

Please cite as: Gill M, Sade RM. Payment for Kidneys: The Case for Repealing Prohibition.

Kennedy Institute of Ethics Journal 2002; 12 (1) : 17-46

Payment for Kidneys: The Case for Repealing Prohibition

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Key words: transplantation, bioethics, organ donation, market for organs, organ sales, philosophy of medicine

BIOGRAPHICAL SKETCHES

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ABSTRACT

We argue that healthy people should be allowed to receive payment for one of their kidneys while they are alive — that the current prohibition on payment for kidneys ought to be overturned. We do not argue that it ought to be legal for an individual to *buy* a kidney. We make our case in three parts. First, we argue that the moral basis for our current policy on live kidney donations and on the sale of other kinds of tissue implies that we ought to legalize the sale of kidneys. Second, we address the objection that the sale of kidneys is intrinsically wrong because it violates the Kantian duty of respect for humanity. Third, we address a range of consequentialist objections based on the idea that kidney sales will be exploitative. We conclude that the case for prohibiting payment for organs cannot be rationally justified, especially in light of the annual loss of thousands of lives that could be saved if payment were not prohibited.

INTRODUCTION

Our society places a high priority on value pluralism and individual autonomy. With few constraints, people make personal decisions regarding what they wish to buy and sell based on their own values. There are laws prohibiting certain kinds of trade, however; these laws are generally aimed at preventing commercial interactions that are associated with serious harms. Payment to living organ donors has been perceived to be just such a harmful transaction.

The original Uniform Anatomical Gift Act (UAGA), originally approved by the National Conference of Commissioners on Uniform State Laws in 1968, was intended to permit individuals to specify their desire to donate organs at the time of their deaths (Uniform Anatomical Gift Act, 8 Uniform Laws Annotated, 1972). Although the framers of the proposed Act considered the possibility that a market for organs could develop, they did not conclude that buying and selling organs was intrinsically wrong. The UAGA was, in fact, silent on the question of payment for organs. Yet, today, every major organization that has an official position on the matter maintains that payment for organs is unequivocally unethical and must be legally prohibited. Why did this shift occur?

In the early 1980s, transplantation was expanding rapidly due to the introduction of improved immunosuppressive drugs. The need for a national system of organ procurement and allocation was identified and codified in the National Organ Transplantation Act of 1984 (NOTA) (1984). At the same time, organ brokerage began to develop (Jacobs 1984, pp. 238-256). A strongly averse public reaction to this development led to the inclusion in NOTA of a prohibition against the provision of any “valuable consideration” in exchange for a transplantable organ. Thus, all forms of payment for organs were made illegal, based on the ethical judgment that the harms of allowing payment substantially outweighed the benefits (Childress 1986).

We believe that possible harms arising from allowing payment for organs have been overstated, and that healthy people should be allowed to sell one of their kidneys while they are alive — that selling kidneys ought to be legal. In what follows, we will present the case for the legalization of kidney sales and answer objections to it. We confine our discussion to kidneys because the kidney is a duplicated organ and one that can be removed safely with little impact on the health of the donor, whereas removal of part of the liver or lungs is associated with higher risk. Moreover, kidney transplantation is by far the most common of all transplants and the discrepancy between kidney supply and need is the greatest.

In presenting our case, we will start by making several important preliminary points. We will then present an initial argument demonstrating that payment for kidneys should not be prohibited; this initial argument is not conclusive in and of itself, but we think that it constitutes a powerful *prima facie* or presumptive case for not prohibiting kidney sales. We will next address the view that kidney sales are intrinsically wrong. Finally, we will address the objection that kidney sales are wrong because paying for organs is exploitative. We hope to show that there are very good reasons for overturning the prohibition on payment for kidneys, and that neither the ‘intrinsically wrong’ objections nor the worries about exploitation withstand careful scrutiny.

PRELIMINARY POINTS

First, we are arguing for the claim that it ought to be legal for a person to *be paid for* one of his or her kidneys. We are not arguing that it ought to be legal for a potential recipient to *buy* a kidney in an open market. We propose that the buyer of kidneys be the agencies in charge of kidney acquisition or transplantation; that is, we propose that such agencies should be allowed to use financial incentives to acquire kidneys. We assume that allocation of kidneys will be based on medical criteria, as in the existing allocation system for cadaveric organs. Kidneys will not be traded in an unregulated market.¹ A similar system is currently in place for blood products: a person can receive money for giving blood products, but one’s chances of receiving blood are distinct from one’s financial status. We further note that transplant recipients, or their agents (e.g., insurance companies, Medicaid), pay for organs now, compensating the organ procurement organization (OPO) that organizes organ retrieval, the surgeon who procures the organ, the donor’s hospital, and so forth. The only component of the organ donation process not currently paid is the most critical component, the possessor of the kidney, who is *sine qua non* for organ availability.

Second, we believe the legalization of kidney sales will increase the number of kidneys that are transplanted each year and thus save the lives of people who would otherwise have died. We base this belief on two views that seem to us very plausible: first, that financial incentives will induce some people to give up a kidney for transplantation who would otherwise not have done so; and second, that the existence of financial incentives will not decrease significantly the current level of live kidney donations. The first view seems to us to follow from the basic idea that people are more likely to do something if they are going to get paid for it. The second view seems to us to follow from the fact that a very large majority of live kidney donations occur between family members and the idea that the motivation of a sister who donates a kidney to a brother, or a parent who donates a kidney to a child, will not

be altered by the existence of financial incentives. Although we think these views are very plausible, we acknowledge that there is no clear evidence that they are true. If subsequent research were to establish that the legalization of kidney sales would lead to a decrease in the number of kidneys that are transplanted each year, some of the arguments we make would be substantially weakened.²

Third, we are arguing for allowing payment to living kidney donors, but much of the supply of kidneys for transplantation comes from cadavers. We believe that payment for cadaveric organs also ought to be legalized, but including that issue unnecessarily complicates the discussion. If we successfully make the case for allowing payment to living donors, the case for payment for cadaveric kidneys should easily follow.

THE *PRIMA FACIE* CASE FOR KIDNEY SALES

With these preliminary points in mind, we will proceed to the initial argument for permitting payment for kidneys.³ This argument is based on two claims: The Good Donor Claim and The Sale of Tissue Claim.

The Good Donor Claim contends that it is and ought to be legal for a living person to donate one of his or her kidneys to someone else who needs a kidney in order to survive. These sorts of donations typically consist of someone giving a kidney to his or her sibling, spouse or child, but there are also cases of individuals donating to strangers. Such donations account for about half of all kidney transplants.⁴ Our society, moreover, does not simply *allow* such live kidney donations. Rather, we actively praise and encourage them.⁵ We typically take them to be morally unproblematic cases of saving a human life.

The Sale of Tissue Claim contends that it is and ought to be legal for living persons to sell parts of their bodies. We can sell such tissues as hair, sperm and eggs, but the body parts we wish to focus on here are blood products. A kidney is more like blood products than other tissues because, unlike the others, they are both physical necessities: people need them in order to survive. The sale of blood products is more like our proposed kidney sales, secondly, in that both involve the market only in acquisition and not in allocation: the current system pays people for plasma while continuing to distribute blood products without regard to patients' economic status, and we propose to do the same for kidneys. We do not typically praise people who sell their plasma, as we do people who donate a kidney to save the life a sibling. At the same time, we don't brand commercial blood banks as moral abominations, either. We generally take them to be an acceptable means of acquiring a resource that is needed to save lives. It is doubtful, for instance, that there would be widespread support for the abolition of payment for

plasma if the result were a reduction in supply so severe that thousands of people would die every year for lack of blood products.

If both The Good Donor Claim and The Sale of Tissue Claim are true, we have at least an initial argument, or *prima facie* grounds, for holding that payment for kidneys ought to be legal. The Good Donor Claim implies that it ought to be legal for a living person to decide to transfer one of his or her kidneys to someone else, while The Sale of Tissue Claim implies that it ought to be legal for a living person to decide to transfer part of his body to someone else for money. It thus seems initially plausible to hold that the two claims together imply that it ought to be legal for a living person to decide to transfer one of his or her kidneys to someone else for money.

Of course, there seems to be an obvious difference between donating a kidney and selling one: motive. Those who donate are typically motivated by benevolence or altruism, while those who sell are typically motivated by monetary self-interest.⁶ The Sale of Tissue Claim suggests, however, that this difference on its own is irrelevant to the question of whether kidney sales ought to be legal, because The Sale of Tissue Claim establishes that it ought to be legal to transfer a body part in order to make money. So if donating a kidney ought to be legal (The Good Donor Claim), and if the only difference between donating a kidney and selling one is the motive of monetary self-interest, and if the motive of monetary self-interest does not on its own warrant legal prohibition (The Sale of Tissue Claim), then the morally relevant part of the analogy between donating and selling should still obtain and we still have grounds for holding that selling kidneys ought to be legal.

There is also an obvious difference between selling a kidney and selling plasma: the magnitude of risk of the procedure. Phlebotomy for sale of plasma is simple, with minimal risk and no lasting side effects, while parting with a kidney involves major surgery and living with only kidney thereafter. It is very unlikely, however, that any long-term ill effects from the surgery itself and from life with only one kidney will occur.⁷ Indeed, the laws allowing live kidney donations presuppose that risk to donors is very small and thus morally acceptable. The Good Donor Claim implies, then, that the seriousness of the procedure of transferring a kidney is not in and of itself reason enough to legally prohibit live kidney transfer. But if the only difference between selling plasma and selling a kidney is the seriousness of the procedure, and if the seriousness of the procedure on its own does not constitute grounds for prohibiting live kidney transfers, then the morally relevant part of the analogy between selling plasma and selling a kidney should still obtain and we should thus still have grounds for holding that kidney sales ought to be legal.

Less prolixly, the point of the preceding two paragraphs is this. If we oppose permitting the sale of kidneys because we think it is too dangerous, then we should also oppose live kidney donations. But we don't oppose live kidney donations because we realize that the risks are acceptably low and that they're well worth taking in order to save lives. So it is inconsistent of us to oppose selling kidneys because of the possible dangers while at the same time endorsing The Good Donor Claim. Similarly, if we oppose kidney sales because we think people should not sell body parts, then we should also oppose commercial blood banks. But we do not oppose blood banks because we realize that they play a big role in saving lives. So it is inconsistent of us to oppose selling kidneys because it involves payment while at the same time endorsing The Sale of Tissue Claim.⁸

The considerable emotional resistance to permitting kidney sales may be based on a combination of distaste for payment and worry about risk. But if neither of these concerns on its own constitutes defensible grounds for opposing payment, then it seems unlikely that the two of them together will do so.

That said, many people continue to oppose kidney sales, and some of them do so directly in the face of The Good Donor Claim and The Sale of Tissue Claim. For such people, there are two possible methods of attack. They can argue, first of all, that there *is* a morally relevant intrinsic difference between kidney sales and both kidney donations and plasma sales, the considerations offered above notwithstanding. They can argue, that is, that kidney sales fall between the cracks of the moral acceptability of kidney donations and plasma sales — that selling kidneys is intrinsically wrong, and that the analogies used in the initial argument sketched above are too flimsy to support any morally weighty conclusion. Or they can argue that while there might be nothing intrinsically wrong with selling kidneys considered in isolation, the real world circumstances in which these sales would take place would inevitably lead to exploitation. In the next section, we will examine the view that selling kidneys is intrinsically wrong, and in the subsequent section, we will examine the view that kidney sales lead to exploitation.

OBJECTION: THE INTRINSIC IMMORALITY OF SELLING ORGANS

The Kantian View

The most common reason offered for the intrinsic wrongness of paying people for kidneys is that it violates the dignity of human beings or is incompatible with proper respect for persons. This opposition to kidney sales is usually grounded in the Second Formulation of Kant's Categorical Imperative, which tells us that we should never treat humanity, whether in ourselves or in others, merely as a means.⁹ But by selling a kidney, according to

this Kantian reasoning, we are treating humanity in ourselves merely as a means. Mario Morelli summarizes this position in this way.

The question that needs to be addressed is why, on a Kantian view, selling a body part is not respecting one's humanity, whereas donating a kidney may not be objectionable, at least sometimes. The short answer is, I think, that selling oneself or part of oneself is always treating oneself as a mere means. It is treating oneself as an object with a market price, and thus a commodity. The transaction, the selling, is done for the receipt of the money to be obtained. One's humanity, one's body, is being treated only as a means and not as an end in itself. It is not simply the giving up of a body part that is objectionable: it is giving it up for the reason of monetary gain. However, there are forms of alienation of the body, such as donation of a kidney to save another's life, that would not violate the principle... One is not using oneself as a mere means if one donates a kidney for such beneficent purposes. (Morelli, p. 320)

On the Kantian view, then, to sell one's kidney is to violate a duty to oneself; it is to violate the duty not to treat the humanity in oneself merely as a means.¹⁰

Unfortunately, this Kantian view seems to condemn not only kidney sales but also the sale of plasma. Cynthia Cohen has attempted to solve this problem by drawing a distinction between essential parts of the body and non-essential parts. She writes, "[A]ny part that is necessary for the functioning of the whole person, Kant asserts, is endowed with the dignity of that person. Kidneys and testicles are such essential body parts; hair [and presumably a pint of plasma] is not" (Cohen, p. 292). Cohen continues,

To sell human beings and those bits and pieces integral to them as embodied selves is to violate that which is essential to them... [A]s it violates humanity dignity to sell whole persons, so, too, it violates that dignity to sell body parts integral to whole persons. Thus, it is ethically acceptable to sell human hair, for this accoutrement is not integral to the functioning of the whole person, but it is not ethically acceptable to sell vital organs..." (Cohen, p. 284).

We have a duty to treat humanity in ourselves as an end, according to this Kantian view. And while selling non-essential body parts does not violate that duty, selling essential body parts does.

The Flaws In The Kantian View

There are two problems with this approach. First, even if selling a kidney does violate a Kantian duty to oneself, that would still not justify a legal prohibition on kidney sales; and second, it is doubtful that selling a kidney does violate a Kantian duty to oneself.

Even if selling a kidney does violate a Kantian duty to oneself, it is still far from clear that we are justified in having laws and public policies against payment for kidneys. For we generally do not use the law to enforce duties to oneself, and the Kantian opponents of kidney sales have not explained why we should use the law to enforce a duty to oneself in this particular case.¹¹

We can put the dubiousness of basing opposition to payment for kidneys on Kantian duties to oneself in terms of two different senses of autonomy. The first sense of autonomy is a thin sense — autonomy as non-interference. According to this sense, people are acting autonomously when they make their own self-regarding decisions free from interference by others. This sense of autonomy is neutral on the nature of the decisions that people make and on the decision-making processes that they go through: if a person isn't harming someone else, on the thin non-interference conception of autonomy, then she should be left alone to do whatever she wants, regardless of what it is or why she chose to do it. The second sense of autonomy is the robust Kantian notion of autonomy as self-legislation. According to this view, people respect their own autonomy only when they are motivated by rational moral law. This sense of autonomy is definitely *not* neutral on the nature of a person's decision or decision-making process; even if an action is entirely self-regarding, it can still violate Kantian autonomy if it fails to live up to certain very high standards of self-respect or if it is grounded in the wrong kind of motive.

The thin sense of autonomy implies that we should legalize kidney sales, for the decision to sell a kidney is self-regarding, so the non-interference model tells us that each person should be allowed to make her own decision. According to Morelli and Cohen, the robust Kantian sense of autonomy implies that it is wrong to sell a kidney because doing so involves the wrong kind of motive and thus violates the rational moral law. But even if Morelli and Cohen are right and selling a kidney does violate Kant's categorical imperative, that still will not prove that kidney sales ought to be illegal. For the robust Kantian sense of autonomy is not the proper guide for governmental legislation. We do not make laws to enforce the Kantian duty to respect humanity in oneself. Governmental law making is, rather, primarily geared toward the promotion of autonomy in the thin non-interference sense.

The concept of informed consent is instructive here. Over the course of the last fifty years or so, we have developed laws on informed consent that ensure that individual patients have the liberty to make their own decisions about what will happen to their bodies. The value underlying these laws is the non-interference sense of autonomy.¹² Do our informed consent laws have as their goal the promotion of robust Kantian duties to oneself? No, they do not. In fact, the goal of informed consent laws is to *prevent* the imposition of robust moral views on the individual. Were we to try to use the law to enforce Kantian duties to self, we would have to trash a great deal of informed consent legislation, for informed consent legislation is intended to allow people to make decisions on the basis of their own view of personal morality, regardless of whether or not that view accords with Kantianism. But since views of Kantian duties to self should have no role in legislative decisions about informed consent in general, they should not have any role in legislative decisions about kidney sales in particular.

But that's not the worst of it for the Kantian opposition to selling kidneys. The worst of it is that there's no good reason to think that selling a kidney violates even the robust Kantian sense of autonomy.¹³

Kant says that we ought not to treat humanity in ourselves merely as a means. But my kidney is not my humanity. Our humanity — what gives us dignity and intrinsic value — is our ability to make rational decisions.¹⁴ And a person can continue to make rational decisions with only one kidney. Thus, Cohen's distinction between essential and non-essential parts doesn't help her cause at all, for a person can function perfectly well with a single kidney and so a second kidney cannot be essential to personhood. Selling a kidney does not destroy or even seriously compromise what Kant says is intrinsically valuable and dignified.¹⁵

The problem with the Kantian opposition shows up clearly when we consider Morelli and Cohen's claim that kidney sales are immoral because they violate "bodily integrity." Now if we take "bodily integrity" in its most literal sense, then selling a kidney clearly violates it. But such literal violations occur whenever a person sells or donates plasma or gives a kidney to a relative, so opponents must not be claiming that it is wrong to engage in any activity that breaks the surface of the flesh and extracts a bit of the body. What, then, is the sense in which selling a kidney violates "bodily integrity" but selling other body parts does not? Here's how Morelli tries to explain it,

I think that a reasonably strong case can be made for the value of bodily integrity in terms of the Kantian principle of respect for the persons, insofar as human persons are embodied. After all, it is undeniable that our existence as rational and autonomous beings and the exercise of our powers of rationality and autonomy are dependent to a considerable extent on our physical well-being... [But] what we do to or with

our bodies can ... constitute or contribute to the impairment of our capacities for rationality and autonomy”
(Morelli, p. 321).

The underlying moral idea here is it violates one’s humanity to engage in activities that “impair” one’s “rationality and autonomy.” That is why suicide and excessive drug use are wrong. But there is no reason to believe that selling a kidney impairs one’s rationality and autonomy in any significant respect. The medical data simply provide no evidence that individuals who have given away a kidney suffer any grave limitations or restrictions on their future decision-making.

The reason even a Kantian should accept kidney sales stands out sharply when we contrast that activity with suicide and selling oneself into slavery. Suicide and selling oneself into slavery clearly violate the Kantian duty to oneself. They violate this duty by destroying one’s humanity through annihilation of the ability to make rational decisions. But while death and slavery are incompatible with rational decision-making, selling a kidney is not. A kidney seller will be incapacitated for several days or weeks while recovering from surgery, but many acceptable activities (such as contracted labor and military service) involve giving up decision-making in the short-term for long-term benefit. Nor are the kidney seller’s future options significantly limited: there are few intellectual side effects or physical sequelae. The fact that two athletes (Sean Elliot and Pete Chilcutt) have played in the National Basketball Association with only one kidney makes it difficult to argue that having one kidney compromises the normal range of physical activity.

There is, moreover, an additional problem facing those who would try to find Kantian grounds for opposing kidney sales while still allowing kidney donations. Kant thought the moral status of an action was based entirely on the motive behind it. A person who sells a kidney, however, may have motives that do much better on the Kantian scale than a person who donates a kidney. A living donor, for instance, could be motivated entirely by illogical guilt and an irrationally low estimation of her own worth, or by an emotionally-rapacious need for grateful adoration, or by a twisted desire to indebt and manipulate someone else. A kidney seller, in contrast, may be motivated entirely by the idea that he ought to save someone else’s life if it is in his power, and by his commitment to earn the money necessary to pay for his child’s education. Needless to say, we do not mean to cast aspersions on the motives of those who donate their kidneys, nor to suggest that all those who sell their kidneys will be motivated entirely by altruism. Our point is merely to highlight another way in which Kantian moral theory fails to justify both the practice of kidney donation and the prohibition on kidney sales. Kant’s moral theory, concerned as it is with one’s

motive, has its place in the first-person deliberations of moral agents; it is ill-equipped to draw the third-person legal distinctions the opponents of kidney sales want to maintain.

Kidneys Are Not Property

The problems with the Kantian opposition also plague the related objection that kidneys cannot legitimately be sold because they are not *property* — that is, not the sorts of things that are ours to sell. Selling a kidney, according to this objection, is morally equivalent to selling a person. And just as the latter violates fundamental moral restrictions on property and ownership, so too does the latter. Fried has this idea in mind when he says that “when a man sells his body he does not sell what is his, he sells himself” (Fried, p. 142), as does Cohen when she says that “human beings and their integral parts are not the sorts of objects that can become the property of others, even if their market equivalent is given in exchange... To sell human beings and those bits and pieces integral to them as embodied selves is to violate that which is essential to them” (Cohen, p. 294).

Now in a certain sense, selling one’s body is equivalent to selling one’s self, for one cannot exist without one’s body. It may even make sense to say that one *is* one’s body. If I sell my body to someone else, then that person will have total control over my body, and a person who has total control over my body has something very close to total control over me. When I cede total control of my body to someone else, in other words, I have in effect enslaved myself to him, and this is clearly a Kantian violation.

But although Cohen and Fried are right to say that the sale of one’s body is morally equivalent to self-enslavement, it is a mistake to go on to claim that kidney sales are wrong in the same way.¹⁶ The error is to equate selling one’s kidney with selling one’s *entire* body; the two things are not the same. A person who sells a kidney still has the rest of her body left. And she can continue to control her own destiny after that. Indeed, the money from the sale of a kidney may enhance the range of choices for the seller, increasing rather than decreasing her capacity to control her own destiny. So while one’s *entire* body is not the sort of thing that should ever become property, that does not imply that a *part* of one’s body cannot ever become property.¹⁷

None of what we have said so far is meant to establish that selling a kidney must accord with everyone’s view of duties to oneself. Undoubtedly, many people believe that selling a kidney would be the wrong thing for them to do. Other people, however, may believe that selling a kidney is right for them. We have seen no justification — Kantian or otherwise — for using the law to impose the view of the first group upon the second.

OBJECTION: EXPLOITATION

Much of the opposition to payment for kidneys is based not simply on Kantian duties to self but on the real world circumstances in which such a practice would occur. A market in kidneys, it is said, will inevitably be exploitative, and for this reason we should not allow it.¹⁸ Some of the worries about exploitation are fueled by stories in the popular press of the international black market in kidneys. Such stories typically involve desperately poor people from underdeveloped countries selling their kidneys to wealthy individuals from developed countries. The wealthy individuals pay very large sums for an uncertain product; the poor people receive their payment and are then hastily returned to their desperate lives, with poor medical follow-up and without one of their kidneys.¹⁹

The international black market in kidneys is eminently worthy of moral condemnation, and the popular press has been right to expose it. But the horrible stories do not constitute justification for a blanket rejection of payment for kidneys in this country because there are two crucial differences between the international black market and the legal domestic program we propose.

First, on our proposal the medical setting in which legal kidney transference would take place is precisely that of contemporary transplantation, safe and medically sophisticated. Screening would select only potential kidney sellers whose kidneys are suitable for transfer and whose medical condition predicts minimal risk. Follow-up care would be scrupulous. Sellers would, in other words, receive exactly the same medical attention and treatment that living kidney donors now receive in this country. The people to whom the kidneys are transferred will also receive the same medical attention and treatment that kidney recipients currently receive.

Second, the domestic program we propose involves money only in the acquisition of kidneys, unlike the international black market. Allocation of kidneys would be based on medical need, as it is today. No private individual would be able to buy a kidney outside the system. Moreover, the poor will have just as much chance as the rich of receiving one of these kidneys.

Exploitation

These two differences between an international black market and a legal domestic program will not, however, dislodge everyone's belief that payment for kidneys is exploitative. The problem, some will continue to believe, is that even if the *benefits* are spread evenly over the economic spectrum, the *burdens* will still fall disproportionately on the poor. For it is the poor who will sell, not the rich. And there has to be something deeply morally wrong with a proposal that results in the neediest giving up a kidney while the fortunate do not.

Though this objection seems solid, the reasoning behind it is surprisingly vague. And when we clarify the ideas underlying the objection, it turns out to be much less substantive than it initially appears.

There are two different ways of understanding the objection. One can hold, first of all, that kidney sales are morally unacceptable no matter who does the selling and the proposal to legalize them is especially pernicious because the poor will be disproportionately affected. Or one can hold, secondly, that kidney sales *per se* are morally unobjectionable, but that we know that in the real world the sellers will be disproportionately poor and this economic disproportionality makes the proposal morally unacceptable. We will examine these two versions of the objection in order.

If payment for kidneys were morally unacceptable no matter who does the selling, then it would be especially offensive that the sellers are disproportionately poor. An activity that victimizes everyone it touches is made worse when those affected are especially vulnerable. The problem with this objection, however, is that it simply assumes without argument that such payments are morally unacceptable and thus ought to be illegal. But the moral and legal status of kidney sales is just what is under dispute. The objection thus begs the question. Of course, many people believe there are independent reasons for thinking that paying for kidneys is immoral and ought to be illegal, regardless of who receives the payment. But they have to articulate and defend those reasons before they can legitimately claim that economic factors will make matters worse. Pointing to the fact that most kidney sellers will be poor will not strengthen a weak argument for the intrinsic wrongness of allowing kidney sales.

The second way of understanding the objection contends that paying for kidneys might not be intrinsically wrong, but we ought not to allow such sales because the resulting situation in which the poor sell and the rich do not would be morally unacceptable.

Some people might be drawn to this objection by a concern with equality, believing that it is morally unacceptable to implement any policy that widens the gap between rich and poor. An egalitarian principle of this sort requires argument, but even if we grant for the moment the essential importance of equality, it still does not speak against paying for kidneys. If paying for kidneys is legalized, the ratio of poor people with only one kidney to rich people with only one kidney will probably rise. The kind of equality that matters to egalitarians, however, concerns not the presence of one kidney versus two but economic and political power. And there is no reason to think that allowing payment for kidneys will worsen the economic or political status of kidney sellers in particular or

poor people in general. To simply equate the selling of a kidney to being worse off is to beg the question once again.

It might seem more promising to cast this objection in terms of consent and coercion. No one should give up her kidney unless she has freely consented to do so. According to this objection, however, the people who end up selling their kidneys will be so desperate that their decision to sell will be neither reasonable nor rational, so should not really be counted as free consent at all. Their poverty will in effect coerce them into selling their kidneys. But, the objection continues, it is clearly immoral to take advantage of others' poverty in this way. For the mere fact that we can find people desperate enough for money to do something they would not otherwise do is no proof that it is reasonable or rational for them to do it, and thus no justification for allowing them to do it.²⁰

On this view, the amount of money involved is what vitiates true consent to sell a kidney.²¹ These worries about money could come in two different guises. One could claim that paying for kidneys will be coercively exploitative because the sellers will be paid too little money, or one could claim that paying for kidneys will be coercively exploitative because the sellers will be paid too much.

Those who hold that the payment will be too low point to the international black market, where payment for a kidney is often five thousand dollars or less.²² Considering the ordeal the sellers must go through, this is taken to be a relative pittance, and certainly not enough to alter in any serious and long-lasting way the dire circumstances that forced the people to sell their kidneys in the first place. On this view, in other words, selling a kidney for five thousand dollars is so manifestly unreasonable that anyone who agrees to do it must be too desperate to give truly informed consent.

One way of responding to this concern is to mandate that kidney sellers receive a much higher sum. Some may object, however, that if the sum is too high, it will unfairly manipulate people into making irrational decisions; large sums of money can tempt many of us to do something that is wrong for us to do.²³

Clearly, though, the worry that people will be paid too little or too much for a kidney is not fatal to the case for payment. There are two ways to view this aspect of the exploitation issue. First, there is a certain amount of money that is universally too much to pay for a kidney, and a certain amount that is too little. Second, there is no objective way to decide universally the question of the monetary value of a kidney. In the first case, the universal non-exploitative payment can be established by setting the fee so that the sellers are reasonably compensated for their ordeal without being unduly tempted to abandon their principles. We are not arguing that kidney sales be left

entirely up to an unregulated market, so we do not rule out the idea that the price could be adjusted to ensure fairness and consent. The second case holds that personal values and circumstances make it impossible to set a single dollar amount for a kidney that would be reasonable and non-exploitative for all potential sellers of kidneys. Personal needs and values, regional economy, and numerous other factors will widely vary the payment level at which a person will choose to part with a kidney. The sum of five thousand dollars will have one value to a poor person living in economically depressed Appalachia, for whom five thousand dollars provides the means to move to an economically expanding area. It will have a quite different value to a similarly poor person living in an urban area, who is satisfied with her routine though menial job and is comfortable with her life. For such a person, this sum of money may represent merely a blip in her otherwise stable, though low, financial circumstances. The most we can hope to do, such a position suggests, would be to set the price of a kidney at a level that would persuade a sufficient number of sellers to relieve the kidney shortage (Barnett and Kaserman 1993).

These solutions, however, will leave unsatisfied some of those who believe selling kidneys to be coercively exploitative. The decision to sell a kidney, these people will maintain, is always unreasonable or irrational, no matter what the price, and so no one can ever truly and freely consent to do it. There is something crucially wrong with the decision to sell a kidney, regardless of whether one is paid a thousand dollars or a million. But to hold that it is irrational or unreasonable to sell a kidney no matter what the price is to revert once again to the view that selling a kidney is intrinsically wrong. It is to assert that kidney sales would be wrong even if people across the economic spectrum did it, and to abandon the idea that what makes kidney sales wrong is that only the poor will do it. Now many people do believe that it would be wrong to allow kidney sales no matter who engages in them. As we have noted above, however, that belief requires justification, and until that justification is provided, the fact that poor people are more likely than rich people to sell their kidneys does not on its own constitute a moral objection to the legalization of kidney sales.

Moreover, The Good Donor Claim will make it very difficult to show that it will always be irrational or unreasonable to sell a kidney, no matter who does the selling. For if it can be rational and reasonable for a person to decide to donate a kidney — to a relative or to a stranger — it is difficult to imagine why it must always be irrational and unreasonable to sell a kidney. It seems plausible that a live seller can gain from the sale something intangible that is equal in value to what the live donor gains. Indeed, it is quite plausible that a living seller can gain exactly what a living donor can gain — the satisfaction of saving a life, or of significantly improving the life prospects of

another — *plus* a financial reward. If it is rational or reasonable for a living person to donate a kidney, then it seems that it would also be rational or reasonable for a living person to sell a kidney when she receives from the transaction the same benefit as the donor plus more.

Perhaps, though, some opponents will continue to maintain that the mere fact that only the poor will sell is clear evidence of the coercively exploitative nature of paying for kidneys, the considerations above notwithstanding. Such opponents might base their view on the idea that something that no wealthy person would ever agree to do must have some essentially rebarbative quality that always makes it wrong to inflict on the poor. The opposition might, in other words, hold a principle such as this: if the only people who will agree to X are poor, then X must be an activity to which no one can truly and freely consent.

The problem with this kind of principle is that it is inconsistent with many of the jobs that employ a large percentage of our population. No wealthy person will ever choose to clean toilets for a living, or pick strawberries. But that does not prove that it is immoral to allow people to do these jobs. Of course we should be concerned about the wages and conditions of custodians and fruit pickers. But the solution is to take measures to ensure fair wages and tolerable conditions, not to ban public toilets and commercial strawberries. Similarly, if we are concerned about the price and safety of kidney sales, then the answer is not to ban them but to make them as fair and safe as possible.

Can the surgical procedure associated with kidney sales ever be really safe? We think it can. There are risks, to be sure, but they can be minimized so that the procedure will pose less of a threat to the seller than do many jobs and activities that our society currently allows. Kidney donation is now not merely allowed but actively encouraged, precisely because these risks can be minimized. And on our proposal, potential sellers will be screened and followed just as carefully as potential donors, so that the risks to the former should be no greater than the risks to the latter.

Additional Flaws in the Exploitation Argument

In the matter of unequal appeal to poor and to rich, it may be instructive to compare our proposal for kidney sales to the current practice of payment for drug tests on human subjects.²⁴ Wealthy people sign up to be subjects for paid drug tests less often than relatively poor people do. The reason for this discrepancy is that drug tests are unpleasant, inconvenient, and not entirely free of risk. But our public policy dictates that so long as certain standards are met, it is morally acceptable to pay people to be subjects of drug tests. These policies are based on the ideas that the benefits of drug testing are considerable, and that it is possible to implement standards that offer

satisfactory (though imperfect) protection to test subjects. The case of kidney sales is analogous. The benefits are considerable, and proper regulations can ensure satisfactory (though imperfect) protection to the kidney sellers.

Does that mean everyone should find it pleasant to think of more poor than rich people selling their kidneys? Not at all; this image will always be distasteful to many. But many people also find it distasteful that it is the poor who clean the toilets, pick the strawberries and volunteer as a paid research subject. If this distaste does not justify outlawing public toilets, commercial strawberries and payment to research subjects, then it will not, on its own, justify a ban on kidney sales either.

Some might try to rescue the exploitation objection by drawing an analogy between payment for kidneys and buying one's way out of military service; they might claim, that is, that it is wrong to allow such payment in the same way that it is wrong to allow people to buy their way out of military service in times of a draft.²⁵ The line of thought goes like this: military service is dangerous, but, because it serves such a great purpose, it is sometimes necessary to ask people to do it. There is something repugnant, however, about the idea of rich people who have been drafted being able to buy their way out of military service by paying poor people to take their place. It is repugnant because it promotes a society in which the poor do the dangerous dirty work of fighting for the rich. So while military service is morally acceptable, payment for military service is morally unacceptable, as it offends against our idea of the equal dignity of all citizens. But payment for a kidney, according to this objection, offends in just the same way. The case of military service thus shows, on this view, that even if donating a kidney is acceptable, and even if it is not irrational or unreasonable for people to accept money for their kidneys, allowing payment for kidneys is still unacceptable because it promotes a society in which the poor do all the dangerous dirty work, and thus violates our ideas of equal dignity.

On closer inspection, however, the analogy to military service does not damage the case for kidney payment but bolsters it. Currently, we pay people to serve in the military. We realize that military service is dangerous, but believe nonetheless that it is acceptable to have a force made up entirely of "paid volunteers." This state of affairs would seem, if anything, to support the case for kidney payment, not detract from it, because the military seems to be an example in which we think it acceptable to pay people to undergo an ordeal that carries with serious risks. And while the volunteer military does not draw exclusively from those in poverty, the majority of enlistees (and an even larger percentage of those who can expect to serve on the front lines) come from the lower part of the economic spectrum.

What is morally offensive about the military example is the idea that someone would buy his way out of *conscripted* military service. That moral offense would be tellingly analogous to payment for kidneys, however, only if society were justified in forcing people to transfer a kidney, and we were proposing to allow people to pay others to take their place in this compulsory kidney donation scheme. Needless to say, we are proposing nothing of the sort. The underlying point here is that the military example gains much of its intuitive power from the background assumption that individuals called up in times of war *owe* their country military service. But we do not think any living person has a duty to sell a kidney, any more than we think any living person has a duty to take a certain kind of job or become the paid subject of a drug test. And once we recognize this difference between the two cases, the analogy between military service and kidney sales falls flat.

Slippery Slopes and Commodification

There is one final type of argument against kidney sales that we have not yet directly addressed: slippery slope arguments. They hold that kidney sales ought not to be legalized because doing so would contribute to the degeneration of our society. Their legalization would, according to this argument, promote an “everything is for sale” mentality that involves a commodifying conception of people that is incompatible with human flourishing.²⁶ There are several ways of filling in this form of argument.

One way in which the slippery slope argument can be filled in is by pointing to other medical procedures that are currently condemned but may begin to appear more acceptable once kidney sales are legalized. One might worry, for instance, that if we allow living persons to sell kidneys today, we will be more likely to allow living persons to sell hearts in the future. The hideousness of heart sales, however, is so great that we ought not to allow kidney sales today. The problem with this version of the slippery slope argument is that it ignores the substantive moral difference between selling a kidney, on the one hand, and selling a heart, on the other. As we’ve noted throughout this paper, the best medical evidence suggests that a person who gives up a kidney will not be significantly impaired, while a person who gives up her heart will die. Our justification for kidney sales thus cannot be extended to live heart sales. We see no reason to believe, moreover, that the legalization of kidney sales would affect societal attitudes in such a way that people will eventually find the prospect of living persons selling their hearts less shocking. After all, the chief idea behind the legalization of kidney sales is that it will save lives. There is no warrant, therefore, for the claim that the legalization of kidney sales will pave the way for acceptance of living heart sales, which would take just as many lives as they save.

A second way of filling in the slippery slope argument is to hold that the legalization of kidney sales will hasten the societal breakdown of generosity, love, and friendship.²⁷ The worry here is that such legalization will transform an activity that is currently entirely free of commercial aspects into mere commerce, thus promoting a mind-set that views other people in more commercial (less generous, loving, and friendly) ways. It is unclear, however, why we should think that the legalization of payment for kidneys would damage generous, loving, friendly relationships. It is unlikely, for instance, that the legalization of payment for kidneys will affect the relationships between living people who freely donate their kidneys and the people they donate them to. For as we've noted above, the vast majority of free live kidney donations are between family members, and it is implausible to claim that legalizing payment for kidney transference between strangers will erode the bonds of love and friendship between, say, a brother and sister, parent and child. It is true that legalizing payment for kidneys will result in certain people (i.e., kidney sellers) engaging in a commercial activity they would not otherwise have engaged in. But there is no reason to believe that those people will have fewer loving and friendly relationships than they did before — no reason to believe that sellers will care less for the people they already care for, or that the people that care for them now will care less for them in the future.

Those who advance the slippery slope argument might claim in response that their concern is not that the legalization of kidney sales will damage close loving relationships that already exist, but that it will alter the view we take of individuals with whom we are not intimately involved. The concern is that we will begin to take a more hardened view of strangers and non-intimates — that we will view them more as spare parts for sale and less as persons with dignity. This concern, however, is so vague as to be virtually impossible to evaluate, and so doesn't seem to outweigh the concrete benefit of saving lives, which the legalization of payment for kidneys promises. It seems to us, moreover, that legalization of payment for kidneys could lead people to develop a hardened attitude toward humanity in general only if they conflated an individual's kidney with the person as a whole. While such a mistake is possible, we see no reason to think the population at large will make it.

But slippery slope advocates might fortify their position by pointing to the very analogies we have used in this paper to make the case for permitting kidney sales. We have maintained that it should be acceptable for poor people to sell their kidneys because it is currently acceptable for poor people to sell their blood, eggs and sperm and to take jobs that are menial (e.g., cleaning toilets) and dangerous (e.g., fighting on the front lines). But our opponents might argue that we shouldn't sanguinely accept the fact that poor people have to do these things.

According to this view, rather, it is morally egregious that poor people have to do these things, a terrible aspect of our commodifying, exploitative society. And the legalization of payment for kidneys will only make matters worse. It will only push us further down the road of societal stratification and personal alienation. This version of the slippery slope argument casts an exceedingly wide net. The crucial question is whether one is willing to take in everything it catches. The argument implies that fundamental elements of our capitalist system — elements that create the situation in which poor people end up doing things wealthier people do not — are worthy of moral condemnation. And while some people will happily embrace that implication, we suspect many opponents of kidney sales will not. We would be surprised, that is, if most of the opposition to kidney sales turned out to be grounded in Marxist political philosophy and if most of the people who oppose kidney sales embed their position within a general rejection of capitalism. Moreover, if kidney sales are wrong because, like the other indignities poor people have to suffer, they are a symptom of a fundamentally immoral capitalist system, then it seems the appropriate response is to work for a redistribution of wealth and a change in the means of production. From the anti-capitalist perspective, opposing kidney sales (which could provide rapid financial opportunity for some poor people) while blithely acquiescing to the rest of the system appears to be unhelpful at best and hypocritical at worst.

Between payment for kidneys and many menial jobs, furthermore, there is *disanalogy* that may strengthen the case for the former. Kidney sales are not intended to produce luxuries, increase convenience or cater to whims, as many menial jobs do. Kidney sales are intended to save lives, with minimal risk to the seller. And the likely prospect of saving thousand of lives outweighs the highly speculative nightmare scenarios of the various slippery slope arguments we have encountered.

CONCLUSION

Undoubtedly, many people will continue to oppose kidney sales, regardless of the arguments we have offered. For many people will continue to find the sale of a kidney simply repugnant, a feeling that rational argumentation alone may be incapable of dislodging.²⁸ But we should not let this feeling of repugnance hold hostage our moral thinking. For a great many things we now hold in the highest esteem — including organ transplantation itself — occasioned strong repugnance in times past.

Still, it is there in our psyches and hard to shake: the sense that there is something unsavory, something sharply distasteful, about paying a perfectly healthy individual to submit to a major operation and to live thereafter without one of his internal organs. The mind flinches at the thought of what this individual will go through for

money. This reaction, however, may be the result of restricted vision, for there is another part of the story, another image that we must attend to before we can honestly say that we are responding to the matter in its entirety.

The other part of the story is the person waiting for a kidney — the person who will live if he receives a kidney or die, or at least suffer needlessly, if he does not. A complete emotional response requires that we frame in our mind an image of this sick person, as well as of her family and friends, that is just as vivid as our image of the healthy one.

When we complete the picture, we may find that our feelings of repugnance begin to soften, perhaps to dissipate. Such imaginative exercises should not substitute for rational moral arguments. But they may help pave the way for a fair consideration of those arguments.

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NOTES

¹ This is an example of what Margaret Radin has helpfully labeled “incomplete commodification” (Radin, p. 1919).

² Titmuss and Singer have argued that the existence of financial incentives for blood products decreases the amount of blood products overall, and some people might believe that the same argument can be extended to financial incentives for kidneys, leading to the conclusion that payment for kidneys will decrease the overall number of kidneys available for transplant. Because live kidney donations are almost always between family members, we believe that there is a significant disanalogy between blood and kidneys that makes it illegitimate to transfer Titmuss and Singer’s conclusions to the kidney debate. We do, however, remain open to the possibility of evidence contrary to our current belief that payment for kidneys will increase supplies. For discussion of Titmuss and Singer in relation to kidney sales, see Campbell, pp. 41-42, Cherry, pp. 340-341, and Harvey, p. 119.

³ Similar arguments occur in Radcliffe-Richards 1996, pp. 375-416; Nelson, pp. 63-78; Radcliffe-Richards 1998, p. 1950; and Dworkin, pp. 155-161. See also Brecher, pp. 120-123.

⁴ As Laura Meckler reports, “Organ donations from the living jumped by 16 percent last year, the largest increase on record, as the waiting list for transplants grew much faster than donations from people who had died. More than 5,500 people gave a kidney or, less commonly, a piece of the liver, accounting for nearly half the nation’s donors in 2000, said the Department of Health and Human Services... The number of living donors has been growing more quickly than the number of cadaveric donors for a decade, but the gap was particularly striking in 2000. While the number of living donors jumped 16.5 percent, donations from the dead edged up by just 2.7 percent. At this rate, living donors will outnumber cadaveric donors within a year or two” (Associated Press, April 16, 2001).

⁵ The New England Medical Center currently has a program to encourage organ donation. As Jay Lindsay reports, “Susan Stephens helped her 13-year-old son get a kidney transplant by giving up one of her own — to a stranger in Greece. A new kidney exchange program at the New England Medical Center

allowed Stephens to donate her kidney, which wasn't a match for her son. In exchange, her son, Corey, was moved to the top of the kidney waiting list. Corey received his new kidney last month, after his mother's donation reduced a possible 18-month wait to a few weeks. Meanwhile, Stephens' kidney ended six years on a dialysis machine for Evangelos Natsinas, 36, of the Greek village Palamas. Doctors say the program will increase the critically small organ donor pool, while allowing willing donors to help loved ones, regardless of whether their organs match. So far, the program only includes kidneys." (Associated Press, April 11, 2001).

⁶ As we note below, the difference between the motivations of a donor and a seller may not be as clear and simple as opponents of kidney sales suggest, for a donor could have selfish motives and a seller could have altruistic ones. But even if we grant for the moment that all donors will be altruistic and all sellers will be selfish, the argument presented here still seems to constitute a strong initial case for kidney sales.

⁷ As Andrews writes, "Physicians have adopted an odd view of risks to organ donors. Transplants surgeons traditionally have maintained that removing a kidney from a live donor presents minimal health risks. 'However,' Arthur Caplan points out, 'when the proposal was made to buy and sell kidneys what had historically been deemed "minimal risks" suddenly escalated into intolerable dangers when profit became an obvious motive?" (Andrews, p. 32; Caplan's astute quotation comes from Arthur L. Caplan, "Blood Sweat, Tears, and Profits: The Ethics of the Sale and Use of Patient Derived Materials in Biomedicine," Clinical Research 33:4 [October 1985], pp. 448-450). Or as Tilney puts it, "The risk involved in nephrectomy is not in itself high, and most people regard it as acceptable for living related donors... [T]he exchange of money cannot in itself turn an acceptable risk into an unacceptable one..." (Tilney, p. 1950).

⁸ Some might try to defeat the initial argument for kidney sales by deploying an analogy to prostitution. Prostitution, they may say, consists of an act that is morally acceptable when money is not involved but morally unacceptable when money is involved. One can, of course, hold that prostitution is morally

unacceptable while also holding that many other acts that involve money are morally acceptable. The example of prostitution, then, shows that the fact that a particular activity, call it A, is acceptable when money is not involved, and the fact that other activities are acceptable when money is involved, do not together imply that activity A is acceptable when money is involved. But if the prostitution analogy is going to bolster opposition to payment for kidneys, we have to know first of all why prostitution is wrong. Now there are two ways in which prostitution could be wrong: because it has unacceptable consequences, or because it is wrong in itself. If prostitution is wrong because of its consequences, the analogy between prostitution and kidney sales will support opposition to the latter only if it can be shown that kidney sales have unacceptable consequences similar to those of prostitution. We will address consequentialist arguments of this sort in the section below on exploitation and commodification. What of the other possibility, that prostitution is wrong in and of itself, distinct from its consequences? Does that do the job of establishing that payment for kidneys is wrong? On its own, it does not. For the bare claim that prostitution is intrinsically wrong does not show that payment for kidneys are wrong as well. What we need is an explanation of the wrongness of prostitution that enables us to draw a close analogy to payment for kidneys. It's not enough for opponents of kidney sales simply to point to the prohibition on prostitution; they also must show that the features of prostitution that make it wrong are shared by kidney sales. They have not done this, to our knowledge.

⁹ Kant (1785), p. 36.

¹⁰ See Chadwick, pp. 131-134 and Kass, p. 73.

¹¹ See Dworkin, pp. 155-161 and Radcliffe-Richards, pp. 384-387.

¹² See President's Commission, p. 6.

¹³ Kant himself seems to have been opposed to the selling of any body part. Even the selling of one's hair, he says, "is not entirely free from blame" (Kant [1797], p. 84). As we argue in this section, however, it is difficult to see how such opposition follows from Kant's fundamental moral principle of respect for humanity. It is worth noting, as well, that the circumstances of kidney transplantation could hardly have

been anticipated by Kant, and so one must proceed with great caution when trying to draw moral conclusions about kidney transplantation (not simply from Kant's fundamental moral principles but also) from his specific judgments of practices particular to his day, such as his condemnation of one's submitting "oneself to castration in order to gain an easier livelihood as a singer" (Ibid).

¹⁴ See Hill 38-41.

¹⁵ For clear discussion of this point, see Nelson, p. 69.

¹⁶ Cohen, p. 295.

¹⁷ See Andrews, p. 37 and Campbell, p. 36.

¹⁸ This kind of argument is made by Morelli, p. 323; Chadwick, pp. 137-8; Essig, p. 65; and Sells (1993), pp. 2983-2984. This kind of argument is criticized by Andrews, pp. 28-38; Cherry, pp. 337-360; Harvey, pp. 117-119; and Radcliffe-Richards, pp. 378-384.

¹⁹ See Finkel.

²⁰ Abouna, et. al., p. 166.

²¹ For criticism of this claim, see Radcliffe-Richards, 380-384, Cherry, pp. 345-349, Tadd, p. 97 and Nelson, p. 74-75.

²² See Finkel.

²³ Sells (1991), p. 20

²⁴ For helpful discussion of this analogy, see Tadd, pp. 97.

²⁵ See Gilbert Meilaender, pp. 43-44 and Cohen, pp. 291-2.

²⁶ See Radin, pp. 1879-1914.

²⁷ See Chadwick, p. 137 and Kass, pp. 80-86.

²⁸ Kass, pp. 84-85.