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Toward the Legalization of Markets in Used Human Body Parts

Abstract:

The legalization of markets in human organs would save lives. Human lives matter. Therefore, we should promote economic freedom and end the prohibition of commercial transactions in this sector of the economy.

Key words: transplants; organ markets; economic freedom; medical ethics

JEL Classification: I11

Prohibition of alcohol sales failed, the so-called War on Drugs continues despite decades of futile prohibition, and people purchase and eat animal parts the all over the world every day for sustenance without committing crimes. But the would-be consumer who tries to trade money for part of another willing person often runs afoul of legal authorities who have decided to impose their suboptimal alternative to a free market for organs. Instead, government enforces an anti-market, prohibitive, and deadly donation-based system, which coerces those in need of life sustaining exchanges to wait, sometimes until it is too late.

According to the Mayo Clinic's estimate, 20 Americans awaiting potentially life-saving organs from voluntary donors die each day (Staff 2019). The cause of the avoidable deaths is clear: present law. "These lost lives are not so much an act of God as they are an act of Congress because of its 1984 National Organ Transplant Act, as amended, which prohibits payment to organ donors" (Williams 2013). Beyond the daily deaths approximately 100,000 people are waiting for their turns once enough designated and matching donors have expired or part with a body part before death without financial compensa-

tion out of altruism (Staff 2019). The United States' current system involves a waiting game: people wait to maybe live long enough to possibly be matched or they die waiting. A more humane system between consenting adults who voluntarily want to transact would harness the power of free exchange between willing parties who have decided to make a deal *quid pro quo*.

Legalization of this market would thus save lives. With a price control, in effect, of zero for such transactions, demand is greater than supply. Many more people wish to receive organ donations than those willing to offer them. Allow the price to rise, qua legalization, and the tendency is to reach equilibrium, where the amount of organs supplied and demand would be equalized. Fewer people would perish, fewer patients would be consigned, for example, to kidney dialysis machines.¹ Black lives matter. White lives matter. All human lives matter. Present arrangements are predicated on the denial of these claims.

Yet the arguments against such exchanges abound.

A common argument against the willing sale of a body part from one to another may be classified as Ethical Equality. "If all patients have equal value as humans, then they should have equal access to health care. This stipulation crumbles, however, when organs can be bought and sold" (Bramstedt 2014).

Such a stipulation misses the point of view of the patient in need who will die without finding a matching organ. Waiting for his turn to be matched with an altruistic donor will not necessarily save his life. What he most likely wants above all else is to trade what he has – money – for what he needs – the right organ – on an open market partnered with a willing participant. Equality be damned since equality may cause his death and being equal in death for the sake of Ethical Equality amounts to a perverse form of *prima facie* inhumane suicide.²

¹ For the case in favor of legalization, see Anderson and Barnett, 1999; Barnett, A., 1999; Barnett, W. 1988; Barnett, Saliba, & Walker, 2001; Barnett and Saliba, 2004; Beard, Jackson & Kaserman, 2007–2008; Block, Whitehead, Johnson, Davidson, White and Chandler, 1999–2000; Block, 1987, 1988A, 1988B; Carey, 2002; Cherry, 1999; Cherry, 2005; Clay and Block, 2002; Crepelle, 2016; Dworkin, 1993–1994; Farber, 2015A, 2015B; Garner and Block, 2008; Healy, 2006; Hippen, 2005, 2008; Kaserman, 2002; Kaserman & Barnett, 2002; Malek, 2001; Radcliffe-Richards, 1996, 1998, 2001; Savulescu, 2003; Scott and Block, 2011; Taylor, 2005, 2006, 2007; Wilkinson, 2003; Young, 2004. For opposition to markets in human organs see Abouma, 2001, 2003; Adair and Wigmore, 2011; A Message from the Holy Father Pope Benedict XVI, 2009; Ascher and Delmonico 2019; Campbell, 2016; Childress, 2015; Cohen, 2003; Danovitch and Delmonico, 2008; Davis and Crowe, 2009; Delmonico and Scheper-Hughes, 2003; Delmonico et. al, 2002; Ethical Principles in the Allocation of Human Organs, 2015; Francis and Francis, 2010; Frey and Jegen, 2001; Goyal et al, 2002; Hughes, 1998; Jefferies, 1998; Jha and Chugh, 2006; Kolnsberg, 2003; Koplin, 2014; Lacetera and Macis, 2009; Lacetera et al, 2012; Mcgrath, 2007; Mellström and Johannesson, 2008; Moniruzzaman, 2018; Rippon, 2014A, 2014B, 2017; Rothman and Rothman, 2006; Satz, 2000; Scheper-Hughes, 2000, 2003A, 2003B; Stempsey, 1996; Tilney, 2008; Titmuss, 1970; Wright, 2015.

² Well, maybe not, exactly, "suicide." Is it beyond the realm of reason to contemplate the claim that those responsible for these deaths, the legislators who have enacted these laws, the police and judges who uphold them, are guilty of at least manslaughter, if not murder?

Another common argument against unfettered organ sales contends that the disparate impacts on poor persons precludes free market approaches. The possibility of poor persons resorting to organ sales to escape poverty serves as a trump card that bests the argument for the free trade of organs. "...The bodily autonomy argument put forth fails to recognize the very different realities different groups face. It assumes that each individual is given the same amount of control over their bodies, whereas bodies are subject to various societal pressures" (Krishnan 2018). Protection of the poor takes precedence over saving lives in the paternalist's position due to unequal levels of individual autonomy in society.

Moreover, the often-cited Iranian system seemingly illustrates the dangers of putting organs on a free market because poor Iranians face few options other than selling their organs (Krishnan 2018). But putting the needs of the poor on a pedestal misses the magic of the free market: as supply of a given good rises its price per unit falls for consumers as producers compete by lowering prices. Consequently compensation for organs would gradually decline as the market satiated consumer demand. Ultimately, the falling remuneration to donors would eventually fail to entice many poor persons to part with their body parts. In other words, organs would become cheaper over time, making the money paid to poor persons wane accordingly.

Notably, the paternalistic proponents of the poor person's position extrapolate from the unfree organ market of Iran as a "case study" (Krishnan 2018) indicating what a free market in America might look like. "Since 1999, Iran has created a program where 'A government foundation registers buyers and sellers, matches them up and sets a fixed price of \$4,600.' This is a very rosy construction" (Krishnan 2018). However, nothing about negating a free market would be called a "very rosy construction" since price fixing causes a market to be unfree. On the contrary, a free market allows for supply and demand to interact, thereby creating a price signal and possible profits for entrepreneurs to compete for using their scarce capital as outlays to meet the customer's demands through investment in supply of the undersold product. Price controls set by law – dirigisme – destroy free markets by removing the profit-motive from would-be investors of capital: the market's entrepreneurs. The only adverse action by government officials more destructive of a free market than a price control is the outright prohibition of goods or services sale altogether. Prohibition of organ sales is the present state in most countries.³

This argument from poverty also fails in several other regards. For one thing, the poor do not have any fewer rights than members of the middle or upper classes. And, yet, this argument implies that they do. The logical implication is that if there were only

³ Donations, of course, are entirely legal. But why should the same identical action, transferring an organ from one person to another, be considered licit, if no money changes hands, and illicit, if this occurs? One would think that our moral scope would be trained on the act itself, and not on something peripheral, such as financing. The same occurs in sexual relations. The law allows congress between consenting adults. But, when one person pays another for participation, it is labelled as "prostitution" and prohibited in many jurisdictions.

middle class and rich people, then markets in used bodily parts would be justified. Suppose there were no longer any poor people.⁴ Would opponents of freedom in this sector of the economy withdraw their objections? Hardly.

Then there is the implication not only that the poor are desperate, but that they are stupid. They are too ignorant to know what is in their best interests. If this is the case, why do we allow them access to the ballot box? If they are such low information folk, they should not be allowed to vote. But, they patently are able to access this political institution. That implies that they can be relied upon to know their own best interests.⁵

A total repeal of the National Organ Transplant Act to allow for the free exchange of money for human organs is overdue for three reasons: every would-be donor naturally owns himself, the donation system results in avoidable deaths, and the missing market for organs causes misallocations. Let us examine each of these considerations in turn.

Alienable property may be legally transferred from its owner to another person. Hence the Founding Fathers of the United States enshrined in American Constitutional law what they claimed were inalienable rights: rights that could not be transferred.⁶ Fast forward to the present. Workers alienate their labor resulting in wages paid by their employers. Landlords alienate their holdings to others for money. Sales of alienable pets commonly transpire between parties. Dead animals – including organs like liver – fill freezers and coolers at most grocery stores for consumers to purchase with money. However, under American law humans' body parts are another matter altogether. For example, an individual sells his own kidney to another person, then American authorities may arrest the buyer and seller for committing a crime of unlawful commerce between willing participants though no victim is harmed in the process. In America one may not voluntarily sell one's self, at least in the physical sense without committing a victimless crime.⁷

Codes of law prohibit the selling of one's body on pain of fine and confinement. Such punitive laws' logical effects result in the negation of an individual's right to self-ownership.⁸ Regardless of the law, self-ownership is *ipso facto* a true statement given that

⁴ Wealthy western nations have not quite, yet, accomplished this goal, but several are nearing it.

⁵ We presume, here, in making this argument that virtually all opponents of economic freedom in this instance also support democracy. For a critique of the latter, see Hoppe, 2001.

⁶ The existence of human slavery in the Colonies before, during and after the American War for Independence (1775–1783) and the ownership of humans as slaves by the Founding Fathers is a noteworthy hypocrisy given the rhetoric – all men being created equal and individuals possessing inalienable rights, etc. – contained in the Declaration of Independence and the Bill of Rights.

⁷ Exceptions to this prohibition include bone marrow, blood plasma, hair, nails and human waste.

⁸ Rothbard wrote "Each man owns himself," (2004, p. 770) but the ultimate teacher also wrote that voluntary slavery "...cannot be enforced on the free market because of the inalienability of personal will," (2004, p. 348). But there is a conundrum created by Mr. Libertarian himself. Rothbard points out that if someone owns something, including one's self, one must be able to sell that thing, including one's self, or he does not fully own the thing or himself. In other words, voluntary slavery by contract is legitimate when an individual agrees under contract to become a slave. For the case in favor of voluntary slavery, see Andersson, 2007;

scarcity is a condition of individuals' existence. Apodictically, only one person exists in and of himself in any given time and place.

To make a claim of ownership implies a claim against others. That is, others must refrain from interfering with your use of that thing. As such the very act of the body occupying its standing room is to make a claim against others because only one body can occupy the space at a time. Or even more precisely ...the very existence of one's body is to make claim against others, for no one else can occupy or use your own body at the same time as yourself (Brackins 2017, p. 272).

Predicated on an individual's existence, the concept of self-ownership conflicts with the legal prohibition of the sale of one's self or body part to others. As such this law denies an individual's natural right⁹ of self-ownership by putting one man at the mercy of the "arbitrary will of another man." Therefore the prohibition of individuals selling their own body parts is at best an unnatural artifice of the legal code and at worst a sinister means of unwarranted control over innocent individuals.

How a society answers the question of self-ownership cuts to the heart of who is in charge of whose life. "The first principle of a free society must be self-ownership of one's body; otherwise, we have slavery, or, alternatively, a situation in which one's body is a commons" (Barnett et al 2003, pp. 596–597). Unless elected officials believe that citizens are their slaves or the bodies of citizens belong to everyone – what might be termed *corpus* communism – these reigning members of the political class should restore the natural right of self-ownership, to wit, by repealing the National Organ Transplant Act and its amendments.

A more practical reason to cease the prohibition of citizens selling themselves boils down to the irrefutable Laws of Supply and Demand. Unfortunately for the potential consumers and producers of organs American law of the 20th Century prohibits the Laws of Supply and Demand to interplay in an organ market. According to Congressional mandate, the just price is not the market price for organs; in fact, no employment whatever of the price system is permissible when it comes to organs with deadly, daily costs to the desperate suffering from healthy organ deficits.

Even medical doctors – sworn to do no harm to their patients – recognize the grave error in disrupting the natural functions of a free market in organs.

Block, 1969, 1979, 1988, 1999, 2001, 2002, 2003, 2004, 2005, 2006, 2007A, 2007B, 2009A, 2009B; Boldrin and Levine, 2008; Frederick, 2014; Kershner, 2003; Lester, 2000; Mosquito, 2014; Nozick, 1974, pp. 58, 283, 331; Steiner, 1994, pp. 232–233; 2013, pp. 230–244; Thomson, 1990, pp. 283–284.

⁹ Locke (2012, p. 10) defined a natural right as follows: "Freedom of nature is being under no restraint except the law of nature. Freedom of men under government is having a standing rule to live by, common to everyone in the society in question, and made by the legislative power that has been setup in it; a liberty to follow one's own will in anything that isn't forbidden by the rule, and not to be subject to the inconstant, uncertain, unknown, *arbitrary will of another man* (emphasis added)."

The laudable goal of widespread organ donation cannot be achieved by forbidding the law of supply and demand from operating in this market. On the contrary, current policies are a clear contributing factor to the short supply of organ donors. Supporters of the compensation ban have unquestioningly allowed their mistaken moral discomfort to warp the market and condemn many to an unnecessarily early death (Adalja 2012).

American law prohibits the Laws of Supply and Demand to function with lethal consequences, whereas a free market for organs would save lives.

Lives aren't the only losses suffered by individuals under the Congressionally declared prohibition of life-sustaining exchanges. The misallocation of resources also results. As the adage holds, desperate people do desperate things. In the absence of a legal market some people invariably take to the black market. Organs are no exception to black markets filling prohibited unmet demand. "Sophisticated black markets exist across the world – particularly in developing nations (economically regressive regimes)¹⁰ – to extract organs, for example kidneys, parts of the liver, and even corneas, from living people, many of whom have been transported for the operation, some against their will" (Martin, 2019). When prohibition forbids a legal supply, an illicit supply will service the unmet demand. "With a worldwide demand for transplants exceeding supply, it was sadly predictable that unscrupulous actors would fill the gap by enticing desperately poor people to give up a kidney or some other organ with the often-unfulfilled promise of cash" (Martin, 2019). The deadly externality of a black market for organs creates a cascade of avoidable effects beyond the increased risk of being abducted for organ harvest.

Government officials, including Congressmen and bureaucrats, spend money on the prosecution of apprehended offenders and punishment of the guilty for the lucrative acts of fulfilling unmet needs under the very prohibition model enacted by Congress. The resources to enforce, prosecute and punish offenders are therefore consequences of the prohibition of all organ sales; they are all avoidable expenses since the demand of the black market is a result of the policy in the first place. Often, tragically, no one other than the parties involved in the legislation's implementation benefits. The costs of such laws result in misallocated resources in excess of the organs at the heart of the economic issue.

This leads us to yet another refutation of an argument against legalization. Critics point to the fact that at present, the effective price of a human organ for sale is zero. However, they assert, if free enterprise were allowed into this sector of the economy, the price would rise, and drastically so. Perhaps, a kidney would sell for \$10,000. If so, this would set up an incentive for criminals to attack people and seize their organs for sale. True enough. Supply curves slope in an upward direction. Increase the return for a criminal act, and organ thieves will have more of an incentive to ply their evil trade. However, this criticism of legalization fails. For, at present, there are black markets for organ sales, and

¹⁰ Developing nation is an inferior term to economically regressive regime.

the price received is much higher than that \$10,000. Stipulate that it is now \$50,000. This means that when legalization takes place, the price of an organ will *drop*, and thus there will be *less* coercive organ harvesting than at present.

Philosophically, the overall question of completely free trade or something less so divides economists into camps, ranging from those who favor a voluntary *laissez faire* free enterprise economy to advocates for the involuntary control of markets by government, commonly called socialism.¹¹ Most economists fall in between the two extremes on the spectrum of free trade. In the case of the prohibition of organ sales by Congress, the Austrian school has "...an alternative way of looking at the entire science" (Rockwell 2003, p. 41) of economics; proponents put forth an analysis of organ sale prohibition as fundamentally at odds with free trade.

Austrians view economics as a tool for understanding how people both cooperate and compete in the process of meeting needs, allocating resources, and discovering ways of building a prosperous social order. Austrians view entrepreneurship as a critical force in economic development, private property as essential to an efficient use of resources, and government intervention in the market process as always and everywhere destructive. (Rockwell 2003, pp. 41–42).

Unsurprisingly, the Austrian solution¹² would be the repeal of the existing prohibition – a destroyer of trade – between consenting sellers and buyers thereby allowing for the competitive and cooperative allocation of scarce resources, namely organs, on a free market.

Opening up a free market by ending the prohibition of organ sales would diminish the incentive for the criminals and create opportunities in a legal market for organs. But that would require legislators to acknowledge that the laws of economics, like supply and demand, supersede those of their own making. Politicians and "...advocates of political intervention do not realize that the laws of human action, economics, are unalterable" (Greaves 1973, p. 151). Simply put, adoption of a free enterprise approach to organs is the answer and the discipline of economics according to Austrians makes this point praxeologically: "Economics is the science which studies human behavior as a relationship between ends and scarce means that have alternative uses. Economics is a striving for efficiency in the use of means to attain selected ends and is essentially the theory of free enterprise" (Greaves 1973, pp. 9–10). The organs (means) need to be exchanged (individual action) to their recipient for his life's sake (ends). Legal prohibitions create the obstacles to the transaction's efficient completion; literally, death by decree of law: the outlawing of what would otherwise be likely life-saving free trade.

¹¹ The example of Iran as a free market for organ sales is fallacious because the regime in power fixes a set price for the exchange and oversees the transaction. Dirigisme is the antithesis of *laissez faire* free enterprise.

¹² Given that the goal was the preservation of human life.

With passage of the National Organ Transplant Act in 1984 members of Congress decided that they knew best that free trade did not work for Americans seeking a possibly life-or-death exchange of money for organs. In so doing these government leaders denied their financial providers with their alienable right to self-ownership, a tenet imprecisely¹³ rooted in the history and tradition of the nation. Enacting the legislation amounted to an attempt to deny the Laws of Supply and Demand by fiat. Human nature being a constant – man acts to achieve his highest end using available means – the results were predictable: a black market for organs supported by those on death's door unwilling to wait on a list. The black market in organs created its own set of unwilling victims and financial burdens borne by taxpayers in the form of the associated costs of enforcement, prosecution and detention of the opportunists willing to break the prohibition against organ sales. The Austrian school's solution is simply to allow for human action. Members of Congress would do well to eat the proverbial humble pie, repeal the prohibition of money for organs and thereby cease the senseless loss of lives that would otherwise be saved by allowing organ sales on the free market.

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¹³ Self-ownership by definition requires the alienability of the person. The Founding Fathers failed to make this clear by using the term “inalienable rights” in the Constitution.

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