

Constraint, Consent, and Well-Being in Human Kidney Sales

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This paper canvasses recent arguments in favor of commercial markets in human transplant kidneys, raising objections to those arguments on grounds of the role of injustice, exploitation, and coercion in compromising the autonomy of those most likely to sell a kidney, namely, the least well off members of society.

Keywords: *autonomy, coercion, economic necessity, exploitation*

I. INTRODUCTION

There has been a good deal of debate among academics and others about the moral propriety of allowing people to sell their bodily organs.¹ Much of this debate has focused on the moral permissibility of a regulated current market in human organs in which living vendors sell one of their kidneys.² Recent advocates of such markets challenge the long-standing consensus among public policy experts, medical practitioners, bioethicists, and the general public that for-profit organ markets are morally illegitimate.³ Specifically, proponents of current kidney markets have argued that such markets are morally permissible since they would respect the autonomy and enhance the well-being of those who sell them, they would involve only organs (like kidneys) that may be easily harvested at low risk to the health of those who choose to sell them, and they would alleviate the chronic and increasingly dire shortage of transplant organs, especially kidneys.⁴

In this article, I argue that pro-market views that make the autonomy of potential organ vendors the key value in the debate over the legitimacy of such markets are seriously flawed. First, those views fail to recognize that the conception of autonomy they endorse implies that those most likely to serve

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as kidney vendors are likely not to sell their organ autonomously. Second, pro-market positions uncritically assume that prohibiting organ markets is misguided paternalism rather than an expression of genuine and legitimate concern for the well-being of the least well-off members of society. Third, because they understate the importance of the injustice of the economic status of likely vendors, these views fail to comprehend how a market in organs will not meaningfully improve the lives of those most likely to sell an organ.

I begin by identifying and critiquing three key themes in recent arguments in favor of a current market in kidneys. I then develop a notion of constraining options that illuminates how the economic disadvantages of those most likely to sell a kidney in a regulated legal market compromises both the autonomy and the well-being of potential organ vendors. Finally, I discuss how choice may be distinguished from consent in a way that highlights how the economic constraints of likely vendors compromise both their autonomy and well-being.

II. PROBLEMATIC THEMES IN PRO-MARKET VIEWS

The Nature and Value of Autonomy

Much of the debate over current human kidney markets assumes that the main ethical concern regarding potential vendors is whether their choice to sell would be an autonomous one. Recent pro-market theorists who take the importance of vendor autonomy for granted yoke their advocacy of current markets to a broadly Frankfurtian hierarchical conception of autonomy.⁵ On this view, personal autonomy is a matter of agential identification with higher order desires or, more clearly, agent-controlled identification with higher order desires.⁶ Advocates of current kidney markets who embrace this approach to personal freedom typically argue that potential vendors may autonomously choose to sell despite having no practical alternative to doing so. In this way, the focus on autonomy comes at the cost of marginalizing such other relevant values as human well-being and justice.⁷

Some of these organ market advocates stress the idea that autonomy involves voluntary choice. For example, Dworkin and Taylor emphasize how sovereignty over our bodies implies that we should be allowed to sell our organs if we voluntarily choose to do so. Cherry takes a similar view, arguing that our property right in our own bodies undergirds the moral legitimacy of our selling our organs as long as our choice to do so is voluntary.⁸ Still other pro-market writers, such as Wilkinson, stress that personal autonomy is a matter of valid consent to sell an organ, irrespective of whether that consent is voluntary.⁹

These pro-markets writers have also recognized that the mere addition of an option to a person's set of available alternatives need not enhance that person's autonomy. For example, Dworkin acknowledges that having more

choices is not always better, at least in the sense that the addition of some options may cause greater anxiety in those who possess them than they would have experienced in the absence of those choices.¹⁰ And on his account, Wilkinson acknowledges that financial incentives sometimes constitute an undue influence insofar as they are extremely difficult for the desperately poor to resist.¹¹ According to Dworkin, however, whatever misgivings those who sell an organ experience are easily trumped by the benefits of organ sales both for those in need of transplant organs and for those who sell them.¹² And although Wilkinson notes how undue influence raises important questions about free will and the ethics of temptation in the case of financial inducements to economically desperate people, he sets aside these worries on the ground that what is essential to autonomy is the issue of valid consent to the choice to sell, not voluntarily choosing to do so. As he puts it, “while desperate offeree cases are almost by definition not free to decline an offer (by which I mean they have no practical alternative), they may still be capable of making a fully autonomous choice, provided they meet certain conditions.”¹³ Taylor and Cherry similarly dismiss concerns about undue influence and potentially irresistible or coercive offers insisting that people acting in the face of strong inducements to sell an organ may do so autonomously. As Taylor claims, it is a mistake to think that “no one can autonomously accept a highly attractive offer.”¹⁴ And according to Cherry, it is possible for those who act on the financial incentive to sell an organ to do so with “individual deliberation and voluntary choice.”¹⁵ And so one prominent theme in pro-market positions is the idea that in one way or another agential identification with what one consents or chooses to do is the essence of personal autonomy. Thus, because people own their bodies and may use them as they wish, because they are autonomous and not being exploited when they choose to sell an organ, because even if they are exploited they may autonomously consent to that condition, or simply because autonomy trumps worries about exploitation or coercion, current commercial markets in human kidneys are morally permissible.

The emphasis on personal autonomy in these views reveals that these writers regard autonomy as the controlling value in the organ market debate. Although these positions ostensibly regard human well-being as an additional concern, it is in fact the well-being of organ transplant recipients that is the main focus, with the well-being of vendors reduced to considerations of their potential temporary economic gain from selling an organ, the impact on their autonomy of legalizing or prohibiting such markets, or on how denying them the opportunity to sell is misguided paternalism. A more robust concern for their well-being would expand beyond whether they do or might be able to sell an organ autonomously to take more seriously the fact that the main source of transplant kidneys in these proposed legal, regulated, current kidney markets will be the least well-off members of society whose economic hardship influences their option sets and their well-being.¹⁶

Moreover, those who focus on autonomy as the primary value fail to realize that people whose circumstances engender no practical alternative to acting in a certain way (e.g., selling a kidney) may be regarded as acting under duress or necessity, which in modern criminal justice contexts is regarded as compelled behavior that is incompatible with autonomy. As criminal defenses, duress and necessity are recognized as conditions that negate voluntariness and moral culpability. Thinking about the kidney market debate in these terms shifts the debate from one in which autonomy as free will governs the discussion to one in which autonomy as trying to make morally responsible choices in conditions of duress and necessity takes pride of place. This shifts the debate, which has ossified into a stale discussion in which proponents and opponents parry one another's arguments with ever finer distinctions about what autonomy as free will is and how it is or is not compatible with exploitation, injustice, and other modes of inducing people to do things they otherwise would likely not do. Specifically, duress and necessity in criminal law are regarded as conditions that diminish or mitigate criminal responsibility. The standard rationale for this defense is that actions performed under duress are actions for which an agent cannot be held fully morally responsible since she did not act fully voluntarily. When invoked as excuses to criminal acts, duress constitutes what is called a necessity defense. Successful necessity defenses mitigate criminal responsibility on the ground that the criminal actions were compelled in the sense that the agent had no reasonable alternative other than to commit the act. Such defenses function as excuses, not justifications, for criminal action. Necessity defenses mitigate criminal responsibility because the agents who commit them are not fully autonomous (in the sense relevant for moral responsibility) when performing those actions, and it would be unjust to hold such lawbreakers fully criminally liable for their actions. What duress and necessity in criminal law contexts suggests for the kidney market debate is that if the circumstances of those most likely to sell a kidney are relevantly similar to those who are compelled by duress to commit a crime, then they are not fully morally responsible for choosing to sell a kidney. Whether potential vendors make morally responsible choices to sell a kidney is relevant to a determination of the consequences of organ markets on the overall welfare of organ vendors. This is because any scheme the success of which depends on some people acting in ways that compromise their moral agency is, *prima facie*, inconsistent with regard for their welfare. Since kidney vendors are likely to act from duress, their choice to sell is less than a fully responsible one. The choice to sell an organ may, of course, be an understandable and even prudent one. Yet insofar as their choice to sell is a result of duress, it is analogous to the responsibility mitigating role of duress in criminal acts. In short, people who in acting from duress sell an organ do not make fully morally responsible choices. In recognizing this, we tacitly acknowledge that their economic circumstances are a crucial part of their overall low standard of well-being. By comparison, placing people in circumstances

where they are likely to make choices under duress (such as selling an organ) that, at best, temporarily enhance their short-term economic interests but do not conduce to their long term well-being compromises their welfare.

Taylor has considered an argument from necessity in which it is claimed that the poverty of those most likely to sell an organ necessitates the sale of their organs.¹⁷ According to Taylor, necessity may be distinguished from coercion since the latter “might require the presence of an intentional agent to do the coercing,” whereas the former does not. The intuition behind the argument from economic necessity is that poverty drives people to make choices to make ends meet, and so the existence of organ markets will in that sense compel those most likely to sell an organ to do so.

Taylor rejects this argument, claiming that even if potential vendors prefer to be in economic circumstances other than the ones they are in, they may nevertheless autonomously choose to sell an organ since they are still directing their own actions within their impoverished economic circumstances. In short, “vendors would not necessarily suffer any impairment in autonomy when selling a kidney, even if they do so out of desperation.”¹⁸ I discuss Taylor’s rejection of this argument in greater detail below, but for now wish to make the point that if we view necessity from the vantage of criminal law, acts done from desperation are not fully autonomous actions. Granted, unlike the criminal law in which voluntariness is regarded as an essential condition of criminal responsibility and, thus, as central to personal autonomy, voluntariness is not viewed in this way by pro-kidney market writers who embrace hierarchical conceptions of autonomy in which personal autonomy is about free will, not morally responsible choices or actions. Surely, however, morally responsible decision making is an element of human well-being, even if it is not an aspect of personal autonomy as free will. If so, then prioritizing autonomy as free will as the key value in the organ market debate marginalizes the well-being of those most likely to serve as vendors, at least inasmuch as it ignores the question whether the choice to sell a kidney is or could be a morally responsible one.

Another flaw in pro-market views of autonomy as voluntary choice or valid consent is that they fail to appreciate that the lack of a practical alternative to selling a kidney is a consequence of vendors’ unjust economic circumstances. It is no doubt true that feeling that one must choose an option one regards as offensive, degrading, or in some other way unacceptable may be deeply upsetting. But the idea that additional choices are not always better in the sense that they are sometimes emotionally difficult to make is not, contrary to Dworkin, the relevant point. Instead, the point is that what appears to enhance personal autonomy by giving people an additional option may compromise their autonomy irrespective of how they feel about it.¹⁹ If this is true, then a commercial market in kidneys may not increase the well-being and autonomy of those who sell an organ because kidney sales do not enhance the well-being and autonomy of those most likely to serve as vendors

in such a market. Indeed, such markets assume that the well-being of those most likely to sell is in general worse than is the well-being of those for whom the incentive to sell an organ will be weak or even nonexistent. And the distinction between freedom and autonomy associated with the argument that those who yield to undue influences or coercive offers may do so autonomously also ignores the fact that the option to sell an organ may compromise autonomy. If people routinely make choices within option sets, they have no role in creating and to which they do not consent, then those choices may not be truly autonomous or serve to enhance their well-being.²⁰

Is Prohibiting Organ Markets Misguided Paternalism?

A second theme in pro-market positions is the idea that prohibiting current markets in kidneys is illegitimate paternalism. As noted, Dworkin regards prohibiting organ markets for the sake of protecting the poor from hard decisions as “paternalistic in the extreme.” And Cherry asserts that “paternalistically protecting the poor from a market in human organs only closes a miserable range of options still further,”²¹ an observation that implicitly acknowledges the aforementioned point that a market in kidneys assumes that the well-being of those most likely to sell an organ is in general worse than the well-being of those for whom the incentive to sell is weak or nonexistent. Goodwin argues that the current debate over organ markets ignores racial concerns relevant to the ethics of organ transplantation since African Americans constitute a disproportionate one-third of those on kidney transplant waiting lists.²² Thus, prohibiting markets in kidneys will have a disparate impact on African Americans in need of transplant organs. Goodwin further claims that most arguments against allowing markets in kidneys are essentially paternalistic worries about the impact those markets may have on the welfare of vendors. Like many paternalistic views, this concern makes dubious assumptions about the abilities of African Americans to make rational decisions about their own good or to know their own interests.

In response to the paternalistic concern that the economically least well-off members of society will be exploited by a market in organs; Dworkin and Cherry suggest that the poor be excluded from participating as vendors in such a market. This is a peculiar suggestion in light of the fact that they each assume that the economic hardship that prompts those most likely to sell an organ is unjust and that given this injustice, prohibiting an organ market would be misguided paternalism. Dworkin asks, rhetorically, what our intuitive response would be to a market in organs that only people who were not poor could utilize to sell an organ for profit, assuming that we would (or should) be outraged by such a suggestion. Aside from the fact that restricting organ vending to those who are at least marginally well-off economically may defeat the purpose of such markets, defenders of a paternalistic prohibition on organ markets might well-wonder about the sincerity of the

pro-market concern for the rights of the poor that stipulates their unjust poverty and argues that for their sake they ought to be allowed to sell their organs.

In contrast to this type of rejection of a paternalistic prohibition on organ markets, Hippen suggests that the poor should be excluded as vendors because their socioeconomic status is an independent risk factor for developing kidney disease. His is, thus, a genuine concern for the public good as well as for the well-being of potential vendors; one that suggests a reasonable response to Goodwin's view. If the disproportionate number of African Americans in need of organ transplants is a consequence of low socioeconomic status, which is an independent risk factor in their contracting kidney disease, then prohibiting a market in organs will not create an additional hardship for them. Instead, if low socioeconomic status correlates with a greater likelihood of suffering diabetes, obesity, and other conditions that predispose members of that socioeconomic group to a greater likelihood of organ failure then denying them the opportunity to sell a kidney is sound public policy and reasonable paternalism.²³

In sum, the idea that prohibiting markets in organs is the worst sort of paternalism because it exacerbates the misery of the poor by denying them an option that would bring them temporary relief from their poverty, or because it discriminates against African Americans or others of low socioeconomic status, is misguided concern for those most likely to serve as organ vendors.²⁴ If the additional option of selling an organ only works as an incentive because of the already miserable options of those most likely to sell, then such rejections of paternalistic prohibitions on organ markets marginalize the value of the well-being of organ vendors rather than taking that value seriously.

Coercion, Exploitation, and Autonomy

One of the many objections that have been lodged against proposals to allow current markets in human kidneys is the argument from exploitation. In its barest form, this criticism contends that allowing current markets in bodily organs such as kidneys would take unfair advantage of the poor. This is so since only the poor would sell organs, and they would sell because they would be compelled by economic necessity to do so. On this view, current kidney markets are schemes for taking unfair advantage of the economic hardship of the poor, and this is morally objectionable exploitation. And so a third prominent theme in pro-market positions focuses on whether potential vendors are economically coerced, exploited, or otherwise compelled to sell an organ in a way that compromises their autonomy. Taylor renders the argument from economic coercion as follows:

According to the proponents of this argument markets in human transplant kidneys would serve to compromise the autonomy of many potential vendors by enabling their poverty to coerce them into selling their kidneys.²⁵

Since coerced actions are not autonomous, those people whose actions are coerced suffer from “a diminution of autonomy.”²⁶

Taylor uses the canonical case of coercion, the gunman who threatens your life unless you give him your wallet, to argue that coercion, strictly speaking, requires that an intentional agent “cedes control over her actions to the person who was coercing her.”²⁷ According to Taylor, because the notion of control is an “intentionally characterized concept,” a person can only cede control to another intentional agent. And since economic forces are not intentional agents, a person cannot cede control to them and, therefore, cannot be coerced by poverty or other economic circumstances. Hence, the argument from economic coercion fails to show that kidney vendors are coerced to sell and, thus, do not sell their organs autonomously.

This argument occurs in a broader context in which Taylor, like other pro-organ market writers, concedes that those most likely to serve as vendors in a kidney market will be the poor and that, despite their poverty, they will be able autonomously to choose to sell an organ.²⁸ This concession implicitly recognizes that people’s economic circumstances may serve as constraints on their behavior, helping to make some choices more or less desirable than others. In short, poverty is a context in which certain options function as inducements that would, in other economic contexts, fail to motivate a person to act.

Clearly, not all constraints are coercive. However, Taylor’s argument that the economic constraints of the poor that help make the option of selling a kidney appealing are not coercive is questionable. This is because a person’s economic circumstances are at least sometimes the consequence of the intentional actions of other economic agents. For example, the World Bank and the International Monetary Fund sometimes implement global economic policies known in advance to entail dire economic consequences for the indigenous populations of undeveloped or developing nations. In such cases, it is unreasonable to think that the adverse economic conditions of those directly affected by such policies are not forcibly and deliberately controlled by such collective economic agents.²⁹

There is a difficulty too, I think, with the idea that coercion requires that a person cede control to another intentional agent (or agents), at least as that notion applies to those adversely affected by the economic decisions of powerful economic agents. The idea of a victim of coercion ceding control to a coercer is ambiguous between an ontological and a normative sense of ceding control. The victim of a gunpoint robbery gives control of the situation to the gunman, in the sense that he has two options, namely to hand over his wallet or refuse to do so. Handing over his wallet just is, ontologically, consenting to do so. Normatively, of course, we want to say that the victim was forced to give his wallet to the gunman and, thus, that he did not in this sense consent to do so. On the normative sense of ceding control or consenting, the victim is not blameworthy or culpable for acting as he did. This analysis,

however, does not seem to be equally applicable to those who are coerced by economic circumstances created by powerful collective economic agents. This is because, unlike victims of gunpoint robberies, the idea that the desperately poor have meaningful control over their economic lives to begin with is false. That is, the canonical case of coercion assumes a situation anterior to that in which the gunman induces the victim to cede control. This anterior situation is one in which the victim is presumed to be in control of his circumstances, to the extent that any of us ever have such control. The gunman intercedes and reduces the victim's options to two, and in choosing between them, the victim cedes control of the situation to the thief. But people in dire poverty often have no economic situation antecedent to their impoverished circumstances over which they ever had meaningful control and so cannot be said to cede control of their circumstances to other economic agents whose decisions manipulate their lives. Since the economic circumstances in which potential kidney vendors make decisions are themselves the result of the choices and actions of intentional economic agents, the idea that they may be coerced or otherwise compelled by their economic circumstances seems a coherent and plausible one.

In his discussion of market exploitation, Cherry similarly rejects the argument from economic coercion or what he calls "market exploitation." According to Cherry, coercion is the essence of market exploitation, and the option to sell an organ is not coercive unless it "places potential vendors into unjustified disadvantaged circumstances."³⁰ But a legal, regulated market in human kidneys does not do this. Instead, it peaceably manipulates people to sell an organ.³¹ The essence of peaceable manipulation is the use of incentives to induce people to act, and this is permissible as long as it is possible for those who act on the incentives to do so with "individual deliberation and voluntary choice" about the costs and benefits of acting on those incentives.³² In other words, a legal regulated market in human organs provides vendors with an opportunity to access an "advantaged state to which they have no prior entitlement."³³ As noted, a legal regulated market in kidneys and other human bodily organs ameliorates, at least temporarily, the dire economic straits of those most likely to sell an organ. From this perspective, prohibiting organ markets rather than allowing them may be exploitative of the poor since such a prohibition denies them the chance to realize the economic value of their organs.

Cherry's construal of the coercion involved in exploitation is flawed. Commercial markets in human kidneys may be viewed as pricing mechanisms the aim of which is to solve the medical-moral problem of the dearth of transplantable kidneys.³⁴ For commercial markets in human kidneys to solve the problem of the scarcity of transplant kidneys, they must provide financial incentives strong enough to induce people to sell a kidney. But since the strength of financial incentives is relative to the level of economic well-being of potential vendors, those most likely to yield to such incentives and sell a kidney are the

poor. What gives the incentive to sell a kidney its motivational efficacy depends crucially on the background socioeconomic circumstances of those most likely to act on that incentive. And if those circumstances are themselves unjustified disadvantages, then an incentive to act that requires those conditions may be coercive without it *placing* those who yield to it into those circumstances. In other words, an offer may be coercive not because it places people in unjustifiably disadvantaged circumstances but because it requires unjustifiably disadvantaged circumstances in order to be an effective incentive.³⁵

Moreover, although Cherry recognizes that incentives are generally intended to elicit specific behavior (such as selling a body organ) in which people are normally not inclined to engage, he fails to realize that economic and other incentives are often exercises of political power.³⁶ Viewed in this way, incentives are efforts to influence people's behavior by providing motives to act in ways they were not already inclined to act, were not sufficiently inclined to act, or were disinclined to act. As such, financial incentives are often an effective way of overcoming people's reluctance to act in certain ways. Bribes and blackmail are clear examples. Of course, financial incentives may be benign or even beneficial, as when they function to call attention to options of which a person was ignorant and, in this way, provide information a person may then use in a decision about how to act. In the context of the debate over current markets in human kidneys, financial incentives for selling a kidney are not plausibly regarded as intended to serve any such purpose. Although commercial markets are often assumed to be a morally legitimate means of influencing behavior since they appear to do nothing more than provide bargaining options to affected parties, the point of financially incentivizing transplantable human kidney donation is clearly to persuade people to sell a kidney. Given the fact that people have been generally unwilling to donate kidneys, the purpose of financially incentivizing human kidney donation seems plainly intended to overcome that general reluctance. But this purpose can only be met if such incentives actually motivate people to sell a kidney. If the most likely vendors of kidneys in legal, regulated kidney markets will be the indigent, this is surely because their economic circumstances act as constraints on what financial options they can reasonably refuse. Thus, it seems that the point of financial incentives in this context is to induce the economically least well-off members of society to sell a kidney for the sake of addressing a pressing social-medical problem.

Finally, Cherry's assertion that prohibiting markets in human organs like kidneys may exploit those who would otherwise utilize the opportunity to sell an organ to their advantage is paradoxical, at least, and incoherent, at worst. The central concept of exploitation as Cherry and most writers on the subject regard it is coercion, which is generally regarded as constituted by threatened harm in the event of noncompliance with a demand. The aforementioned gunman case that is often taken to be the canonical example of coercion involves the presence of a threat, not the absence of an opportunity. Recall that according to Cherry for market exploitation to be objectionable, it

must involve placing people in “unjustified disadvantaged circumstances.” But those most likely to sell an organ are already in unjustified disadvantaged circumstances, a point Cherry concedes when he asserts that “paternalistically protecting the poor from a market in human organs only closes a miserable range of options still further.” And so prohibiting organ markets does not constitute a threat of harm to potential vendors. In fact, potential vendors are harmed by the unjustified disadvantaged circumstances in the form of poverty that make the option to sell an organ a viable one. The paradoxical implication of Cherry’s view of exploitation is that prohibiting a market in organs only exploits organ vendors if they are already exploited. This view of exploitation also entails, absurdly, that a prohibition on organ markets exploits everyone who might wish to sell an organ, even the very wealthy.³⁷

Thus, Taylor’s claim that coercion requires that in order to be coerced one must yield control to a coercing agent presupposes that victims of coercion have meaningful control of a situation to begin with, and Cherry’s assertion that coercion (market exploitation) requires placing people in unjustified disadvantaged conditions obscures the deeper reality that they are already placed in such conditions. Crime victims and the poor typically do not have such control and are already situated in unjustified disadvantaged circumstances that in a clear sense compel them to act as they do.

Although most advocates of organ markets acknowledge that the people most likely to sell a kidney will be those greatly constrained by their economic disadvantages and that the option to sell will probably be an incentive they will experience as a very difficult one to resist, they nevertheless defend the claim that the poor may sell an organ autonomously. There is, however, an inconsistency in this position. The contradiction is that regarding the legal prohibition on organ markets as a constraint on organ vendors’ autonomy is inconsistent with disregarding the economic constraints of poverty as similarly restrictive of vendors’ autonomy. It is beyond dispute that dire economic need is a limitation on personal freedom. And if the concern for potential vendors of organs is freedom from unjustified restrictions on their autonomy, then that concern ought to extend beyond the legal prohibition on organ markets to the autonomy-limiting and welfare-compromising poverty suffered by them. Alternatively, if it is possible to maintain autonomy in the context of the constraints of poverty, which pro-market writers assume, it should also be the case that potential organ vendors remain autonomous in the context of a legal prohibition on organ markets.

III. CONSTRAINT, AMBIVALENCE, AND AUTONOMY

The Idea of Constraining Options

As noted earlier, other concepts may better explicate the sense in which the poor would be forced to sell an organ if organ sales were legalized. These

are the ideas of duress and necessity. The common notion they share with coercion is the concept of compulsion. These concepts are intimately linked to familiar and plausible notions of constraint and economic exploitation, which helps shed additional light on the question whether organ sales by the poor may be autonomous and whether they would serve the well-being of those who would sell.

Constraints take many forms as, for example, when one's choices and actions are restricted by physical or mental handicaps, illness, ignorance, social inequality and injustice, and economic poverty. The concept of constraint permeates much of the recent literature on markets in human organs, in large measure because advocates of organ markets often cast the debate in terms of "autonomy as freedom from constraints,"³⁸ and take the view that legal prohibition of markets is a constraint on personal autonomy.

In a curious twist on this theme, Hippen argues that commercialized kidney sales may relieve the pressure created within families by the perceived filial obligation to donate an organ to a needy family member. For Hippen, such gift relationships may function as a constraint on both organ donors and organ recipients given the existing system of organ procurement and distribution. This is so since donors face the dilemma of choosing to donate versus "being thought complicit in the consequences of not donating" which, in the case of kidney failure, involves dialysis and the attendant probability of an early death.³⁹ Moreover, these difficult choices typically occur in contexts of suffering and tragedy highlighting how the options available to both parties to the donation relationship are constrained by existing legal prohibitions on organ markets.

Hippen's point that a market in human kidneys may liberate some people from the tyranny of filial responsibility is one way pro-market writers view the legal prohibition on such markets as constraining personal autonomy. And it may be true that people will feel less of an obligation to donate an organ to a family member if there is a market in kidneys that provides an alternative source from which to get the needed organ. It may also be true that a market in kidneys might lead family members to feel an obligation to help out less directly, for example, by finding someone willing to donate a kidney for a fee or even by paying for the organ and the cost of having it transplanted into a loved one. Still, the idea that easing the burden of the gift relationship within family obligations is a good reason for commercializing kidney sales ignores the fact that such a market will create a different and more widespread constraint on those most likely to sell a kidney. In short, the benefit of easing filial duties to donate an organ to one's family members in need comes at the expense of burdening those most likely to sell a kidney with a choice that will be very difficult to resist because of their economic constraints. In other words, legalized kidney markets create a different and potentially tyrannical constraint on those most likely to serve as organ vendors if the success of those markets requires that the poor serve as vendors. And economic poverty as a constraint already limits the autonomy and compromises the well-being of potential vendors.⁴⁰

Another way people's choices may be restricted is when they are constrained to do what they already want to do, as when one's future choices are restricted by such self-binding actions as getting married, making promises, and creating legally binding instruments such as contracts, wills, and trusts. Unlike compelled or coerced behavior, such self-binding action is thought to be a paradigm of autonomous behavior, as demonstrated in the Homeric account of Ulysses binding himself to the mast of his ship and ordering his men to leave him bound irrespective of any subsequent appeals to untie him. Ulysses' choice enabled him to resist the Sirens he knew would otherwise have induced him to steer too close to the rocky shore, ensuring shipwreck. Such cases illustrate the general proposition that sometimes less is more insofar as "sometimes there are benefits from having fewer opportunities rather than more."⁴¹ This contrasts with the usual presumption that, in general, additional options enhance personal autonomy.⁴² Also contrary to the usual presumption is the fact that sometimes the addition of an option diminishes autonomy, thereby illustrating the converse of Elster's observation, namely that sometimes more is less. This can occur when the presence of a new option is so attractive that it would be virtually impossible to refrain from choosing it. Irresistible temptations are an example. If I am presented with an offer that is literally irresistible, then any other course of action previously open to me is ruled out. Although the addition of a powerfully attractive option may not be irresistible, it may nevertheless negate the viability of other choices and, thus, render them pragmatically unavailable. In considering this possibility, which he ultimately rejects, Taylor puts the point in the language of economic opportunity costs:

(According to) . . . this type of argument from irresistibility . . . the amount of money (vendors) could gain for their kidneys would be significantly higher than that which they could secure any other way. Since this is so . . . the option of selling their kidneys would, for such potential vendors, render ineligible the other options that they would have otherwise pursued through drastically increasing the opportunity costs associated with their pursuit.⁴³

The idea is that the option to sell a kidney nullifies other options, leaving the alternative of selling a kidney as the only viable choice. The addition of options may even constitute a constraint that paralyzes an agent's volition. Consider the case of a criminal convict whose life sentence is commuted to time served after having spent his entire adult life in prison. The choices the agent had prior to his release from prison, highly constrained given the realities of criminal incarceration, have been replaced by a wealth of new options. The sudden freedom to live in society as he sees fit may overwhelm rather than liberate such a person's will. The general point is that people who have lived much of their lives in highly restrictive circumstances are sometimes unable to accommodate into their lives, as Elster puts it, "too much choice."⁴⁴ A less dramatic but equally real threat to personal autonomy

recognized by those who embrace hierarchical theories of autonomy is that a person's options may generate an ambivalence of the will that renders choices and actions unfree. Such volitional ambivalence, as Frankfurt and Slote have called it, involves higher order ratifying desires irreconcilably at odds with one another, each attempting to enact incompatible choices or actions. As Slote puts the point, "In ambivalence . . . we have conflicting second-order desires/volitions about a first-level desire or want: wanting the first-level desire to exist or issue in action and, at the same time, wanting this not to be so."⁴⁵ This describes a division within volition itself, rather than merely a conflict between desires or affects. In cases of volitional ambivalence, there is no single conative, self-directing the agent's actions, and so she cannot truly be autonomous (i.e., self guiding) with respect to her choices or actions. Put differently, volitional ambivalence is a state in which an agent cannot decisively and wholeheartedly identify with either of her conflicting first-order desires. This entails that a person in such a state is not autonomous and, thus, that her choices and actions are not freely chosen.

Of course, not all states of ambivalence compromise volition, and there are different orders of ambivalence and different kinds of psychic instability, but it seems plausible to suppose that when a person is intentionally and strongly induced to act, her autonomy will often be compromised and her consequent action will be less than fully autonomous. This is because it is plausible to think that certain kinds of interventions in human agency are so effective as to make the resulting action attributable to the intervener and not (at least fully) to the agent. Slote uses the example of someone who is offered a million dollars to lick the boots of the person making the offer to show how this is so. Since nearly anyone would be tempted to accept this offer while resenting the person making the offer, this is an agency-undermining state of ambivalence. As Slote puts it, "it is this state of ambivalent conflict that accounts for our intuitive judgment that such a person does not lick the boots of his own free will."⁴⁶ Note that Slote's point is not that just any instance of determining the behavior of another compromises that person's free will. Indeed, many instances of such determination are routine, unobjectionable, and even manifest rather than compromise a person's autonomy, as when one fulfills the terms of a contract or meets his other moral and legal obligations. The point is that some ways in which a person's actions may determine another's behavior are volitionally compromising, and coercive offers are among these. As I have suggested, coercive offers compromise autonomy when the person being made the offer experiences volitional ambivalence of a significant enough order.⁴⁷ It is not easy to determine when ambivalence is "significant enough," and like trying to ascertain various degrees of weakness of will, we may have little choice but to observe behavior in specific circumstances and, given incomplete and imperfect information, draw the most plausible conclusions about whether persons so situated would likely feel constrained. At any rate, my claim is the quite

modest one that a market in kidneys may induce strong ambivalence in would-be vendors, perhaps, strong enough to compromise their autonomy, and it is noteworthy that this possibility is an implication of the conception of autonomy most pro-market writers endorse. Thus, on their own theoretical turf, there are grounds for concern about the consequences for vendor autonomy of commercial markets in kidneys.

Because commercialized organ sales rely on strong inducements to those most likely to sell an organ, then such a market will have the likely effect of creating strong states of volitional ambivalence in many of those who opt to sell a kidney. Insofar as organ markets induce volitional ambivalence of this order, they will likely compromise the autonomy of vendors. Clearly, unusually attractive offers may tempt people beyond their ability to resist. Moreover, it is widely recognized that illicit organ markets flourish in large part because of the promise of significant and sometimes exorbitant financial compensation for those willing to sell an organ.⁴⁸ Since such offers are most appealing to those in dire economic need, there is reason to worry that the option to sell an organ, even in a legal, regulated, market, may constitute a coercive offer. Thus, may the introduction into a person's life of a new option, or set of options, render previous choices practically unavailable.

As noted, recent proponents of organ markets recognize this concern but contend that so long as a person's choice to sell an organ is voluntary or expresses legitimate consent, the transaction is morally permissible. In this way, voluntary choice and valid consent become the key issues in determining whether the choice to sell an organ is truly autonomous. But on this conception of autonomy, invalid consent or involuntary choice will be a result of an irreconcilable conflict between higher order evaluative beliefs or judgments or, in other words, a conflict within volition itself that makes whole-hearted identification with one's volitions impossible. The question is do financial incentives to sell an organ preclude voluntary choice or genuine consent to sell? On pro-market views that embrace the Frankfurtian hierarchical conception of autonomy, a person may voluntarily choose or validly consent to an option just in case his higher order volition endorses his lower level desire to accept the offer to sell an organ, or he validly consents to that choice even when that choice is involuntary. Thus, although coercive offers and undue influences may undermine voluntary consent, such consent may yet be autonomous since what is essential to genuine consent is autonomy not voluntary choice. Moreover, this approach supports the distinction between autonomy and voluntariness since it stipulates that so long as agents reflectively identify with the reasons for which they act their actions are autonomous even if they are not free to do otherwise (i.e., have no practical alternative open to them).

However, divorcing freedom (voluntariness) from autonomy in an effort to demonstrate how those who choose to sell an organ are autonomous with respect to their choice even if the offer constitutes an inducement that

undermines voluntary choice ignores the reality of volitional ambivalence. Hierarchical theories of autonomy recognize that people may experience conflicts of volition that compromise or even undermine the autonomy of their choices. Being pulled simultaneously in incompatible directions, each of which is reflectively endorsed (or identified with) by the agent is not an instance of an autonomous but unfree agent whose consent is valid but involuntary. If this is what typically occurs when people yield to the incentive to sell a body organ, then they do not validly consent to such transactions because they do not autonomously decide to do so.⁴⁹

Moreover, the notion of autonomy used by pro-market writers depends on a conception of valid consent or voluntariness that ignores the institutional structures that generate the choices of those most likely to sell their kidneys. A Marxist concept of exploitation that emphasizes the role of background institutional forces in inducing people to behave in specific ways helps show how this is so. This is a notion of exploitation or constraint that more clearly illuminates how the institutional structures that generate the choices of potential kidney vendors may compromise the autonomy and well-being of those vendors. In other words, since the constraints within which the option to sell a kidney are unjust, and the victims of that injustice do not, and could not have, consented to that injustice, their choice to sell a kidney is only superficially autonomous and does not enhance their well-being.

IV. ORGAN MARKETS, JUSTICE, AND WELL-BEING

The tendency in many pro-organ market discussions is to assume that markets are free in the sense that people's voluntary choices within the market imply their consent to those choices. There is a sense in which this is true. When a person seeking housing rents an apartment, his voluntary choice of which one to rent seems to entail his consent to that choice. But there is also a sense in which this is not true since a voluntary choice within a set of options does not imply consent to or agreement with the option set itself. A person may not want to live in an apartment at all but have no practical alternative to doing so. And so a person who chooses among apartments may voluntarily agree to rent one while not consenting to the economic constraints that make it the case that living in an apartment is his only viable housing option. In general, option sets may be thrust upon people against their will, imposed by unjust local and global socioeconomic and political structures.⁵⁰ Thus, even if a person's choices from among their option sets implies consent to those choices and, thus, that those choices are autonomous, if the option sets are themselves not freely chosen, there is reason to think that some of the choices within that set may not be truly autonomous.

Earlier I noted how choice and consent have been distinguished in such contexts as rape law and domestic violence to illuminate how victims' choices to endure unwanted sexual relations or refraining from invoking legal responses

to the violence perpetrated against them need not imply consent to those relations or that violence. In that discussion, it was suggested that consent and choice may be distinguished in a way that highlights how choices within certain sorts of constraints may not be autonomous. In the context of markets in human organs, choice and consent may be distinguished in way that highlights how choices within unjust constraints may not be autonomous. Specifically, Peter has recently claimed that there are two views of personal choice within free markets.⁵¹ The first or standard view is derived from Friedman's perspective and claims that there is freedom of choice within the market sphere. Samuelson's view urges, alternatively, that the market is essentially coercive and that choices within it are not free. Peter suggests that these divergent views follow from different emphases, asserting that "If the focus is on individual choice and preferences, one gets Friedman's view. If the price mechanism is represented from the angle of the constraints it sets and the influence it thereby exercises on individual actions, one gets Samuelson's view."⁵² According to Peter, the idea that people enjoy freedom of choice within markets has dominated economic thinking to the point where the impact of potentially coercive aspects of the market on individual choice has become invisible. In illustrating this point, Peter cites the cases of people living in poverty who offer to sell one or more of their bodily organs, and the choices women face when trying to combine family work with the demands of the labor market. These examples generate concerns about whether the choices are truly free because "instances of significantly constrained volition are common in economic life and prompt the intuition that constraints may matter in the analysis of individual actions."⁵³ Moreover, the standard view that market transactions are free is a result of conflating "choice and consent in economic theory."⁵⁴ That is, the possibility of choosing between different alternatives is thought to entail consent to those choices, which in turn is thought to imply that those choices are autonomous. This is the same assumption made by organ market advocates who concede the injustice of the poverty of potential organ vendors and then claim that the choice to sell an organ may nevertheless be an autonomous one. In his overview of conceptions of ownership, Cherry invokes Friedman's view of choice within markets as the source of the notion that economic transactions are models of free choice.⁵⁵ As Peter notes, such views uncritically assume that the choice to sell an organ entails unproblematic consent to do so. But choice within unjust, coercive, mutually exploitative, or even peaceably manipulative constraints may not by itself ensure that the choices made express true, valid, unproblematic consent. Two questions begged by the assumption that choice entails consent are, what counts as consent, and consent to what? As Peter suggests, if choosing between alternatives within a market does not always express consent to those option sets, then it is possible that one may choose yet not consent to that choice. And if kidney vendors cannot or do not consent to the background constraints, then the apparent autonomy of and consent to such choices may be an illusion. In this way, many recent pro-market positions

grounded in autonomy fail to meet the relevant economic exploitation objection to a market in organs; one premised on the notion that such exploitation is partly about the injustice of the constraints that determine option sets.

There is a concept of exploitation in which the core idea is taking advantage of people's unjust vulnerabilities. That concept derives from Marx and focuses on the injustice of the constraints on choice generated by capitalism.⁵⁶ As Cohen has argued, exploitation in the Marxist sense is an assault on self-ownership since workers own their bodies and their labor power but when they produce surplus value their labor is in effect forced.⁵⁷ There is nothing mutually advantageous about this, as Marx was at pains to demonstrate in his critique of capitalism. Moreover, the injustice of exploitation is not merely that capitalists get something (surplus value) for nothing (labor they do not pay for). Rather, the injustice is structural insofar as the background institutions constrain workers to create something (surplus value) for which they get nothing. As Cohen makes clear, exploitation in the Marxian sense is not just what happens when a worker sells his labor for a wage it's *what happens to make that happen*. This perspective helps make clear Peter's claim that unjust background constraints on personal choices "helps us to see that the fact that people choose to sell their organs does not imply that they have consented to the institutional arrangements that confront them with such alternatives."⁵⁸ And so analyzing the choices people make given the constraints under which they choose is not enough to determine whether those choices are truly voluntary, valid, or autonomous. As Peter puts this point, "to evaluate the legitimacy of market transactions, the constraints under which people choose will have to be taken into account and the analysis of the choices people make given those constraints will not suffice."⁵⁹ This is directly contrary to the assumption of recent pro-organ market writers that it is possible to determine whether the choice to sell an organ is autonomous independently of the unjust economic poverty, exploitation, or even peaceable manipulation, that constrains the choices of those most likely to serve as vendors in a kidney market. That assumption is part of the logic of the standard economic account of choice and consent championed by Friedman, which maintains that choice entails consent not only to the alternatives on offer but also to the mechanism that generates them. Applied to the issue of organ sales, this view implies that unless the option to sell an organ is fraudulent, or compelled in some way that undermines autonomy, then the choice to sell an organ constitutes autonomously consenting to sell. But as I have argued, equating valid consent with autonomous choice while simultaneously ignoring the institutional constraints under which people choose and in which individual market transactions occur is an incomplete analysis of choice and consent. When pro-organ market writers suggest that the injustices under which people live and which structure their option sets are irrelevant to the evaluation of their choices they implicitly conflate the distinction between choices within option sets and the institutional arrange-

ments that engender those options. But, to cite Peter again, “To read the choices people make as acts of consent . . . fallaciously subsumes the evaluation of the constraints which shape the set from which a choice is made under the evaluation of the alternatives from which one can choose.”⁶⁰

Of course, showing that choice does not entail consent to the background circumstances of people’s options is not enough to establish either that organ markets are not free or that the decision to sell a bodily organ within such markets is morally illegitimate. If it can be shown, for example, that people either do, or under certain circumstances would, choose the background constraints that yield their options, then the objection to inferring consent from choice given those constraints would be met. Although adequate discussion of this possibility is beyond the scope of this article, it should be noted that such attempts will need to take seriously the point I have been urging throughout this article and especially in this section, namely, that what is required to determine whether and in what sense organ vendors legitimately agree to sell an organ are background sensitive concepts of consent, choice, voluntariness, and autonomy.⁶¹

V. CONCLUDING REMARKS

I have argued in this article that recent advocates of markets in human bodily organs have sought to defend a conception of autonomy that makes it possible for a person to autonomously choose to sell a body organ irrespective of the fact that he does so involuntarily, is coerced, is compelled to do so by unjust poverty, or is exploited. I have also shown how the hierarchical conception of autonomy typically employed to articulate the nature and value of personal autonomy in these arguments actually implies that conditions of constraint sometimes generate volitional ambivalence, a state in which an agent cannot wholly identify with her higher order desires and, thus, cannot choose or act autonomously. If the circumstances of those most likely to sell a body organ in commercial organ markets constrain potential vendors in this sort of volitionally ambivalent way, then potential vendors are not autonomous. This is an important corrective to those who claim that on the preferred conception of autonomy, an agent may act autonomously even when she acts involuntarily, from coercion, or by being exploited.

I have also offered an analysis of how the well-being of potential organ vendors is marginalized in pro-market perspectives. It is disregarded in its full sense because these perspectives tend to conflate people’s choices to sell organs with their consent to the contexts of constraint within which those choices are made possible and desirable. Even if people may autonomously choose within contexts of constraint that are economically unjust, those constraints define a comparatively impoverished level of well-being that can only be temporarily allayed by selling an organ.

Moreover, the idea that exploited persons may make autonomous choices misses the deeper reality that what makes the option of selling an organ attractive to economically disadvantaged people are the economic constraints within which they make their choices. And these, in turn, are the result of broader social, political, and economic structures over which they have no control, no meaningful voice in establishing or revising, and from which there is no exit. This is the deeper concern about exploitation that advocates of markets in human bodily organs fail to appreciate.

Defenders of organ markets sometimes compare the right to sell an organ with the right to engage in dangerous occupations like coal mining, roofing, or military service. But organ selling, at least in a current organ market, is not and cannot be an occupation. This is because the human body is not plausibly regarded as a container of useless spare parts. Indeed, an unchallenged assumption of organ market advocates is that human kidneys (and other organs) are unproblematically redundant. But like other complex systems, human bodies deteriorate over time. As critical functions and components slow down and fail, backup systems allow the human organism to continue living even as damage to the whole continues. Gavrilov of the University of Chicago argues that human beings appear to function, and fail, as do other complex systems like power plants and automobiles. These are systems “with multiple layers of redundancy: with backup systems and backup systems for the backup systems. The backups may not be as efficient as the first-line components, but they allow the machine to keep going even as damage accumulates.”⁶² Even damaged cells rely on “DNA repair systems” or extra copies of the damaged gene to carry on the work. On this view, “extra” lungs or gonads, teeth, and kidneys are not useless spare parts. They are part of a living organism that may play an important role in maintaining physical well-being over the course of a lifetime. This reality does not justify failing to donate a kidney or other organ to save someone’s life, especially if the donor has a reasonable chance of living a normal life without the donated organ. It does, however, suggest that the idea in some pro-market views that we are all walking around with spare parts we can do without is a mistake. As noted earlier, Hippen, an advocate of regulated markets in human organs, allows that since low socioeconomic status is an independent risk factor for kidney disease, we should not permit those of such status to participate as vendors in organ markets. Aside from the question whether disallowing such prospective vendors would leave a market with too few donors to solve the problem of a dearth of transplant organs, Hippen’s view underscores the reality that human well-being is enormously complicated and viewing organs like kidneys as redundant in the sense that they are extra organs, we can do without fails to appreciate this fact. Perhaps, an appreciation of the complexity of human well-being helps make sense of the reluctance people intuitively feel about donating or selling their organs while they are alive.

NOTES

1. Recent scholarly arguments in favor of markets in human organs include Dworkin (1994), Wilkinson (2003), Taylor (2005), Cherry (2005), and Hippen (2005). Non-academic commentary on the prospect of legalized organ sales includes newspaper reports, editorials, and other popular publications. See, for example, Jacoby (2003). Jacoby decries the current unwillingness among policy makers to explore various ways of compensating organ donors for their donation, many of which would not require a market or a market involving living donors. See also Capron and Noel (2004, 9f) and Basler and Hudnall (2006, 10–5) and (2007, A12–5).

2. Taylor uses the term “current market” to denote a market in which living vendors sell one of their organs in the immediate future.

3. Radcliffe-Richards et al. (1998) in “The case for allowing kidney sales,” describes the anti-market consensus as follows: “When the practice of buying kidneys from live vendors came to light some years ago, it aroused such horror that all professional societies denounced it, and nearly all countries have now made it illegal. Such political and professional unanimity may seem to leave no room for further debate” Reprinted in *Bioethics: An Anthology* (p. 487), Helga Huhse and Peter Singer, eds. (Blackwell Publishing, 2006). For similar sentiments, see Taylor (2005, 1–2). Cherry’s argument in favor of organ markets is largely a critique of this bioethical consensus against human organ markets. Cherry claims that “the global consensus to proscribe organ sales does not have the force usually assumed” (2005, xi). Cherry rightly notes that opponents of organ sale do not always distinguish between the various types of markets that might be used and, thus, that the global consensus against such markets appears to be a blanket condemnation of current as well as futures markets in human organs.

4. Dworkin (1994) cites Arthur Caplan’s claim that the dearth of transplantable human organs is “perhaps the most pressing policy issue” facing those in and outside the field of organ transplantation. Cherry refers to the shortage of transplant organs as “an urgent public health care crisis.” In her review of Cherry’s book, Goodwin (2007, 1376), arguing that the shortage of transplant kidneys “disparately impacts the lives of people of color,” calls the shortage a “current organ crisis.” In contrast, Sharp (2006, 17–24) refers to such rhetoric as “scarcity anxiety,” suggesting that the focus on the shortage of transplant organs neglects the role and responsibility of the “transplant industry” in generating its own patients. Note that although there are many human organs suitable for transplantation, and many organ market advocates cast their views in terms of markets in human organs, in fact human kidney markets are the main focus of most of these discussions because kidneys, unlike other human organs, are easily harvested and transplanted without serious adverse health effects on donors and recipients. Accordingly, I shall refer throughout this discussion to current markets in human kidneys, not to futures or other markets in kidneys or to any kind of market in human organs other than kidneys.

5. Although recent advocates of organ markets stress different aspects of personal autonomy, they generally subscribe to a hierarchical conception of autonomy very much like Frankfurt’s. Wilkinson, Dworkin, and Taylor explicitly tie their arguments in favor of organ markets to such hierarchical accounts, whereas Cherry’s view focuses more on the idea that since we own our own bodies we have a right to do with them as we wish, though in his discussion of mutually advantageous exploitation he approvingly cites Frankfurt’s notion of personal freedom as allowing for autonomous choices in the face of exorbitant offers. See Cherry (2005, 93).

6. Unlike some writers, Taylor argues that it is a mistake to construe Frankfurtian autonomy as agential identification with higher order desires since identifying with one’s higher order desires might be the result of various sorts of compulsion (e.g., brainwashing). Instead, an agent is autonomous just in case she controls which desires she endorses. See Taylor (2006, 135–59).

7. Notwithstanding the fact that Dworkin asserts that “Markets can increase both autonomy and well being” (1994, 156) and Taylor claims that “Concern for the core values [of] personal autonomy, well being and human dignity *supports* the view that it is morally permissible to trade in human organs” (2005, 3, original emphasis), both prioritize autonomy over concerns about exploitation, injustice, and the well-being of potential organ vendors. Reiterating a point made by many writers on issues in medical ethics, Taylor claims that “Respect for personal autonomy is the preeminent value in contemporary bioethics.” (2).

8. The principle Cherry bases his argument on is that “As the general significance, or strength, of ownership, privacy, liberty, and forbearance rights increases, so too should the standard of proof that must be met rightfully to interfere in one’s use of self, body, and property” (2005, 21). I note in passing

that this principle implies that as the strength of ownership, privacy, and liberty rights *decreases* so too would the standard of proof needed to rightfully interfere in people's use of self, body, and property. A number of recent U.S. Supreme Court decisions (e.g., the so-called "partial birth" abortion decision in *Gonzales v. Carhart*, 2007) unambiguously decrease privacy and liberty rights, which on Cherry's principle weakens the standard of proof that needs to be met in order to rightfully interfere with persons' use of their bodies, etc. As a general principle for grounding moral positions, this appears to put the cart before the horse, allowing legal (and, thus, political) expediency to determine the moral boundaries of privacy, liberty, and ownership rights.

9. Wilkinson's view is complicated by the fact that he regards valid consent as constituted by enough "information, competence, and voluntariness" (81), yet he thinks, too, (and as far as I can tell, inconsistently) that voluntariness is not a necessary condition of autonomy (118–20). According to Wilkinson, people who have no practical alternative to an offer and, therefore, are not free to decline it "may still be capable of making a fully autonomous choice, provided that they meet certain conditions." The conditions are that the agent be able to reflectively endorse or identify with the reasons for which she acts while "free from distorting or controlling influences" (*ibid.*, 120).

10. Dworkin (1994), Dworkin's point is about the psychic cost exacted by the addition of emotionally difficult choices to one's set of options. Although he agrees that having more choices is not always better, he does not endorse the idea that having more choices does not enhance autonomy in a quantitative sense. Indeed, Dworkin seems to think, as do other writers like Radcliffe-Richards, that additional options like the offer to sell an organ cannot impair a person's autonomy because additional choices broaden rather than constrict choices. But as Taylor points out, this is a mistake for some additional options may impair autonomy insofar as they constrain an agent in a way that makes alternative choices pragmatically unavailable. See Taylor (2005, 65) and Radcliffe-Richards (1996, 384).

11. See also Cherry's (2005) description of coercive and irresistible offers (92–3) and Taylor's discussions of the arguments from economic coercion, economic necessity, and irresistible offers in Taylor (2005, 51–71).

12. *Ibid.*

13. Wilkinson (2003, 120).

14. Taylor (2005, 69).

15. Cherry (2005, 92).

16. None of the pro-market writers I discuss in this article give an overall account of human well-being but assume that autonomy, access to medical care (in particular to transplant organs for prolonging life), and enhanced (even if only temporarily) economic status are part of that well-being. I, too, shall not undertake a description and defense of an overall account of human well-being but assume that economic poverty and the personal and social problems associated with it are detrimental in myriad ways to the physical and psychological health of those who endure it. This is consistent with the idea that some cases of organ sale may enhance the well-being of vendors along specific dimensions of well-being, such as by generating much needed financial resources, even if such sales do not have that effect in general or across other dimensions of well-being.

17. Taylor (2005, 62–3).

18. Taylor (2005, 63).

19. Dworkin observes that given the injustice of their economic situation, it would be "paternalistic in the extreme to deny poor people choices which they perceive as increasing their well being" (1994, 157). One wonders why their perception of what enhances their well-being matters at all, and what the empirical evidence is that they actually perceive the choice to sell a kidney as enhancing their well-being.

20. I discuss these points at greater length in sections 3 and 4.

21. Cherry (2005, 93)

22. Goodwin (2007, 1367–85).

23. I should emphasize that this is my characterization of Hippen's point, one he (via private correspondence) disagrees with. On his view, transplant physicians have an obligation not to participate in transactions in which foreseeable harm to a vendor will likely occur. This would not necessarily preclude an at-risk vendor from selling a kidney were there a willing buyer. As Hippen points out, a policy prohibiting transplant physicians from engaging in transactions in which foreseeable harm to a kidney vendor will likely occur may have the same effect as instituting a reasonable paternalism without having a paternalistic rationale.

24. That the economic benefits of selling an organ are likely to be temporary is supported by recent research on illicit kidney markets in India. See Goyal et al. (2002). Cherry (2005, 95) acknowledges this

when he notes that legitimizing organ sales increases people's options and may provide them with the ability "to support their families temporarily while looking for other work." But note, too, that here and elsewhere in his discussion (e.g., 151, "organ selling is less risky than many other occupations"). Cherry, like other pro-market writers, compares organ vending with more traditional, dangerous, forms of employment like military service, roofing, and coal mining. But as I discuss at greater length in the concluding section of this article, selling bodily organs is not and cannot be an "occupation." For a relevant discussion of how serving as a human subject for drug-safety trials in exchange for financial compensation strains intuitions about what uses of the body could constitute an occupation or a way of making a living, see Elliot (2008, 36–41). By contrast, Taylor is unclear about whether the option to sell an organ yields a temporary or long-term solution to vendor poverty when, in his rejection of what he calls the argument from irresistible offers, he claims that "it is surely wrong to hold that one can protect the autonomy of destitute people by removing from them the opportunity to escape from their poverty." Taylor (2005, 69).

25. Taylor (2005, 13).

26. Taylor (2005, 13).

27. Taylor (2005, 13).

28. As noted above, Dworkin's response to the argument from exploitation is that given the economic injustice facing the poor it would be "paternalistic in the extreme . . . to deny poor people choices which they see as increasing their well being" (1994, 157). Wilkinson asserts that "it is at least worth taking seriously the possibility that exploitation that is rationally consented to and desired by the exploitee, is morally preferable to exploitation that is forced and unwanted. Thus, even though all exploitation is harmful, mutually advantageous exploitation will often be less morally objectionable than other forms" (2003, 71). Wilkinson's analysis of exploitation occurs in the context of arguing that those most likely to sell an organ may validly consent to do so despite the pressures of their penury.

29. Davis (2006, 146) offers as an example of this an economic decision that blocked access by the poor to clean water: "In Dar-Es-Salaam . . . municipal authorities were pressured by the World Bank to turn over the water utility to the private British firm Bewater—the result, according to aid agencies, was a sharp rise in prices despite little increase in service; poor families have had to turn to unsafe water sources." Admittedly, this is an ambiguous case, and it might be argued that the unhappy consequence of the poor turning to unsafe drinking water because they can no longer afford the newly privatized clean water was a foreseeable but unintended result of the World Bank's initiative. Even forcible and deliberate control over others' economic circumstances is not necessarily coercive if some of the untoward results of the manipulation were not intended. My point, however, is that such manipulation may sometimes be coercive, a possibility excluded by Taylor's analysis of coercion.

30. Cherry (2005, 92).

31. See Cherry's (2005, 88–92) discussion of market exploitation, where he distinguishes between coercion and "peaceable manipulation" in rejecting the idea that organ sales would be coercive offers.

32. Cherry (2005, 92).

33. Cherry (2005, 91).

34. On the concept of pricing mechanisms as a means of solving medical-moral problems, see Magnell (2006).

35. Cherry seems to acknowledge this point when he cites Zimmerman (1981, 121–45) in considering the idea that the option to sell an organ might be coercive "if the intent of the offer is to elicit behavior that contradicts the individual's normal operative goals, and in that sense attempts to use him as a mere means." But, as noted, Cherry uses the distinction between coercion and peaceable manipulation to reject the idea that organ sales would be coercive, notwithstanding the fact that he recognizes that the line between coercion and peaceable manipulation is not always easy to draw. See Cherry (op.cit., 88–92).

36. See Grant (2002, 111–39).

37. This is a different point than the one Cherry makes when he claims that "Contrary to the often cited concern that an organ market will exploit the poor, *this analysis suggests that in offering to sell organs, the poor may be exploiting the illness of the rich for personal gain*" (2005, 94) (original emphasis). This is a very odd claim and seems wrong on two counts. First, and strictly speaking, the analysis does not imply merely that the poor would exploit the illness of the rich for personal gain but that the legalized market and all who benefit financially from it (e.g., transplant physicians) would exploit the illness of the rich for personal gain. But, second, there can be no such exploitation since the poor offering to sell organs to the wealthy do not thereby place the rich in "unjustified disadvantaged circumstances." For the poor and other alleged beneficiaries of a current kidney market to genuinely exploit the rich they would

have to *cause* the illnesses of the rich and then offer to sell them the kidneys they need to continue living.

38. This is Cherry's (2005, 49) gloss on John Rawls' conception of individual liberty.

39. Hippen (2002, 597).

40. Hippen notes that being allowed to sell an organ, even if it is a constrained choice, is compatible with fulfilling one's filial or other duties (e.g., to charity) since a market transaction may be one way of discharging an obligation.

41. Elster (2000, 1).

42. Cherry (2005, 95) endorses this presumption when he observes that "In general, it is difficult to count a policy as exploitative if, as in the case of legitimizing organ sales, it increases the number of options open to individuals."

43. Taylor (2006).

44. Elster (2002). This observation is reminiscent of Fromm's assertion that the too rapid and extensive removal of traditional restrictions on individual action has created in many people a "fear of freedom." (See Fromm 1960.) See also Schwartz (2005). Schwartz argues that the assumption that more choice means better options and increased satisfaction or happiness is false. In advanced Western nations like the United States, it is possible to have one's autonomy undermined by an overabundance of choices that causes paralyzing indecision. On his view, the plethora of choices in contemporary Western societies like the United States has been on the whole detrimental to human well-being.

45. Slote (1980, 140). Frankfurt elucidates a similar concept of volitional ambivalence or "psychic instability" throughout much of his work. See, for example, "The Faintest Passion." p.99.

46. Slote (1980, 144).

47. Compare Cherry's case of a rich person offering a poor philosophy graduate student two million dollars for one of his kidneys (2005, 92–93). Cherry has us imagine that the student is happy to have been offered the money, that he considers it rational to accept the offer, and that his higher order volitions endorse his lower order desire to accept the offer even though the student's lower order desires are being manipulated by the offer. Cherry's is a case of someone manipulated to want what he ends up wanting, and so the higher order willing is not coerced.

48. See Goyal et al. (2002).

49. For a fuller explication of these issues, see Hughes (2006, 237–51).

50. There is a large literature on the injustice of global poverty, and many writers on the problem now concede that the desperate poverty endured by millions of people is the result of radically unfair distributions of wealth. For recent work on this issue and an extended argument for this claim, see Pogge (2002). See also Davis (2006) for a detailed account of how the desperately poor are increasingly compelled to live in urban slums bereft of the kinds of economic options that might alleviate their plight.

51. Peter (2004).

52. Peter (2004, 2).

53. Peter (2004, 3).

54. Peter (2004, 3).

55. Cherry claims, "Along with association and occupation, economic freedoms are fundamental elements of total freedom. Owners have exclusive use of their property and among the pursuits to which it may be put is the creation of profit. Things that one owns, including body parts, would then be open to being sold as long as both vendor and purchaser freely agree to the transaction" (2005, 31).

56. In contrast, Cherry claims that the core notion of exploitation is "to benefit by taking unfair advantage" of another person (2005, 88). He further interprets Marx as endorsing a concept of exploitation in which exploiters (Capitalists) extract surplus value from those who are exploited (workers) in a relationship of mutually advantageous exploitation (2005, 90). But this view of exploitation is not the full Marxist sense of the concept. As noted earlier, there is a sense of exploitation that assumes the unjustifiable disadvantages of those who are exploited and then takes advantage of this disadvantage.

57. Cohen (1995).

58. Peter (2004, 4).

59. Peter (2004, 4).

60. Peter (2004, 6–7).

61. Peter discusses this objection and canvasses various attempts, including those of Robert Nozick and John Rawls, to show how people might consent to the constraints that generate their options. In the end, he concludes that since the constraints are unjust, no such account will work.

62. Gawande (2007, 50–9).

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REFERENCES

- Basler, B., and C. Hudnall. 2006. Winning the waiting game. *AARP Bulletin* 47(6):10–5.
- . 2007, March 23. The true price of a human organ. *The Chronicle of Higher Education* A12–5.
- Capron, A. M., and L. Noel. 2004, December 31. Global ethics must keep pace with organ transplants. *The Detroit Free Press* 9f.
- Cherry, M. 2005. *Kidney for sale by owner: Human organs, transplantation, and the market*. Washington, DC: Georgetown University Press.
- Cohen, G. A. 1995. *Self-ownership, freedom and equality*. Cambridge: Cambridge University Press.
- Davis, M. 2006. *Planet of slums*. London: Verso.
- Dworkin, G. 1994. Markets and morals: The case for organ sales. In *Morality, harm and the law* (pp. 155–61), ed. G. Dworkin. Boulder, CO: Westview Press.
- Elliot, C. 2008, January 7. Guinea-pigging. *The New Yorker* 36–41.
- Elster, J. 2000. *Ulysses unbound*. Cambridge: Cambridge University Press.
- Frankfurt, H. 1999. *Necessity, Volition, and Love*. Cambridge: Cambridge University Press.
- Fromm, E. 1960. *Fear of freedom*. London: Routledge.
- Gawande, A. 2007, April 30. The way we age now. *The New Yorker* 50–9.
- Goodwin, M. 2007. Private ordering and intimate spaces: Why the ability to negotiate is non-negotiable. *Michigan Law Review* 1367–85.
- Goyal, M., *et al.*, 2002. Economic and health consequences of selling a kidney in India. *Journal of the American Medical Association* 288:1589–93.
- Grant, R. 2002. The ethics of incentives: historical origins and contemporary understandings. *Economics and Philosophy* 18:111–39.
- Hippen, B. 2005. In defense of a regulated market in kidneys from living vendors. *Journal of Medicine and Philosophy* 30:593–626.
- Hughes, P. 2006. Ambivalence, autonomy, and organ sales. *The Southern Journal of Philosophy* 44:237–51.
- Jacoby, J. 2003, October 14. Too many die as law forbids payment for organ donations. *The Detroit Free Press*.
- Magnell, T. 2006. Collapsing goods in medicine and the value of innovation. *Journal of Value Inquiry* 155–68.
- Peter, F. 2004. Choice, consent, and the legitimacy of market transactions. *Economics and Philosophy* 20:1–18.
- Pogge, T. 2002. *World poverty and human rights: Cosmopolitan responsibilities and reforms*. Cambridge, UK: Polity Press.

- Radcliffe-Richards, J. 1996. Nefarious goings on: kidney sales and moral arguments. *The Journal of Medicine and Philosophy* 21:375–416.
- Radcliffe-Richards, J., *et al.*, 1998, June 27. The case for allowing kidney sales. *The Lancet* 351:9120.
- Schwartz, B. 2005. *The paradox of choice: Why more is less*. San Francisco, CA: Harper Collins.
- Sharp, L. A. 2006. *Strange harvest: Organ transplants, denatured bodies, and the transformed self*. Berkeley, CA: University of California Press.
- Slote, M. 1980. Understanding free will. *Journal of Philosophy* 77:136–51.
- Taylor, J. S. 2005. *Stakes and kidneys: Why markets in human body parts are morally imperative*. Aldershot, UK: Ashgate Press.
- . 2006. Autonomy, inducements, and organ sales. In: *Philosophical reflections on medical ethics* (pp. 135–59), ed. N. Athenassoulis. New York: Palgrave MacMillan.
- Wilkinson, S. 2003. *Bodies for sale: Ethics and exploitation in the human body trade*. New York: Routledge.
- Zimmerman, D. 1981. Coercive wage offers. *Philosophy and Public Affairs* 10:121–45.

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