5)
the circumstance that many organs are harvested from cadaveric sources (i.e., former persons, who can not be physically harmed by procurement) and that (6) certain organs are more central to the existence of persons (e.g., the higher brain verses a redundant kidney), as well as (7) the ways in which the burden of proof shifts with assumptions regarding the nature and ground of morally justified political authority.

In the preceding chapters, I have argued that the global "consensus" appears in many areas to be not just unfounded but misguided. For example, while opponents argue that consent to organ sales are not fully voluntary, it is unlikely that barriers to autonomous consent respect the distinction between altruistic donation and commercial sale. For consent to organ donation to be morally effective it must be informed and free of coercion. On the one hand, concerns to provide adequate information regarding the risks of surgery or of the potential for serious complications apply to both donation and sale. Such concerns can be ameliorated in each case in the light of further analysis. On the other hand, offers to purchase organs cannot easily be understood as coercing the poor into selling. Such offers neither place potential vendors in unjustified disadvantaged circumstances nor deprive vendors of any pre-existing options. Regardless of whether organs are donated or sold, it is impossible fully to insulate patients and family members from external social and institutional pressures. In either circumstance, incentives are
strongest if the medical or financial resources are needed to avoid the suffering and death of a loved one. While offers to purchase organs may be seductive, they are not necessarily coercive. Indeed, they propose to advantage vendors in ways to which they have no prior entitlement. Moreover, autonomous rational choice among the available options remains possible.

Provided that physical and psychological harms are adequately compensated, vendors and recipients each benefit from the exchange. If moral harms, such as the objectification of persons as mere collections of space parts, are minimized, it is implausible to understand the market as necessarily exploitative. The market increases the number of options open to impoverished individuals to increase their prospects while saving the lives of patients who are desperately ill. In contrast, prohibition appears to exploit the poor and sick to support particular views of moral propriety and human dignity, which denies those impoverished and ill this opportunity freely to choose on their own judgments regarding how best to advantage themselves. Moreover, all systems of organ procurement and allocation objectify and commodify human body parts, even donation. The incentives to increase organ availability, whether through donation or sale, evokes an industry designed to procure, allocate, and transplant human organs. This industry, whether for-profit or non-profit, recasts organs as a scarce medical resource and "product" of exchange. On either
ground. one has specified a market for human organs, albeit a heavily regulated market, with carefully stipulated conditions regarding who bears the costs and benefits of procurement, distribution, and transplantation. It is inadequate to criticize commercial markets as improperly commodifying human organs without also addressing this critique to systems of donation. In short, while at times couched in terms of improper commodification, the debate is less about commodification than about who should receive the medical resources and who should bear the costs of appropriation and transfer.

As the exploration of Kant’s position demonstrated, selling organs is consistent with many influential conceptions of human dignity: vendors do not will to destroy themselves and selling an organ is a plausible manner in which to discharge a duty of charity. Moreover, organ selling is less risky than many other occupations. It is consistent with the health of persons, and the practice of saving others supports the respect and dignity of moral agents. Those who sell redundant internal organs participate in a life saving activity, at some risk to themselves, which is intended to alleviate suffering and to foster human dignity. Indeed, as the analysis of Aquinas’s principle of totality suggested, insofar as one’s intention in removing the organ is not to destroy the natural good of the body, then the sale of internal redundant organs can be consistent with the good of bodily functional wholeness. Those who sell organs engage
in transactions which can help others through the market and assist their family through the provision of resources otherwise not available. Selling organs can be an instance of an individual cooperating with others in society to provide for the needs of others, as well as for oneself. While prohibition is robustly paternalistic by demeaning the poor and sick by considering them unable to make moral decisions about their own fates, the market respects the dignity of vendors and patients as persons and rational moral agents able to make choices about their own lives.

On balance, concern with issues of equality and liberty favor a system of payments to those who supply human tissue. While opponents claim that a market will lead to a situation in which the poor will sacrifice their bodies for the health of the rich, while the rich gain unequal, and therefore unfair, access to a scarce medical resource, prohibition forcibly prevents those worse off, i.e., the poor and sick, from bettering their own situations. Insofar as a commercial market leads to an increase in the number of available organs, all potential recipients whether rich or poor stand a better chance of receiving transplants. This view also incorporates the idea that persons have the right to treat at least some physical parts of their bodies in some respects as objects of possession, gift and trade, such that it is plausible to understand the sources of human organs as entitled to the value of the benefits ultimately derived from their use. Legislating that donors may only transfer organs as a gift
does not thereby reduce the value of such organs to zero. Rather it transfers the value of the organs from donors and their families to other parties. Increasing vendor compensation reduces this strikingly unequal allocation of costs and benefits. Organ selling may be a means to generate resources for the poor which can be reinvested in personal as well as familial economic development, thereby decreasing financial inequalities. Even if a market might lead to some initial losses in equal access to expensive health care, this may be compensated for at the social level by gains in individual liberty as well as of personal and family wealth, and less total human suffering.

Community solidarity and altruism are also likely supported by the creation of a market. While prohibition closes off options for increasing the supply of organs, the existence of a market creates social space for persons to interact in the pursuit of private family and social goals. These may include, directed donation to members of a particular minority, the sale of organs to raise funds to feed and house the poor, or the pooling of money to purchase organs for the impecunious. If it is altruistic for a parent to give a kidney to a child to save his life, it can similarly be altruistic for a parent to sell a kidney to pay for a life saving operation. A market in organs can create and respect further opportunities for the expression of social solidarity and private altruism.
With regard to health care outcomes, it is plausible that a market would fare better than current systems of donation. Commercial incentives have the promise of leading to greater organ availability, with organs of better quality, and more efficient organ procurement for transplantation. For example, legal safeguards from tort liability, which are unavailable under donation, gear in with market based organ procurement, transplantation and scientific research. Torts predicated on warranty or strict liability are only possible if the transplanted organ is understood as a good which is being sold to the recipient. Organs removed from living persons are also more likely to be of significant use to recipients. They have greater vitality and can be screened in advance for defects, disease, or other negative factors. If organs are primarily procured from the recently deceased, such as accident victims, one loses both vitality and in the press of time some screening opportunities. Organ quality may be problematic precisely because of insufficient commercialization. In addition, indirect health benefits and life expectancy associated with increases in income, or resources to support educational training, are advantages in favor of permitting such a market. Insofar as there exists a social commitment to provide all with access to adequate health care, including organ transplantation, this commitment may be more effectively achieved with a market rather than through prohibition.

Finally, the purported moral repugnance of organ selling is not a
feeling nor an intuition all share. Feelings about the inappropriate nature of commerce in human organs can be countered by equally strong but contrary feelings. For example, those who object that organ vending is morally repugnant because the procurement operation is not performed for therapeutic purposes, should recognize that such criticisms apply equally to procurement in the case of altruistic donation. The Hippocratic injunction *primum non nocere* is equally satisfied or violated in either situation. Moreover, as the exploration of Locke’s arguments concluded, given adequate medical and social safeguards, selling organs is not plausibly analogous to slavery or suicide. Therefore, comparisons with such practices possess only rhetorical force. As with other ethical controversies, such as homosexuality, physician assisted suicide, genetic engineering, and abortion, one must determine whether generalized feelings of moral repugnance or intuitions regarding the wrongness of an action are justified, prior to presupposing that such ought to carry any weight in meeting the burden of proof, or lowering the standard of proof, to proscribe organ sales.

The arguments of the preceding chapters suggest in sum that there are good grounds for holding that the global “consensus” does not have the strength usually assumed. Indeed, there are strong grounds for re-assessing the foundational arguments it claims for support. First, it fails adequately to appreciate the phenomenological and physiological
distinctions among different body parts, the relative strength of ownership rights, as well as the general significance of forbearance, privacy and property rights. Second, the consensus fails as well to take adequate account of the ways in which a market would likely maximize health care benefits, promote equality, liberty, altruism, and social solidarity, protect persons from exploitation, and preserve regard for human dignity, more successfully than prohibition. Finally, with regard to Aquinas, Locke, and Kant, in each case their positions on closer examination do not globally preclude the selling of redundant internal organs. If certain premises are reexamined and recast in plausible ways, then their general positions can support the permissibility of organ sales.

Moral controversies achieve closure through loss of interest, agreement, force or sound rational argument (Engelhardt, 1996). While one might hope to resolve the controversy regarding organ sales through sound rational argument, there are good grounds for holding that the global "consensus" to proscribe organ sales fails to take adequate account of many of the issues central to the debate. Indeed, there are significant medical, moral, and social policy reasons for holding that legal prohibition of organ sales causes more harm than benefit. Despite the apparent potential of a market in human organs to increase the efficiency and effectiveness of organ procurement, as well as the number of organs
available for transplantation, the global consensus continues to hold that such a market is morally impermissible and promotes global prohibition. Yet, the urgent public health challenge due to the considerable disparity between the number of patients who could benefit significantly from organ transplantation and the number of human organs which are available for transplant will not be resolved through a rhetoric of moral repugnancy, exploitation, and human dignity. All of this leaves us with a well-founded basis critically to approach current national and international proscription of payments for human organs for transplantation. If this public health crisis is to be adequately addressed, any future policy assessment must honestly face and take account of the challenges presented by the analysis of this study.

Note

1. As already noted, this position draws on Pope Pius XII’s analysis which recast the principle of totality as allowing that charity might offer sufficient reason to violate the natural good of anatomical wholeness provided that the functional integrity of the body was maintained.
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