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Should there be a legal market for transplant kidneys from live donors?

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Abstract

Since markets expand choice and promote individual liberty, many economists have claimed that a market for human kidneys should be permitted. In contrast, this essay argues why such a market should remain illegal. This is because: it is unclear whether a kidney market would increase the supply of good quality kidneys; such a market would exploit the poorest members of society; if a market were permitted it would exacerbate existing inequalities based on income; and allowing such a market would impose unfair costs on those who decided to keep both kidneys. A system of 'mandated choice' is presented as a viable alternative solution to the kidney shortage problem.

In this essay, I will address two issues – whether a legal market for transplant kidneys from live donors should be introduced, and what impacts this decision would have for the supply and distribution of kidneys in the future. After giving a brief description of the current system of kidney supply in the UK and the majority of developed countries, I will defend the view that a legal market for kidneys should *not* be established. I will then go on to argue that in light of this conclusion, the shortage of kidneys for transplant must be addressed using alternative non-market methods. The move to a 'mandated choice' system provides a good alternative that could be implemented.

In almost every single country in the world, selling a kidney is illegal.[1] Indeed, in the UK it is an offence under the Human Tissue Act 2004[2] to even advertise organs for sale. In these countries, individuals can only donate their kidneys either upon their death or whilst they are alive to a known friend or relative. In other words, kidneys fall into the category of 'market inalienable' goods according to Radin's[3] classification – they can be charitably given away but never traded in the market. Some, such as Erin and Harris[4] and Becker and Elías,[5] have argued that this classification is a mistake, citing statistics that highlight how the demand for organs constantly outstrips supply by a large margin. Indeed, according to recent figures released by the NHS[6] there were around 6,400 people on the UK waiting list for a kidney in 2011/12 but only approximately 2,600 received the transplant they needed. Such authors have offered a number of arguments in favour of market-based systems. For instance, some claim that the market would be more efficient than the current organ ban since payment would elicit a greater supply of kidneys, which when traded would generate a Pareto improvement over the status quo. Others have argued that a ban on kidney sales is a curtailment of individual liberty, as one should have the right to do with one's body as one wants. Although these claims are persuasive *prima facie*, I will argue that they are misguided when applied to the current problem.

So why should a kidney market not be established? I will advance four arguments in defence of my case. Firstly, although the supply of kidneys would

[1] Iran is the only exception, although this practice has previously been legal in China, India and the Philippines.

[2] Human Tissue Act 2004, Chapter 2, Section 32.

[3] Radin, 'Market-Inalienability'.

[4] Erin C, Harris J. 'An ethical market in human organs'.

[5] Becker G, Elías, J. 'Introducing Incentives in the Market for Live and Cadaveric Organ Donations'.

[6] National Health Service Blood and Transplant. Organ Donation and Transplantation – Activity figures for the UK as at 12 April 2013.

undoubtedly increase, it is not clear that the introduction of a kidney market would increase the availability of *good quality* kidneys. Due to the presence of asymmetric information, kidneys donors would always have more knowledge regarding their medical history and thus the quality of the kidney they were donating than the doctor or the recipient. In a system based on donations, since the donor would not receive any payment for their donation there would be no reason to conceal this information. By contrast, in a market-based system the possibility of receiving money for their kidney might incentivise the donor to hide this information, especially if they had experienced health issues in the past, meaning that their kidney was more likely to be of poor quality. Medical tests could of course be performed to ascertain the quality of the kidney to a certain degree, with the kidney only being used if it reached a predetermined quality threshold, but the asymmetry of information could arguably never be completely eradicated and these tests are costly in terms of the time, effort, and expense involved. Indeed, Titmuss[7] cites the presence of asymmetric information as one reason why blood in the American blood market is of inferior quality compared to blood in the UK where supply is solely reliant on voluntary donation. Therefore, it seems that the introduction of a market for kidneys might draw lower quality kidneys into the market that could harm the patient in the long run.

Secondly, it could be argued that the introduction of a kidney market could result in the exploitation of poorer individuals. Indeed, these individuals might resort to selling a kidney because they desperately needed the money and were faced with no other reasonable alternative for earning it, a situation Satz[8] has described as a 'desperate exchange.' This argument is often twinned with the suggestion that by selling a kidney, these poor individuals are harming themselves in order to make ends meet. Many have responded here by suggesting that it is perfectly possible to live a healthy life with only one kidney and that

[7] Titmuss R. 'The Gift Relationship: From Human Blood to Social Policy'.

[8] Satz D. 'Why Some Things Should Not Be For Sale: The Moral Limits of Markets'.

regulation could be used to counteract the possibility of these exchanges being made. However, I would counter by stating it is a well-known fact that renal function deteriorates with age as Weinstein and Anderson have shown,[9] and living with a single kidney is more likely to put undue stress on the body later on in life. These two facts could possibly result in medical complications for the donor in the future. Furthermore, no system of regulation could ever determine *all* cases of exploitative transactions – some would always occur as was the case in India when a kidney market was legal, where married women were often coerced into selling a kidney in order to raise money for their families, according to Satz.[10] Therefore by prohibiting the option of selling a kidney, the possibilities of these 'desperate' exchanges being made and the harm being inflicted at all are removed.

Thirdly, on a related point one could argue that in a market system kidneys would be redistributed from poor to rich. By contrast this situation would arguably not occur under a system based on donation, since such a system is more likely to have suppliers from all different ranges of incomes. As Scheper-Hughes[11] has suggested, *in extremis* this could even result in the poor being seen as 'spare parts' for the rich. Indeed, Shapiro[12] has noted that the fact there is pressure for a kidney market to be introduced at all is only because many rich patients exist who are willing to pay for a kidney. Some might respond here by stating that many poor people already provide services to the rich that are not reciprocated. For instance, poorer individuals are much more likely to take jobs in the service sector that could be seen as 'undignified' such as cleaning offices or toilets. This unfortunately is true. However, we surely don't want to *exacerbate* this inequality, which could occur if a kidney market were permitted. In other words, by changing the metric used to value kidneys and extending money's

[9] Weinstein JR, Anderson S. 'The Aging Kidney: Physiological Changes'.

[10] Satz D. 'Why Some Things Should Not Be For Sale: The Moral Limits of Markets'.

[11] Scheper-Hughes N. 'The Last Commodity: Post-Human Ethics, Global (In)Justice, and the Traffic in Organs'.

[12] Shapiro J. 'The Ethics and Efficacy of Banning Human Kidney Sales'.

reach inside the body, a kidney market might actually *worsen* existing inequalities based on income level. Thus by prohibiting such a market we remove the possibility of these inequalities being inflamed.

Finally, as stated above market proponents have claimed that individuals should be able to decide what they do with their own bodies. After all, surely granting individuals the power the sell a kidney can only benefit those who would do so without harming those who would not? By contrast I would suggest that it *could* be harmful for those latter individuals. Here, although the addition of a choice to a choice set such as the ability to sell one's kidney can benefit the individuals specific to the transaction, it can harm those who are not part of the transaction by changing the environment in which all individuals operate and make their own choices. For instance, consider the example of bank loans in a world where a kidney market existed. In this world, kidneys might be viewed as potential *collateral* against the value of the loan. Indeed, Cohen[13] found evidence of this in India when the sale of kidneys was permitted. As Satz[14] has noted, this finding suggests that those who chose *not* to sell a kidney might have found it more difficult to obtain funding, since *ceteris paribus* they had less valuable material to offer to the bank for collateral against the loan. Therefore, it seems that the ability to do with one's body as one wishes in this respect can actually have unintended consequences on those who decide not to sell a kidney, simply by imposing costs on them and making them responsible for a choice they did not want to make, as Dworkin[15] has suggested. Arguably these latter individuals should not have to bear a cost for their choice not to sell a kidney, and this represents another good motive for banning such a market altogether.

Given that a kidney market should not be introduced, how could the current kidney shortage be addressed? A number of interesting alternatives have been

[13] Cohen L. 'Where It Hurts: Indian Material for an Ethics of Organ Transplantation'.
[14] Satz D. 'Why Some Things Should Not Be For Sale: The Moral Limits of Markets'.
[15] Dworkin G. 'Is More Choice Better than Less?'

proposed, such as Roth, Sönmez and Üver's[16] 'kidney exchange' scheme and the move to a system of 'presumed consent.' However, I would propose that the most successful alternative for eradicating the kidney shortage would be to move to a system of 'mandated choice.'

In a 'presumed consent' system, the number of individuals who implicitly agree to make their organs and not just their kidneys available for transplant after their death could be maximised. This is an example of an 'opt-out' system, where individuals are automatically enrolled on the organ donor register and must specifically un-enrol themselves if they do not wish to donate. By contrast, in 'opt-in' systems individuals must make an active choice and register their intention to become an organ donor with the relevant institution. By changing the status quo and moving to such an 'opt-out' system, the supply of organs from deceased donors would arguably increase, as has been the case in many nations who have done so. For instance, in two similar nations, Germany and Austria, the rates of those on the organ donor register wildly differ according to Johnson and Goldstein.[17] In Germany in 2002 which had an 'opt-in' system, the 'opt-in' rate was roughly 12%. By contrast in Austria, which had an 'opt-out' (or 'presumed consent') system, approximately 99% of the population had effectively signed up at that time. This situation arises, as Thaler and Sunstein[18] have highlighted, since humans are subject to a number of biases that affect the way decisions are made. One such bias is known as 'status quo' bias or the 'default effect' where individuals are extremely likely to continue with the default option as the action required to change options is prohibitively costly, usually in terms of the time and effort required to change the default. Therefore by exploiting this bias and altering the default option, policymakers could help to make patients better off by increasing the supply of potential kidneys from deceased donors.

[16] Roth A, Sönmez T, Üver U. 'Kidney Exchange'.
[17] Johnson E, Goldstein D. 'Do defaults save lives?'
[18] Thaler R, Sunstein C. 'Nudge: Improving Decisions about Health, Wealth and Happiness'.

However, such a move might prove controversial. This is because many might argue that the government should never 'presume' anything about how an individual's organs are to be used after their death or because such default options might clash with the religious or ideological beliefs of potential donors. These are legitimate concerns. In light of these issues I would argue that a system of 'mandated choice' should be introduced as Thaler[19] has suggested. Under this system individuals would be legally required to provide answers to organ donation questions when completing official forms such as driving licenses – it would thus be mandatory for an individual to make an explicit choice as to whether or not to become an organ donor. Indeed, Thaler cites figures in Illinois where after such a system was adopted, the donor sign-up rate rose to 60% as compared to the national average of 38% across the rest of the US. Therefore by increasing the sign-up rate, the shortage of organs for transplant could be addressed. Furthermore, there is another advantage to using such a system. In many cases of 'presumed consent,' after a potential donor has died their relatives legally contest their implicit approval to donate an organ – these relatives argue that because the sanction to make the potential donor's organs available for transplantation was tacit it should not qualify as that donor's true wishes. By contrast in a system of 'mandated choice,' such situations should arise far less frequently since the donor made an explicit, rather than implicit, choice.

To conclude, in this essay I have defended the view that a legal market for human kidneys from live donors should *not* be introduced, for four reasons. Firstly, it is not clear that by permitting a market the supply of *good quality* kidneys would increase due to the presence of asymmetric information. Secondly, the introduction of such a market would leave those who are poorest in society vulnerable to exploitation as many might be forced to sell a kidney out of sheer desperation. Thirdly, a kidney market might generate a situation where

[19] Thaler R. 'Opt-in vs Opt-Out'.

kidneys are redistributed away from the poor and towards the rich simply because the rich have the money to pay for the transplant. Finally, by permitting a kidney market those who decided *not* to sell a kidney might end up worse-off, since they had to pay a cost as a result of their decision – a cost that arguably they should not have to pay since others forced the decision upon them. In light of these arguments I have suggested that the shortage of kidneys could be addressed via a non-market method – by moving to a system of 'mandated choice.' Such a move could increase the supply of organs, and not just kidneys, available for transplant by forcing individuals to make an explicit choice regarding whether or not to become an organ donor after their death.

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