HUMAN ORGAN TRANSPLANTATION: ECONOMIC AND LEGAL ISSUES

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Life or death, a legal issue

Imagine that a member of your family faced sure death unless a body part could be found and quickly transplanted. Your doctor and the hospital have the know-how to perform the procedure but lack the human raw materials with which to do the job. To what lengths sure you be able to go to obtain the body part? And, since the supply is usually smaller than the demand, who should decide who gets the human organ and on what basis? Should a free market be allowed? Or, should a government bureaucracy make the decision? Is this a matter requiring a national standard that justifies preemption by the federal government? Or, is it a matter of state's rights that fits neatly under the Supreme Court's recent Federalism[1] cases? What about "equity"and ability to pay? Should body parts be provided regardless of wealth? This article examines those questions and concludes that the free market is the most just and beneficial system possible.

A bitter struggle to control the nation's most precious medical resource, body parts, rages between state governments, the federal government, medical agencies, doctors, and the often forgotten donors and donees. State legislatures, dissatisfied with the federal government's attempt to seize complete control of this market, have begun passing laws that would bar donated body parts from being shipped beyond their borders to sick people elsewhere in the country.[2] These laws have been enacted in an attempt to thwart the paternalistic effort by the Clinton

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[1] In Alden v. Maine, 67 U.S.L.W. 4601, the supreme court ruled that the states were protected from federal wage and hours legislation by its sovereign immunity. In two cases, Florida v. College Savings Bank, 67 U.S. L.W. 4830 and College Savings Bank v. Florida, 67 U.S.L.W. 4590, the supreme court determined that congress exceeded its constitutional mandate when it authorized private suits against a sovereign state for patent infringement and Lanham Act violations. Why can't a state control the transplantation of body parts under these theories?

[2] See, Sheryl C. Stolbery, "Fight Over Organs Shifts From States to Washington," The New York Times, March 11, 1999, at C1, Col. 2.

Administration to control transplantation. What is paternalism? It is the view that the elites, who gain power through controlling regulatory compliance, know better what benefits the people than they do themselves. And, since they know better, they have the right to impose their ideology on the entire community. The plan would force, without regard to local need, organ recovery networks and transport centers around the nation to share their precious organs nation wide under a government mandated regulatory compliance scheme.

One example of a state's reaction is illustrated by Governor Tommy G. Thompson of Wisconsin who said, "They changed the rule, so I introduced legislation." He continued, "in this state, we go out and aggressively encourage people to be donors, with me doing the public service announcements. If I'm going to do that, I want those organs to stay in the state and take care of patients that need it in Wisconsin."[3] Four other states, Louisiana, Oklahoma, South Carolina and Florida have adopted laws similar to Wisconsin's. Legislation has also been introduced in Arizona and Texas.[4] These laws are regarded by some as provincial. "Oklahoma has been castigated," said the Director of the Oklahoma Sharing Network. "We have been called narrow-minded, self-centered, not caring for others. Actually, our law is pretty moderate. It says we can't by-pass local patients unless we get a pay-back for the organ." The Clinton Administration has fired back at the states by including a preemption clause in the final regulations that will, if judicially sanctioned, thwart their efforts.[5]

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[3] Id.

[4] Id.

[5] 42 C.F.R. Section 121.12 (1998). The Secretary is clearly concerned that the final rule might run afoul of the Supreme Court's recent "Federalism" cases discussed Infra, at notes 50 and 51. She attempts to foreclose such an inquiry by claiming that any state input in the program would result in less sharing of body parts and violate Medicare and Medicaid reimbursement rules. She says that the value of a federal program outweighs the state's policy interests, see generally 63 Fed. Register 16321 (Apr. 2, 1999).

More than 61,000 Americans now await body parts.[6] But only about 20,000 transplants are performed each year because the demand for human organs far outweighs the supply.[7] Under the current system for sharing parts, the nation is divided in 63 areas composing of 11 regions, and there are huge disparities in waiting times from area to area and region to region.[8]

For instance, for patients with blood type O, who represent 47% of the nation's liver transplant candidates, the median waiting period in New York City is 511 days while in nearby Northern New Jersey it is only 56 days. [9]

Early in 1999 Donna Shalala, the Secretary of Health and Human Services, announced her intention to even out queues by giving body parts to the most sick patients first, regardless of location. She claimed the current system put geography ahead of medical need. But the plan, issued in the form of a federal regulation, caused such a bitter fight among doctors, hospitals, and patients that Congress delayed it's effective date until October 1, 1999. So what was the system?

The system that was

In 1999, the organ donation system was 15 years old; it began with the 1984 law called the Organ Procurement and Transportation Act (NOTA),[10] that gives the Department of Health and Human Services the authority to regulate the national organ distribution system. The law prohibited the buying and selling of organs and declared them a national resource. The law, in

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[6] Supra, Note 1. Providing rough support for this figure, Lori Noyes, "Organ Donor and Transplant Facts," Organ Transplant Ring, November, 1998, p.3, estimates 62,000.

[7] 63 Fed. Register 16296 (Apr. 2, 1998).

[8] Supra, Note 1.

[9] Id.

[10] Pub. L. 101-666, Title II, Sec. 202, Codified at 42 U.S.C. 274 (6) (2) (D).

effect, prohibits a free market for body parts.[11] The system works this way; a private, non-profit organization, United Network for Organ Sharing, contracts with the Health and Human Services agencies to distribute donated body parts, through the Organ Procurement and Transportation Network (OPTN).[12] The network has divided the country into 11 regions; within them, there are 63 local organ procurement organizations, whose job it is to obtain and distribute this material.[13]

Under the old rules, organs are offered first within the local area, then region wide, then nationally.[14] The system, however, is incredibly confusing. Dallas and Fort Worth, for instance, share an airport and are only 30 miles apart, yet they belong to different organ procurement organizations and do not share with one another. If there are extra livers or kidneys in Fort Worth, they are first offered to patients in Houston, 4 hours away.[15]

With its rule, the Clinton Administration ordered the organ sharing network to come up with better distribution system. It threatened that if network officials did not change the system on their own, the Department of Health and Human Services would do it for them. The because of the Clinton Administration's initiative, many officials and doctors with local organ procurement organizations have begun to press their state legislatures to pass laws that would keep organs within state boundaries.[16]

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[11] Id.

[12] 63 Fed. Register 16300.

[13] Id.

[14] 63 Fed. Register 16298.

[15] Supra. Note 1.

[16] Supra, Note 1.

The final rule

The Department of Health and Human Services has released what it calls the Final Rule.[17] Its stated purpose is to encourage organ donation, develop an organ allocation system that functions as much as technologically feasible on a nationwide basis, providing the basis for effective federal oversight of the OPTN and better information to patients, families, and health care providers.[18] Under the Final Rule the OPTN is required to develop equitable allocation policies that provide transplant material to those with the greatest urgency in accordance with sound medical judgement.[19] The intent is to increase the likelihood of patients obtaining a match; it gives all patients equal chances to obtain organs compared to others in similar situations, wherever they may live in the United States.[20] It is intended that mere location will not be a primary factor determining a place on the queue. Instead, organs will be allocated according to objective standards of medical status and need.[21]

Under the Final Rule, human organs donated for transplantation are a public trust.[22] Consequently, the government argues that it must control the process to insure that donated material is equitably allocated among all patients without regard of their economic status.[23] The preamble of the Final Rule states that, at the national level, the

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[17] 42 C.F.R. 121 (1998).

[18] 63 Fed. Register 16295 (1998).

[19] Id.

[20] 63 Fed. Register 16297 (1998).

[21] Id.

[22] 63 Fed. Register 16298 (1998).

[23] Id.

current policies treat patients inequitably because they create enormous geographic disparities in waiting time.[24]

The principle that donated body parts are a national resources implies that (1) In principle, and to the extent technically and practically achievable, any citizen or resident of the United States in need of a transplant should be considered as a potential recipient of each retrieved organ on a basis equal to that of a someone who lives nearer to the source of the organ or tissue. Body parts ought to be distributed on the basis of objective priority criteria, not on the basis of location or wealth, and (2) The current practices in this area do not give patients, their families and physicians the timely information they need to help in selecting a transplant hospital,[25] and this must be rectified.

Share across geographical lines?

During the rule-making process, many patients and advocates argued that human tissues should follow the patient.[26] That is, regardless of where a patient lives or lists, he should have the same chance or receiving an organ as if living or listing elsewhere.[27] They contended that local preference prevents this proper result. They ask, why should patients who list in areas that, for some reason, obtain more organs in relation to the local demand, benefit over patients from other areas who have equal or greater medical need?[28]

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[24] Id.

[25] Id.

[26] 63 Fed. Register 16304 (1998).

[27] Id.

[28] Id.

Some argued that the feasibility of national organ sharing is limited by the cold ischemic time (the time that an organ remains viable).[29] Some commentators argue that the travel time to and from large cities, where most transplant heart specialists are located, readily permits a national allocation scheme.[30] Opponents of the national scheme maintained that local donations will suffer if the donors know that their organs may be shipped out on a nationwide basis. It was also suggested that local doctors would be less aggressive in obtaining body parts if they knew that they would have to be shared nationally.[31]

Which is to be preferred, helping the sickest first or those most likely to survive the greatest number of years?[32] Many witnesses at the public hearing agreed on two broad points: first, from the perspective of individual patient who is at risk of eminent death, the "sickest first" policy is the only choice; and second, there are patients that are so likely to die that it would be futile to help them and thus waste tissue that could have saved someone else.[33]

The available evidence show that for most patients, higher medical urgency does not reduce the likelihood of post transplant survival. Thus, less ill patients should not

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[29] Id.

[30] Id.

[31] Id.

[32] In battle conditions, army doctors use triage: painkillers, only, for soldiers not likely to survive, little attention for the ones likely to recover on their own, and heavy investment of medical resources for the middle group, where the rate of return on such effort is expected to be the highest. In effect if not by intention, present institutional arrangements put the entire society on a war footing. In sharp contrast, markets allocate scarce goods and services in accord with wealth (e.g., based directly or indirectly on past earnings; that is, contributions to the betterment of economic welfare.) Cadillacs, that is, go to those who can afford them, not those who "need" them most; Geos end up in the hands of the relatively poor, not drivers who can better utilize them.

[33] Id.

receive a higher priority.[34] Although current OPTN policies vary by organ, the predominant thrust of OPTN is nevertheless to give priority on the basis of the greatest medical need.[35]

What is the government's responsibility to provide access to transplantation services to all Americans, regardless to economic status? During the rule making process, access was described in terms of the person's ability to pay, which almost always required health insurance.[36] A few state-supported hospitals testified that they accept all patients regardless of income.[37] But the great weight of testimony was that most transplant hospitals require that the patient demonstrate the ability to pay.[38] As a result, many commentators argued that the promise to honor the altruistic gift of an organ to whomever needs it most is being violated.[39] Secretary Shalala concluded that the department and OPTN should give more emphasis to social-economic equity in transplantation decisions. National treasures, she maintains, should not carry a price tag.[40]

Government's expectations

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[34] Id.

[35] Id.

[36] 63 Fed. Register 16305 (1998).

[37] Id.

[38] Id.

[39] Id.

[40] Id. But what is the logical effect of this thinking on the market? Can a poor person go to Auto Zone, select a part for his car and refuse to pay based on an equity or economic status ? Certainly not! This is nonsense!

Secretary Shalala opined that the rule would have three major effects.[41] They are:

(1) First, it establishes terms of public oversight and accountability for the entire organ transplantation system, and the OPTN in particular. She believes that this reform creates major public benefits in the categories of "good government," preserving public trust and confidence in organ allocation, and assuring the rule of law. The benefit of the proposed rule is substantial and may well lie primarily in the future problems avoided (e.g.: reduction in organ donation if the public were to lose confidence in the fairness of the OPTN in allocating ordinances) rather than the specific current problem to be resolved.[42]

(2) This rule requires creation of a system of patient-oriented information on transplant program performance. The Secretary maintains that the new rule will provide better times and numbers, and percentage of transplant center organ turn downs of organs for non-medical reasons, to patients and physicians. Finally, information is needed that is easy to use for patients, physicians, and families who wish to compare center performance on any of these dimensions.[43]

(3) Third, this rule will improve equity by creating performance goals against which the OPTN can reform current allocation policies. Equity is a goal. As it is achieved, benefits accrue to members of society at large, to donor families, to transplant candidates, and to transplant recipients. The Secretary regards a system that allocates organs to those most in need based on sound medical judgment, but with little regard to

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[41] 63 Fed. Register 16324 (1998).

[42] Id.

[43] Id.

geography, as reasonable and as a profound benefit to society quite apart from those that are life saving.[44]

Allocation of body parts

The rule provides that organ allocation policies and procedures must be in accordance with sound medical judgment[45] and will be designated and implemented as follows: (1) to allocate organs among transplant candidates in order of decreasing medical urgency, with waiting time used to break ties within medical status groups.[46] Neither place of residence nor of listing shall be a major determinant of availability.[47] For each status category, Intra-Transplant Program Variance in the performance indicator "waiting and status" shall be as small as can be reasonably achieved.[48] Priority shall be given to reducing the waiting time variance in the most medically urgent status categories before reducing it in less urgent status categories.[49]

Recall that the states are attempting the pass legislation to "save" body parts for their citizens. The governor of Wisconsin argues that the federal program "pre-preempts state's rights."[50] The Final Rule deals with the Governor Thompsons of the world by invoking the Supremacy Clause of the U.S. Constitution; it mandates preemption of any local law in the area of body parts. The regulation states: "no state or local governing

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[44] Id.

[45] 42 C.F.R. Section 121.8 (a) (3) (i) 1998.

[46] Id.

[47] Id.

[48] Id.

[49] Id.

[50] Supra, Note 1.

entity shall establish or continue in effect any law, rule, regulation, or other requirement that restricts in any way the ability of any transplant hospital, OPTN or other party to comply with organ allocation policies of the OPTN or other policies of the OPTN that have been approved by the Secretary under this part."[51] Will this preemption clause survive the recent Supreme Court Federalism cases that support State's rights?[52] Is there a national purpose at play here?[53]

An economic introduction

Organ transplantation has been part of medical technology for over forty years, beginning in the 1950s with the first consistent successes in kidney transplantation. Recent advances in technology which are advancing the frontiers of transplantation dramatically, however, are now poised to combine with another powerful force–that of free markets–to impel society to confront the mechanism by which providers and users of human organs are brought together. The purpose of this section of the paper is to address the economic questions affecting trade in body parts.

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[51] 42 C.F.R. Section 121.12.

[52] Several recent cases decided by the Supreme Court may signal a resurgent federalism. The court has recently ruled, for example, that the Federal Government may not compel a state sheriff to perform federal gun background checks, Printz v. United States, 521 U.S. 898 (1997). In three cases decided on June 23, 1999, Alden v. Maine, 67 U.S.L.W. 4601, Florida v. College Savings Bank, 67 U.S.L.W. 4580, (involving a holding that Congress lacked the Article I power to override state sovereignty in a suit against the state under the Fair Labor Standards Act) and College Savings Bank v. Florida, 67 U.S.L.W. 4590, (concerning the a patent suit by the bank against the state under U.S. patent law) the high court ruled that Congress exceeded its authority under Article I when it authorized suits against the states. The cases demonstrate that the high court meant what it said in Seminole Indian Tribe v. Florida, 517 U.S. 44 (1996). In Seminole, the court said that Congress may not abrogate state powers under its Article I authority. Could it follow that Congress, and the president, may not abrogate the states' authority to control the distribution of body parts within their jurisdiction?

[53] This Federalism issue may arise because of a feeling by the court that the lack of a compelling threat to the entire county like the Great Depression, World War II, and the Cold War, no longer exist. We no longer need federal supervision of all things, great and small, to exist very well. See, generally an article by the Dean of Stanford Law School, Kathleen M. Sullivan, "Federal Power, Undimmed," The New York Times, June 27, 1999, at A 21, Col. 3.

Inside the human body, there are twenty-five different organs and tissues that can be transplanted under current technology, including bone, bone cartilage, bone marrow, corneas, heart, kidneys, intestines, lungs, and livers. Organ transplantation is not some sort of experimental new science. Success rates for such surgeries are as high as 95+%; and for many diseases, a transplant is the standard method of treatment.[54] The amount of resources available in a human body is amazing; but yet, ten people die every day in the U.S. while waiting for an organ transplant that never comes. The queue grows each day, but the number of organ donors does not.

Two basic organizational principles are in competition for facilitating the transfer of body parts from provider to user: (1) the present system–that of donation–and (2) a legal, free market reflecting the forces of supply and demand, with the characteristics of any free market. This paper will first consider the present system and then move to the capitalist alternative.

The Donation System

Currently, to become an organ donor, one must sign a "donor card". This allows for the specification of which tissues are to be transplanted. The age of an organ supplied can range anywhere from those of a newborn to senior citizens. Unfortunately, signing a donor card does not automatically qualify a person–even an adult; the family of the deceased must also know of and agree to the procedure. To become an actual donor, a person must be in good health and death must be sudden--possibly through accident or stroke. The person must also be declared brain dead; in this condition, the functioning of

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Scott Russell, *The Body as Property*, (New York: Viking Press, 1981), p.112

the brain has ceased--permanently and irreversibly. In this state, the heart and lungs of the "deceased" person continue to function with support of mechanical ventilators. When doctors extract an organ, they surgically remove it through routine medical procedures and normal funeral arrangements can then be made (including open casket).

There are hundreds of institutions which are privately funded (additional ones are supported through tax revenues) that specialize in the donation and transplantation of organs. These institutions include: American Heart Association, American Society of Transplant Physicians, American Association of Critical-Care Nurses, and The North American Transplant Coordinators Organization. They locate and transplant body parts for citizens in need and also keep a networking list of current persons in need.

The major problem associated with the process is lack of supply. According to surveys, more than 85% of the public believes in and supports organ donation, but only about one-third of available organs are ever donated.[55] Different measures can be taken to encourage more citizens to donate. At present, when a new driver gets his license, there is a place on the back in which he can sign up to be a organ donor. This is a very simple process and very time efficient; nevertheless, very few people sign up, relative to the great demand.

Apart from psychic gains, donors have no possible way of benefitting from this system. They simply sign papers and eventually die, but do not improve their financial situation. They never even know if their organs have been taken. The practice is

[55]Noyes, *Organ Transplant Ring*, p.2

restricted, though, because eligibility requires one to be related to the recipient, whether by blood, marriage, friendship, or as members of the same community.

Market Organization

Under present arrangements, a doctor informs the family of the death of their loved one and asks if they will allow him to harvest the organs in almost the same breath. When a family has just learned their loved one has passed away, the last thing they want to think about is people cutting them open and removing various body parts. This situation may supply dramatic plots for hospital shows such as *ER* and *Chicago Hope*– this might well be the only virtue of extant law--but in terms of saving the lives of desperate patients, it is an abysmal failure.

Consider the following situation: The daughter of a very wealthy man is found to have a malfunctioning kidney. There is a long waiting list of people in need of kidneys, and this child is placed at the end of the queue. The girl's father places an advertisement in the newspaper as well as on the internet offering $100,000 to whomever can deliver a compatible kidney to them the fastest. Is it wrong for the father to offer money for an organ? Many people would object, because this would put his daughter ahead of those who have been waiting for a transplant for a long time.

When we wreck our automobiles, we do not drive them off a cliff or bury them because they are no longer of use to us; we parcel them out (salvage them), we restore life to other automobiles by providing parts which will allow them to last longer. Yet thousands of people die each year of natural causes with perfectly good "salvageable" organs; and thousands of other people die each year because one of their "parts" are broken and are in desperate need of another one to replace it. A person does not need his

organs after death. These internal components merely take up space and wilt away with the rest of the body. The healthy, extractable organs could be used again and would greatly enhance the life span of persons in need of a transplant. Some could be preserved for later use, and others could be quickly transferred to persons in need.

A market for human organs is an eminently reasonable concept. At this point in time, it is not legal to exchange body parts for money. If someone needs an organ, his name is placed on a waiting list until one becomes available. If someone wishes to donate a body part, he is able to agree to do so; upon his demise, the transfer is made. At present, a relatively low proportion of the organs potentially available for this purpose are in fact donated. Why? The reason is that our law prohibits economic incentives. There is simply no financial gain in donating organs. Only a free market organization of this transaction can satisfy this motive. Absolutely crucial to the functioning of any market, this one specifically included, is the existence of such incentives. In the present situation, many people will not donate their organs because they do not like the idea of pieces of them being removed from their bodies after their death. For these potential donors, financial incentives are absolutely imperative. It is all well and good to rely on benevolence, <u>in part</u>. This presumably accounts for the small supply of human tissues presently available. But why not supplement this with the more ordinary financial incentives? After all, we do not rely solely on benevolence to put food on the table, or clothes on our back. If we did, we would be as poorly fed and ill clad as those at the end of the queue who suffer needless months on a dialysis machine, or actually die as a result of the hatred for commerce implicit in the legal status quo.

There is a great demand right now for organ donations, and the supply of organs is very low. If legalization of a market in human body parts occurred, the initial price of organs would of course rise; but as more and more organs are donated, and we moved toward an equilibrium price, we would never again be faced with the specter of people dying for the lack of that which is potentially readily available.

If a market for human organs were allowed, many people would benefit. It would become a market as for everything else, such as cars or carrots. Suppliers would be reimbursed for their organs and would therefore be more likely to leave them to the medically needy upon their demise. We rely upon monetary incentives in many other walks of life to good effect. The laws of economics apply here as well. The father would place the advertisement in the newspaper and on the internet, and then choose the respondant asking the lowest price, assuming equal quality, availability, convenience, etc. But isn't this practice unfair to the other people in need of organs and already waiting for them? If so, it is also unjust to potential suppliers, because they cannot benefit from this transaction, either. One would also have to argue that people who could not afford a car or a carrot were being cheated, and that the dealers who did not sell to a particular customer were being robbed as well. Obviously, this is irrational. A man must earn his right to purchase any consumer good, and this applies to human body parts as to all else.

Can it be cogently urged that transplant material is a matter of life and death, and that therefore we ought to suspend the market in this one case? Not at all. For one thing, body parts are not at all the only thing necessary for survival; there are also doctors, milk, penicillin, MRIs, ambulances, steel, just to name a few things. For another, if the world

wide collapse of socialism has taught us anything, it is that the last best chance for maintaining life, e.g., a strong economy, is not to eschew the "magic of the marketplace." If we want to ensure a continuing adequate supply of cars and carrots, the last thing we ought to do is to apply to these goods the mechanisms now used for the transfer of human body parts.

Objections to Market Organization

Some argue that the selling of organs would put transplants out of reach for many and allow the rich to outbid all others. It of course cannot be denied that in any market system, those with the most assets will jump to the head of the donee queue. But the poor will also benefit. Consider, again, cars and carrots. Under the market system, the wealthy have first call on these items, too. But the impoverished in this country need never fear the famines endemic to countries – such as in Africa – which embrace socialism. And those at the bottom of the U.S. income distribution have more and better access to automobiles than even the middle class of most nations. Death does not discriminate very much, at present, for transplants. Both rich and poor patients die from a lack of organs which needlessly and tragically go to the grave. Under markets, this simply will not occur. Vastly enhanced supplies will be forthcoming given economic incentives. No patient at any income level will be consigned to death for lack of human tissue.

Wealth is the product of man's capacity to produce goods and services desired by others. Those who argue that money is earned by the strong at the expense of the weak

are simply mistaken[56]. It is false to claim that money was made by the man who invented the computer at the expense of those who did not. It is not the wealthy man's "fault" that he is wealthy, or that other men did not use their intelligence to produce great value. Likewise, one can not claim that the organ was bought by the wealthy man at the expense of those who are not wealthy. He did not buy the organ at the expense of anyone; he bought it for his own benefit, and to that of the seller.

One argument against a free market in body parts is that citizens would go around murdering one another to obtain organs to sell or to give to a loved one in medical need[57]. Society already experiences these problems, however, in such areas as domestic violence and aggravated robbery. There is no reason to suppose that this would be exacerbated in a new, legal human commodity market. The same mechanisms of law enforcement and criminal jurisprudence are available to deal with such events in any event, should they occur.

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[56] This is the core error in Marx. For a remedy to this fallacy, see Mises, Ludwig von, "Economic Calculation in the Socialist Commonwealth," in Hayek, F.A., ed., Collectivist Economic Planning, Clifton, N.J.: Kelley, 1975 (1933); Mises, Ludwig von, Socialism, Indianapolis: Liberty Fund, 1981 (1969); Bohm-Bawerk, Eugen, Capital and Interest, South Holland, IL: Libertarian Press, George D. Hunke and Hans F. Sennholz, trans., 1959 (1884); see particularly Part I, Chapter XII, "Exploitation Theory of Socialism-Communism"; Rothbard, Murray N., Classical Economics: An Austrian Perspective on the History of Economic Thought, Hants, England: Edward Elgar, 1995; Hoppe, Hans-Hermann, 1990, "Marxist and Austrian Class Analysis," The Journal of Libertarian Studies, Vol. 9, No. 2, Fall, pp. 79-94; Foss, Nicolai Juul, 1995 "Information and the Market Economy: A Note on a Common Marxist Fallacy," Review of Austrian Economics, Vol. 8, No. 2, pp. 127-136; Rothbard, Murray N., "Karl Marx:: Communist as Religious Eschatologist," Review of Austrian Economics, Vol. 4, 1990, pp. 123-179.

[57] The economically illiterate writers of the t.v. show "Law and Order" (mis)lead their audience into believing that this sort of behavior results from free enterprise.

If anything, there is good and sufficient reason to believe that such "body snatching" dangers would be lessened under a regime of economic freedom. Consider diagram 1 in this regard. Here, supply and demand conditions are such that at the present zero price allowed to be paid by donee to donor, there is a shortage of some 60,000, as 80,000 people wish to have this operation, but it is given to only roughly 20,000. What would be the equilibrium price in such a setting, that which would equate supply and demand, and clear the market? Any estimate must be a very rough approximation, since in the absence of a legal market we have no empirical experience, and economic theory alone is insufficient to determine an exact price. Let us suppose[58] then, just for the sake of argument, that the price for the average human tissue suitable for transplant is $10,000. This, then would furnish the incentive for the body (part) snatcher under free enterprise. However, the present situation is far worse. For it is not at all the case that there are now 50,000 organs that can be bought and sold, the precise amount, in our hypothetical example, which would generate the price of $10,000. Rather, there are only 20,000 such body parts available. Extending a vertical line from this point on the quantity axis yields a price of $100,000, not the $10,000 which would occur with laissez faire. And what is the economic significance of this price? This is the present black market or illegal price which serves as the incentive for the criminal. The point is, the greater the potential profits, the more likely is the theft of human organs. Thus, our present price regulations actually exacerbate the threat of organ theft. Were we to

[58] Three scientists were marooned on an island with plenty of canned goods, but no can opener. The first, a chemist proposed to heat the cans to a certain temperature, whereupon they would burst, without destroying their contents. The second, a physical engineer, agreed with the goal, but proposed a different means: dropping the cans onto a rock from a precise height, to this same end. At this point they both turned to the third man, an economist, who opined, assume we have a can opener....

decriminalize this market, such horrors would decrease; we could in one fell swoop reduce the profit incentive for body snatchers.

But at least, it will be said, no "profits" are being made from organ transplantation under the present system. Most commentators preach that a market for human organs would be immoral, wrong and unfair. Happily, they are unwilling to extend this basic economic error to more ordinary goods and services. Were they to do so, and were their arguments implemented, we would to that extent approach the institutional arrangements responsible for ending the Soviet economic system.

There is one anomalous group in this sad scenario: healthcare professionals; they are virtually the only ones completely satisfied with the status quo prohibitions and price controls[59]. But there is a reason for this stance. They are the only ones "profiting" from the current system, aside from very few desperate patients who miraculously pass through the waiting list and actually receive an organ. These healthcare professionals

[59] It is a staple of basic economic analysis that price controls boomerang, and hurt the very people they were ostensibly designed to aid. Most economists hold strong beliefs about the deleterious effects of minimum wages, rent controls, and tariffs, for example. On this see Frey, Walker. But these insights have not yet percolated into the consciousness of the general public. For an appreciation of markets in bodily organs, see Barnett, Andy H., Frank Adams and David L. Kaserman, "Markets for Organs: The Question of Supply," Contemporary Economic Policy, forthcoming; Barnett, Andy H., Roger Blair and David L. Kaserman,"The Economics and Ethics of a Market for Organs,"Society, September/October, 1996, pp. 8-17; Barnett, Andy H., T. Randolph Beard and David L. Kaserman,"Scope, Learning, and Cross-Subsidy: Organ Transplants in a Multi-Division Hospital -- An Extension," Southern Economic Journal, January 1996, pp. 760-67; Barnett, Andy H., David L. Kaserman,"The 'Rush to Transplant' and Organ Shortages," Economic Inquiry, July 1995, pp. 506-515. Reprinted in Price Theory and its Applications, edited by F.M. Scherer and Bernard Saffran, Edward Elgar Publishing, 1999; Barnett, Andy H., T. Randolph Beard and David Kaserman,"The Medical Community's Opposition to Organ Markets: Ethics or Economics,"The Review of Industrial Organization, December 1993, pp. 669-678; Barnett, Andy H., T. Randolph Beard and David Kaserman,"Inefficient Pricing Can Kill: The Case of Regulation in the Dialysis Industry,"Southern Economic Journal, October 1993, pp. 393-404. Reprinted in Foundations of Industrial Organization, edited by Robert Ekelund, Edward Elgar Publishing, 1998; Barnett, Andy H., David Kaserman, "The Shortage of Organs for Transplantation: Exploring the Alternatives," Issues in Law & Medicine, Fall 1993, pp. 117-137; Barnett, Andy H., David Kaserman and Roger Blair,"Improving Organ Donation: Compensation versus Markets," Inquiry, Fall 1992, pp. 372-378; Barnett, Andy H., David Kaserman, "An Economic Analysis of Transplant Organs: A Comment and Extension," Atlantic Economic Journal, June 1991, pp. 57-63.

are making a fortune from organ and tissue transplantation. "The organs and tissues from a brain-dead but otherwise healthy patient can generate over $2,000,000 in business for the medical industry. The total amount of money spent in the United States on organ and tissue transplants and follow-up care is around $8,000,000,000 per year and climbing rapidly" (Organ Keeper, background)[60].

Reasons for a Free Market

Legalization of trade in body parts would provide a positive reassurance to each individual that when they were deceased, their organs would be used to prolong the life of another human being. This feeling in and of itself might provide some additional incentive to create a drastic increase in the number of organs supplied. There would also be a great comfort knowing that each individual's family would have a means to provide for funeral expenses, and possibly bring in enough money from the sale to aid it in other estate costs, if the family donated a organ to someone in need. Instead of spending, say, six thousand dollars on a funeral, relatives could sell an organ to someone in need and defray their expenses, in the same way that other types of inherited wealth is used by heirs. Some might consider it immoral to make a "profit" from a loved one's death[61]; but selling an organ would help prolong another person's life and could also help relieve the financial burden of the donor family.

A free market would also shield physicians from having to issue Solomon-like judgments with which many are uncomfortable and under which many physicians

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[60] Organ Keeper is an organization who believes that there should be a market for human organs, and to protest the lack of one, they have become "organ keepers" and share information as well as their own beliefs through the internet. See on this http://organkeeper.com/backgrnd.html.

[61] These people would presumably be very happy in North Korea or Cuba, where such sentiments are in the ascendency.

reluctantly labor[62]. Most organ donations are made by relatives of donees in need[63]. In these cases, the incentive stems from the fact that there are close family ties involved. Sometimes, not very often, the donation comes from a friend. In such cases, the doctor plays an important role in the decision to donate. He must base his decisions on the conflicting obligations to the donor and the patient. These moral obligations have been widely discussed[64] but no clear norms have been set to guide doctors in this decision-making process. Legalization would aid the doctor, because the donor would already know the incentives available and the decision to donate would already have been made.

Legalization of trade in body parts would produce more jobs in the fact that there would be a demand for workers to locate and transplant organs from donors and to recipients. Free trade, in itself could provide an added cash flow in our market system. Overall, this legalization would save lives and positively boost our economy.

Conclusion

Putting a dead body in a coffin, six feet under the surface of the earth is not profitable to anyone except the undertaker, but it is, unfortunately, a part of our tradition. A funeral today (on average) costs a deceased persons' relatives about six thousand

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[62] If they are not uncomfortable in this role, this is even more reason to preclude them from it.

[63] Sean Elliott of the National Basketball Champion San Antonio Spurs, is a recent case in point.

[64] Caplan, Arthur, "Ethical and Policy Issues in the Procurement of Cadaveric Organs for Transplantation," New England Journal of Medicine, 311, 1984, pp. 981-983; Childress, James F., "Ethical Criteria for Procuring and Distributing Organs for Transplantation," Journal of Health, Politics, Policy and Law, 14:1, 1989, pp. 87-113.

dollars[65]. It is part of "tradition" to lay our loved ones at rest, but it is not a moral tradition. It is not considered "immoral" to allow a seven year old child to die of liver failure after waiting three years on a transplant list, while at the same time people were dying with perfectly good livers and taking them to the grave with them. Evidently, it is not considered "immoral" to lay someone to rest who had a perfectly good liver, which could save a child whose liver is about to cause his death.

Let us conclude with our numerical example: The advertisement the father placed in the newspaper and on the internet is responded to by several men, asking various prices for the kidney, ranging from $250,000 to $150,000. The father tries to negotiate with the sellers, and succeeds in getting the price dropped to $120,000. The arrangement is made, and the little girl receives her kidney. The donor receives his $120,000. Everyone involved in this transaction benefits. Those who did not receive the kidney are not losing anything from this deal, and those who did not sell a kidney did not lose anything. As with all such "capitalist acts between (other) consenting adults,"[66] they simply did not benefit from it.

Our laws should allow free trade of healthy human organs. Our current laws regarding organ transplantation do not sufficiently provide for society's needs. People are dying because we cannot efficiently use the resources readily available. We, in the U.S., operate basically in a free market. This means that prices, quantities, qualities, supply, and demand are set by the producers and consumers. Legalizing the free trade of organs would allow our nation to efficiently control one of our most precious, natural

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[65] Johns, Albert, "Planning May Help Families Minimize the High Cost of Funerals," Las Vegas Review Journal, May 24, 1998, Lifestyle Section, pp. 1-2.
[66] Nozick, Robert, Anarchy, State and Utopia, New York: Basic Books, 1974

resources–life itself, in many cases. It is the responsibility of politicians, bureaucrats and judges to get out of the way of citizens who, through private arrangements, can organize markets to save precious lives. If they do not, they are complicit in the resulting deaths.