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EMBRACING THE COMMODIFICATION OF HUMAN ORGANS: TRANSPLANTATION AND THE FREEDOM TO SELL BODY PARTS

MARK J. CHERRY*

I. INTRODUCTION

Mr. Jake Linford's rich exploration in "The Kidney Donor Scholarship Act: How College Scholarships Can Provide Financial Incentives for Kidney Donation While Preserving Altruistic Meaning" elucidates the moral complexities to which organ donation policy gives rise.¹ His conclusion that providing valuable college scholarships as an incentive would very likely increase kidney donation rates is, I believe, correct. Indeed, elsewhere I have argued extensively in favor of developing an open market in human organs for transplantation.² It is worth noting, though, that however much Mr. Linford wishes to avoid market terminology, while preserving the rhetorical language of "altruism" and "gift-giving", he is defending a market in human kidneys for transplantation—albeit a heavily regulated and governmentally restricted barter market. At times his arguments rely on common but questionable assumptions. The discussion presumes, for example, that human kidneys are not properly understood as a commodity.³ Why? The discussion also assumes that the debate regards determining which policy would be both effective in increasing the availability of organs and politically tenable, i.e., which policy will not unduly disturb public

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1. Jake Linford, *The Kidney Donor Scholarship Act: How College Scholarships Can Provide Financial Incentives for Kidney Donations While Preserving Altruistic Meaning*, 2 ST. LOUIS U. J. HEALTH L. & POL'Y 265 (2009).

2. MARK J. CHERRY, *KIDNEY FOR SALE BY OWNER: HUMAN ORGANS, TRANSPLANTATION, AND THE MARKET*, at xiii-xiv (2005).

3. See Linford, *supra* note 1, at 291-92 (discussing the way in which the medical community presents the procurement of kidneys as a gift in order to preserve the rhetoric of altruism and suppress negative social reaction).

sensibilities, while also increasing access to kidneys for transplantation.⁴ Mr. Linford works with the standard assumption that cash payments to donors would somehow morally soil the procurement and distribution of organs for transplantation.⁵ Perhaps, however, the jurisprudential question would be better focused on a critical and careful exploration regarding the permissible limits of governmental authority over the free choices of persons.

In this reply essay, I briefly raise several challenges to these central assumptions. My goal is to explore the ways in which such assumptions are uncritically accepted even as they frame the debate. I argue that each is illegitimate. First, I argue that human kidneys are as a matter of fact commodities. Honestly recognizing and confronting this circumstance will likely lead to greater trust in the transplantation community. Denying that human organs are a commodity, even while treating them as such, encourages the continuation of dishonest public policy, tending towards vice rather than virtue. Second, I argue that individuals possess authority over themselves and their own bodies, and thus the burden of proof legitimately to forbid persons from selling a redundant internal organ, such as a kidney, is significant and not easily met. Third, as a result, even if financial incentives (such as college scholarships) resulted in fewer kidneys available for transplantation, such a consequence would not meet the burden of proof necessary to forbid individuals from selling their redundant or renewable internal organs. In sum, instead of rhetorically pretending that offering valuable incentives (such as college scholarships) to donors does not commodify human organs, we should honestly embrace a market in human organs for transplantation, including direct financial payments and other valuable offers, to compensate persons for parting with their redundant or renewable internal organs while living, or to compensate families for the organs of their recently deceased loved one.

II. HUMAN KIDNEYS AS COMMODITIES – EMBRACING REALITY

Offering financial and other valuable incentives for organ donation is usually denounced as inappropriately treating the human body and its parts as commodities. Many argue that offering financial, or other valuable compensation, to living donors exemplifies immoral and improper commodification of the human body.⁶ The underlying moral intuition is that

4. See *id.* at 295-96 (arguing that scholarship incentives preserve the rhetoric of altruism while protecting individuals from coercion and exploitation to a higher degree than is possible with a system of outright commodification).

5. See *id.* at 311 (claiming that a raw cash-for-kidneys system could lead to unreasonable coercive pressure).

6. See MARGARET JANE RADIN, *CONTESTED COMMODITIES* 156 (1996) (arguing that objectification, a pejorative when applied to persons, occurs through commodification when

while some goods (e.g., cars) are appropriately procured and distributed through the market, others (e.g., human kidneys) are not.⁷ Insofar as valuable incentives for donating organs for transplantation would improperly commodify human body parts, it is argued that such incentives should continue to be prohibited.⁸

Mr. Linford urges, for example, that one of the advantages of utilizing college scholarships as an incentive is that “[b]ecause scholarships are understood as manifestations of altruism, the scholarship incentive can be designed to preserve spaces where altruistic giving will be both desirable and essential.”⁹ Moreover, Mr. Linford later states:

[p]roviding financial incentives in the form of a scholarship occupies a different rhetorical space than that of a *raw financial incentive*. An incentive program that naturally leads to a discussion of financial incentives in terms of gift language preserves the rhetoric of altruism and protects space for altruistic meaning.¹⁰

In contrast, “commodification” is presented as a moral invective: “[o]ften, however, those who donate organs or gametes do not realize that they are contributing to a system rife with commodification”.¹¹ The hope is that the rhetorical effect of “college scholarships” preserves the underlying moral intuition that it is somehow wrong to treat human organs as a commodity, thereby continuing to frame organ donation within the moral discourse of “altruism,” while still providing a valuable incentive to increase the living kidney donor pool.

Here, an initial conceptual concern is to distinguish those characteristics that mark off a commodity from other types of goods. Commodities are signified by 1) objectification (“ascription of status as a thing in the Kantian sense of something that is manipulable at the will of persons”); 2) fungibility (“fully interchangeable with no effect on value to the holder”); 3) commensurability (“values of things can be arrayed as a function of one

cultural rhetoric views certain human attributes as commodities that can be bought and sold in markets).

7. See, e.g., Alan Wertheimer, *Two Questions About Surrogacy and Exploitation*, 21 PHIL. & PUB. AFF. 211, 218 (1992) (arguing that while some goods, such as automobiles and books, may be properly traded for money, other goods, such as human beings, should not be exchanged for money).

8. See generally RADIN, *supra* note 6, at 163 (arguing that commodification, objectification, and subordination are intertwined, which results in the failure to respect human beings and personhood).

9. Linford, *supra* note 268, at 4.

10. *Id.* at 303 (emphasis added).

11. *Id.* at 293 n.126.

continuous variable"); and 4) money equivalence ("the continuous variable in terms of which things can be ranked is dollar value").¹²

A challenge for those who oppose treating human organs as a commodity is that organs are in fact manipulable and interchangeable with others of the same kind. This is the very reason that transplantation is medically viable. When a kidney is removed from Anna and surgically implanted in Alexei, it ceases to be a living part of the donor and becomes a living part of the recipient. All systems of transplantation objectify human organs and treat them as fungible—organ transplantation as a surgical practice requires that we view these decidedly useful body parts as exchangeable objects.

Incommensurability represents a concern that the values at stake cannot be relevantly summed and compared. Here the disquiet is that offering financial and other valuable compensation to organ donors would involve an exchange of incommensurable values. By itself, though, incommensurability will not establish that straight-forward financial compensation is morally inappropriate. Whereas one may raise the concern that financial compensation will fail appropriately to weigh and compare economic versus non-economic values, non-market-based strategies for procurement and allocation face similar difficulties, as do scholarship-based strategies. Markets, however, do not require that the goods exchanged be precisely commensurable. Such a requirement would rule out nearly all transactions. Rather, permissibility requires that the parties transact voluntarily, that deception or other forms of coercion are not employed, and that each agree to the value being received. This means that what is received in return is worth at least as much to the party as that which was given. As others have noted, one can buy or sell "priceless" works of art without claiming that its aesthetic or historic value is commensurate with the money that is paid.¹³ For example, on June 24, 2008, a "priceless" Monet water lily painting was sold at auction for forty-one million pounds at Christie's in London.¹⁴

Other commentators have urged a related challenge to the commensurability of organ donation and financial payments. Here, the claim is that it is morally inappropriate

when one party to a transaction is oriented toward the exchange of "gift" values, while the other party operates in accordance with the norms of the market exchange of commodities. Gift values, which include love,

12. RADIN, *supra* note 6, at 118.

13. WERTHEIMER, *supra* note 7, at 218.

14. Mike Collett-White, *Monet Painting Smashes Auction Record*, REUTERS UK, at <http://uk.reuters.com/article/UKNews1/idUKL2469637120080625> (last visited Mar. 15, 2009).

gratitude, and appreciation of others, cannot be bought or obtained through piecemeal calculations of individual advantage.¹⁵

Giving kidneys a monetary expression through financial compensation, one might believe, is an inappropriate way to value human body parts. The concern is that through property discourse and financial incentives, individuals are encouraged to value those goods regarded as property solely in economic terms.

On the one hand, if the criticism is reasonable, it is not clear how the proposed scholarship program avoids this difficulty—college scholarships are all too obviously financially valuable.¹⁶ Whoever would otherwise be paying for the college education (parent, relative, or student) is keenly aware of the cash value of the college scholarship. On the other hand, this criticism appears to be greatly over simplified. Gift values, love, and charity can in various ways be brought into the market. For example, one party to a transaction may deliberately sell goods for less than the market value as a subtle gift, provide a frequent patron a free drink at the bar, or discount the cost of a medical office visit or legal consultation. Indeed, the criticism is relevant if and only if such a dichotomy of intentions exists. Persons who negotiate regarding the fair market value of one's kidney will not likely experience such conceptual dissonance,¹⁷ and those who wish simply to donate their organs as free gifts may continue to do so. Such observations strongly suggest, however, that there is no reason to limit market incentives to college scholarships.

Other critics raise the concern that such "raw financial incentives" will put a price on all organs, and those who do not sell their organs will become hoarders of something that is useful to other people and that is

15. Elizabeth S. Anderson, *Is Women's Labor a Commodity?*, 19 PHIL & PUB. AFF. 71, 84 (1990).

16. The Undergraduate Admission website for Saint Louis University touts that "[m]ore than \$30.8 million in financial aid was awarded to first-time freshmen in 2007-2008. Of this total, \$19.2 million was awarded in the form of scholarship or grant assistance." Saint Louis University, Undergraduate Admission, Scholarships and Financial Aid, at www.slu.edu/x5203.xml (last visited Mar. 15, 2009). Such advertisement is designed to encourage students to apply to Saint Louis University regardless of their ability to afford the tuition, thereby giving the university a larger pool of candidates among whom to choose to offer admission.

17. For example, consider the case of Dr. Richard Batista, a vascular surgeon who is asking for one and a half million dollars in compensation for the organ he donated to his wife as part of their divorce settlement. Charlotte Cardingham, *Doctor Demands £1 Million for Donated Kidney in Divorce Settlement*, MONEY.CO.UK, at www.money.co.uk/article/1002483-doctor-demands-1-million-pounds-for-donated-kidney-in-divorce-settlement.htm (last visited Mar. 15, 2009). Dr. Batista's attorney, Dominick Barbara, stated that "[i]n theory we actually asked for the return of the kidney. Of course he wouldn't really ask for that but the value of it." *Id.*

financially valuable.¹⁸ The moral stumbling block is that such considerations hold equally against systems of donation. As organ donation became perceived as the standard of care, organs were recast as mere things—as scarce medical resources.¹⁹ Persons who are unwilling to donate their organs, either while living or after death, are perceived as immorally withholding life-sustaining medical resources. It is this reconceptualization of persons as sources of scarce medical resources that has in large measure driven the ever increasing proposals for “required request laws”,²⁰ as well as for coercive “presumed consent,”²¹ “expected donation,” or “routine salvage” systems of organ procurement.²² This moral challenge similarly underlies systems of so-called rewarded gift-giving, such as scholarship programs: students (or their parents or other relatives) who do not donate will be seen as having failed fully to explore the available options for financing higher education in that they possess significantly valuable property, e.g., a kidney, which can be traded for a college scholarship. How soon will it be until this question is added to college financial aid application forms?

When the Institute of Medicine committee on increasing access to organ transplantation issued its 2006 report, *Organ Donation: Opportunities for Action*, their recommendations argued that the goal of the transplantation community should be the aggressive ideologically driven re-education of social mores to appreciate organ donation as a “social responsibility”;²³ that is, to understand organ donation as a taken-for-granted moral duty.

. . . [T]he goal should be to move towards a society where people see organ donation as a social responsibility. In such a society, donating organs

18. See generally Gabriel M. Danovitch & Francis L. Delmonico, *The Prohibition of Kidney Sales and Organ Markets Should Remain*, 13 CURRENT OPINION IN ORGAN TRANSPLANTATION 386, 387 (2008) (arguing that the concept of organ sales would target vulnerable and poor populations by luring them with the opportunity of selling their valuable body parts).

19. See generally KAZUO ISHIGURO, NEVER LET ME GO (2005) (telling a fanciful story in which an entire class of persons is created to provide donor organs and humans are used as a source of spare parts).

20. Peter A. Clark, *To Be or not to Be a Donor: A Person's Right of Informed Consent*, 8 CURRENT OPINION IN ORGAN TRANSPLANTATION 334, 336 (2003) (stating that “[t]hese laws directed hospitals to develop policies to assure that families of all donor-eligible patients would be given the opportunity to donate.”).

21. *Id.* (discussing “presumed consent” systems which allow doctors to proceed with donations unless the person has expressly stated that they do not wish to donate).

22. Adam J. Kolber, *A Matter of Priority: Transplanting Organs Preferentially to Registered Donors*, 55 RUTGERS L. REV. 671, 691-96 (2003) Kolber describes “routine salvage” as a system that “would seek to transplant every medically eligible organ and would thereby maximize lives saved from organ donation.” *Id.* at 695.

23. Inst. of Med., *Organ Donation: Opportunities for Action – Short Report 3* (2006).

would be accepted as a normal part of dying, and in cases where a person died without recording a specific choice about donating his or her organs, the surviving family members would be comfortable giving permission.²⁴

Concerns to avoid recasting persons as collections of spare parts or as hoarders of scarce medical resources is not a challenge particular to financial transactions, and thus is not a legitimate objection to offering financial compensation to increase living organ donation. This moral concern must be addressed under any system of organ procurement and allocation.

Mr. Linford is aware that the insistent reference to organ donation as an altruistic gift is more rhetoric than reality: “. . . viewing kidney procurement through an exclusively donative lens is also a terminological subterfuge, recognized even by those who are opposed to market-based solutions. Organ donation as gift is entirely illusory rhetoric, inasmuch as it applies to actors in the system other than the donor herself.”²⁵ Moreover, Mr. Linford later states:

Recipients of kidneys either pay out of pocket or turn to private or public insurance to purchase kidneys from the procurement agencies, which generate income by arranging transplants. Doctors who perform transplants are never asked to donate their services because of a concern that to do otherwise would corrupt the process. Only the donor is treated as potentially subject to corruption via commodification.²⁶

Donors, surgeons, organ procurement agencies, and recipients alike objectify organs, treat them as fungible objects, and charge money for access to organs. All systems of organ procurement and allocation treat organs as commodities, even donation.

Well meaning protests to the contrary will not change the reality. An editorial in *The Lancet*, for example, asserted:

Ethical arguments have been made for and against the practice, with the pro side generally contending that legitimising a market for organs would increase their availability. But human livers and kidneys are not commodities, and hospitals are not just another convenient locale for money to change hands. Trade in human organs is immoral and ought to be outlawed around the world.²⁷

The author of the editorial leaves it conveniently unstated that surgeons, nurses, hospital administrators, and staff charge significant amounts of money for access to medical goods and services—that is, *a great deal of*

24. *Id.*

25. Linford, *supra* note 1, at 292.

26. *Id.* at 292-93.

27. Editorial, *Not for Sale at Any Price*, 367 LANCET 1118 (2006).

money changes hands in hospitals. Legislated "altruism" or "gift-giving" requires self-sacrifice in an otherwise commercial setting, where surgeons, nurses, pharmaceutical companies, hospitals, and staff profit.

On-going discussions regarding the permissibility of financial compensation, or other valuable incentives (such as college scholarships), for living organ donation do not really concern whether human organs should be commodified, but rather who should receive the valuable health care resource and who should bear the costs of appropriation and transfer. Each type of organ procurement and allocation system specifies carefully stipulated conditions regarding which party will bear the costs and benefits of procurement, distribution, and transplantation. Insofar as donors are legally prohibited from accepting financial compensation, organs are a highly constrained commodity, where donors are required to part with their property without material compensation, while others (including physicians, hospitals, procurement agencies and so forth) benefit financially, and the recipient of the transplant benefits physically as well as financially, in terms of quality and quantity of life, being able to return to work, reduced medical bills, and so forth.

Castigating "raw financial incentives" for kidney donation in favor of the supposedly more rhetorically palatable college scholarships, because scholarship incentives allegedly preserve altruism, even though altruism in this context has already been denounced as "terminological subterfuge" and "entirely illusory rhetoric,"²⁸ strikes this commentator as side-stepping reality in favor of deceptive marketing. It is a policy specifically designed to seduce healthy members of the public into parting with their very valuable property altruistically, within what is otherwise a commercial transaction, thereby further muddying the waters of what ought to be a transparent and honest process.

To be clear, I am not raising an objection in principle to permitting individuals to purchase a college education through kidney donation. Many students may welcome such a valuable offer. Perhaps federal and state governments could even be convinced to treat the purchase as a non-taxable transfer of resources. However, it would be more honest openly to acknowledge the commercial circumstances of organ transplantation. As Mr. Linford points out, the public has discovered the commercialization of human bodies regardless.²⁹ Moreover, financially compensating donors would also be significantly more fair than the current prohibition on such payments. That human organs can only be transferred at a price of zero does not thereby reduce the value of such organs to zero. It

28. See Linford, *supra* note 1, at 292.

29. *Id.* at 294 (noting that sperm and egg donors sell the products of their body for a financial incentive).

straightforwardly transfers the value of the organ from the donor to other parties. College scholarships are one type of compensation, but many donors and potential donors may welcome the opportunity to improve their financial status even if they do not desire to go to college, or to support another through college. Failing to acknowledge that human organs are a valuable commodity, even while public policy and the transplantation community treats them as such, encourages the continuation of a dishonest social political fiction in what is otherwise a very financially valuable commercial transaction. Honestly recognizing and confronting this circumstance will likely lead to the public's placing of greater trust in the transplantation community.

III. BARTER MARKETS AND THE CROWDING OUT EFFECT

The *Oxford English Dictionary* defines "barter" as "the act of trafficking by exchange of commodities."³⁰ In its exchange of valuable commodities—e.g., a kidney for a college scholarship—the proposed college scholarship program is a barter market for procuring kidneys for transplantation. Granted, it would be a heavily regulated and governmentally restricted market, bartering with goods rather than cash money, but it would be a market nonetheless. While I believe that coercively limiting incentives for kidney donation to college scholarships is unduly authoritarian, integrating barter markets as one market-based strategy among others would open up interesting possibilities for accessing organs for transplantation. Consider organ trading in which families in need of a transplant trade with each other for the necessary healthy organs. For example, a lobe of healthy liver could be exchanged for a healthy kidney, or couples could engage in paired donor kidney exchanges.³¹ At Johns Hopkins University Hospital, for example, in July of 2003, surgeons performed a "triple swap" kidney transplant operation" in which three patients, who were not tissue compatible with their own willing donors, exchanged their donor's kidney for

30. Barter, *Oxford English Dictionary Online*, at www.oed.com (last visited May 14, 2009)

31. See Francis L. Delmonico et al., *Donor Kidney Exchanges*, 4 *AM. J. TRANSPLANTATION* 1628, 1628, 1630 (2004) (finding that as of 2003, four live donor paired exchanges and seventeen list exchange kidney transplants had been performed under the United Network for Organ Sharing (UNOS) system of kidney transplantation); Susan L. Saidman et al., *Increasing the Opportunity of Live Kidney Donation by Matching for Two- and Three-Way Exchanges*, 81 *TRANSPLANTATION* 773, 779 (2006) (discussing that when incompatible donor/recipient pairs are entered into a computerized database, compatible pairs are identified who could enter into exchanges that would not otherwise occur).

a kidney from another of the three donors.³² Each donor provided a kidney to one of the three transplant patients.³³ Similar organ swaps have followed.³⁴

The success of paired kidney exchanges and other types of organ exchanges led eventually to the revision of the 1984 Organ Procurement and Transplantation Act.³⁵ The original text prohibited the sale, for “valuable consideration” of human organs for use in transplantation, punishing violators with a fine of not more than \$50,000 or imprisonment of not more than five years, or both.³⁶ The law prohibited any for-profit commercial harvesting, financial incentives, or other valuable consideration, to encourage donation or sale of human organs for transplantation.³⁷ Valuable consideration was originally defined as excluding “the reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ or the expenses of travel, housing, and lost wages incurred by the donor.”³⁸ In 2007, Public Law 110-144 amended the Organ Procurement and Transplantation Act to specify that paired kidney exchanges, and certain other types of organ exchanges for transplantation, do not violate the prohibition on receiving valuable consideration.³⁹ Such amendment was necessary because receiving an organ in exchange for an organ, and thereby saving the life of a loved one, is quite obviously the receipt of valuable consideration; it is a “trafficking by exchange of commodities”⁴⁰—the exchange of kidneys for transplantation.

Mr. Linford raises the concern that financially compensating living organ donors will curtail altruistic donation or otherwise intimidate charitably inclined donors.⁴¹ Critics often argue that the existence of financial

32. Press Release, Karen Blum, Johns Hopkins Medicine, Johns Hopkins Surgeons Perform World’s First ‘Triple Swap’ Kidney Transplant Operation (Aug. 1, 2003), at www.hopkinsmedicine.org/press/2003/august/030801.htm (last visited Mar. 15, 2009).

33. *Id.*

34. See, e.g., Press Release, Trent Stockton, Johns Hopkins Medicine, “Triple Swap” Kidney Transplant Operation a Success (Mar. 4, 2004), at www.hopkinsmedicine.org/Press_releases/2004/03_04a_04.html (last visited Mar. 15, 2009) (explaining how a triple swap kidney transplant was performed with a new technique called plasmapheresis).

35. 42 U.S.C. § 274e (1984); Amendments to the National Organ Transplant Act, Pub. L. No. 110-144, 121 Stat. 1813 (2007).

36. 42 U.S.C. § 274e(a)-(b) (1984).

37. See *id.* § 274e(a) (1984).

38. *Id.* § 274e(c)(2) (1984).

39. Amendments to the National Organ Transplant Act, Pub. L. No. 110-144, 121 Stat. 1813 (2007).

40. See *supra* note 30 and accompanying text.

41. See Linford, *supra* note 1, at 267-68 (noting that altruism purists believe that altruistic giving will decrease in a market system and fewer kidneys will be procured for donation).

incentives for organ procurement undermines the freedom charitably to donate one's organs.⁴² The empirical claim is that if financial incentives are routinely offered, while only some will exercise the liberty to sell, such incentives may result in an adverse social reaction with fewer individuals willing to donate organs.⁴³ This is often referred to as the "crowding out" effect. The Institute of Medicine committee, for example, concluded that permitting financial incentives would "crowd-out" altruistic donation:

[t]he committee examined financial incentives within the gift model of donation to determine if they would provide additional increases in the rates of organ donation. Hard data on the impact of incentives are lacking, and it may be difficult to obtain reliable data to address these issues. A pilot study of financial incentives for organ donation may set in motion a societal process that is difficult to reverse even after the pilot study itself is abandoned. For example, if people begin to view their organs as valuable commodities that should be purchased, then altruistic donation may be difficult to reinvigorate.⁴⁴

This criticism ignores the current circumstance, however, that prohibition of financial compensation straightforwardly precludes the freedom of all persons to sell their organs. Given that with a general prohibition on organ selling only some will exercise the freedom to donate, the freedom of all to sell, if they so desire, is absolutely restricted. Prohibition of compensation for living organ donation necessarily "crowds out" all commercial based incentives for increasing access to transplantation.

Even with a system of financial incentives for organ donation in place, private individuals could still donate organs out of charity, refusing all compensation, to family members, close friends, or strangers in need of transplant. For-profit markets in food and medicine exist side-by-side with food banks, charity hospitals, and other not-for-profit programs. Presuming that the willingness to donate body parts is motivated by actual, rather than coerced altruism, those who are willing to donate should still be willing to donate regardless of the possibility of compensation. Most organ donations from living persons are to family members or close friends. The motivations underlying such donations are likely to maintain the same force regardless of the existence of a market: love, beneficence, loyalty, gratitude, guilt, or avoidance of the shame of failing to donate. For these donors, their willingness to donate stems from their relationship with the particular patient. Such donations are unlikely to change either in general character

42. See *id.* (noting that some critics assert that the commodification of kidneys could adversely coerce participation of underprivileged individuals).

43. See *id.* (discussing that altruism purists hold that there will be a net loss in kidney procurement if a market system is instituted).

44. INST. OF MED., ORGAN DONATION: OPPORTUNITIES FOR ACTION AT 11 (2006).

(e.g., from altruistic to compensated) or in relative number (e.g., become other than driven by the need of a particular friend or relative).

Financial incentives encourage persons to raise resources to further personal as well as social interests and goals. With financial incentives for organ donation, organ procurement need not be artificially limited to acts of altruism. As Mr. Linford notes in his discussion of attitudinal studies, financial incentives increase the likelihood of organ donation: “[t]wo Gallup polls, the first taken in 1993 and the second in 2005, indicate an increasing willingness on the part of survey respondents to consent to donate their organs or the organs of a deceased family member if offered a financial incentive.”⁴⁵ Financial incentives would likely lead to an increase in the number of living persons willing to donate internal redundant or renewable organs to recipients, who are neither family members nor close friends. Incentives would also likely lead to the willingness of more families to have the organs of their loved ones harvested upon death. Such public policy would thereby incur significant health benefits for all those in need of organ transplantation.

Inevitably the “crowding out” criticism treats the pool of available organs as a zero sum game, with any loss of a donated organ characterized as an overall loss on the number of organs available. As Mr. Linford notes:

[t]he 2005 Gallup poll also noted a polarization, with more respondents indicating that financial incentives would make them less likely to donate increasing over time (8.9% reporting less likelihood of donation of their own or a family member’s organs in 2005 vs. 5% reporting they were less likely to donate their own organs and 8% indicating they were less likely to donate a family member’s organs).⁴⁶

As with all attitudinal studies, the meaningfulness of the data depends on which questions were asked, of whom, in what order, and given what sort of emphasis. Respondents may have forgotten, for example, that the existence of financial incentives does not preclude donors from acting altruistically, refusing all compensation. That highly valuable works of art (e.g., the aforementioned Monet painting) can be sold on the auction block does not prevent patrons from giving such works to museums free of charge. Regardless, insofar as offers of valuable compensation encourage a sufficiently large number of individuals to donate an organ while living, or to make their organs available upon death, such incentives would more than make up for any losses in strictly altruistic donation.

45. Linford, *supra* note 1, at 274-75.

46. *Id.*

IV. PERSONS AND THEIR BODIES

Even if the market resulted in a net loss in the number of kidneys available for transplant—an unlikely consequence—it is unclear what grounds legitimately exist to forbid the consensual sale of human organs for transplantation. Here, debate usually focuses either on efficiently increasing the number of procured organs or on paternalistically protecting potential donors (often couched in lofty terms, such as “preserv[ing] the nobility of organ donation”⁴⁷), and thereby routinely fails to note the moral significance of persons and the authority that an individual has over his own body.⁴⁸ A person’s authority over himself, the freedom of choice over his own body and mind, is part-and-parcel of maintaining personal integrity. It is core to the respect of persons, which lies at the heart of moral and legal reflections on informed consent to medical treatment.⁴⁹ Here, relevant moral considerations can be gathered under three general rubrics: first, the authority of persons over themselves, i.e., the authority to be secure against unauthorized touching or battery; second, a liberty interest, i.e., an acknowledgment of the value of freedom or autonomy; and third, a general concern regarding the best interests of the person, combined with a recognition that individuals are generally the best judges of their own best interests.⁵⁰ Bringing together longstanding moral and jurisprudential considerations that highlight individual autonomy and the authority of persons over themselves, such reflections appreciate persons as possessing a dignity that should not be violated by unauthorized touching, but who may consent to more-or-less risky activities. It is an acknowledgement of the authority of persons over themselves.

Historically, the common-law has appreciated a right to be secure against battery, a right not to be touched, which was grounded in the authority of individuals over themselves, rather than in a view of the best interests of the person. The focus was on the individual as in authority to

47. International Summit on Transplant Tourism and Organ Trafficking, *The Declaration of Istanbul on Organ Trafficking and Transplant Tourism*, 3 *CLINICAL J. AM. SOC’Y NEPHROLOGY* 1227, 1227-1231 (2008).

48. H. Tristram Engelhardt, Jr., *The Body for Fun, Beneficence, and Profit: A Variation on a Post-Modern Theme*, in *PERSONS AND THEIR BODIES: RIGHTS, RESPONSIBILITIES, RELATIONSHIPS* 277, 301 (Mark J. Cherry ed., 1999); Eric Mack, *The Alienability of Lockean Natural Rights*, in *PERSONS AND THEIR BODIES: RIGHTS, RESPONSIBILITIES, RELATIONSHIPS* 143, 176 (Mark J. Cherry ed., 1999).

49. See generally Mark J. Cherry, *Persons and Their Bodies: Rights, Responsibilities, and the Sale of Organs*, in *PERSONS AND THEIR BODIES: RIGHTS, RESPONSIBILITIES, RELATIONSHIPS* 1, 5-8 (Mark J. Cherry ed., 1999) (noting that consent to organ donation must be voluntarily given in order for it to be morally effective).

50. Mark J. Cherry & H. Tristram Engelhardt, Jr., *Informed Consent in Texas: Theory and Practice*, 29 *J. MED. & PHIL.* 237, 241 (2004).

determine what was to be done to himself and his body. In medicine, this jurisprudential tradition found particular voice in the opinion of Justice Cardozo in *Schloendorff v. The Society of The New York Hospital* (1914), who argued that

[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault, for which he is liable in damages. This is true except in cases of emergency where the patient is unconscious and where it is necessary to operate before consent can be obtained.⁵¹

A competent patient has the right to refuse medical treatment, even if the surgery or other therapy would benefit the life or health of the patient. Such a right to be left alone has been recognized in a number of key court holdings. For example, in *Olmstead v. United States* (1928), the Supreme Court held that

[t]he makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.⁵²

Neither the general public nor the state need to agree with the person's decision, or even judge his choice reasonable. In 1964, Warren Burger, at that time a D.C. Circuit Court of Appeals Judge, commented that

[n]othing in [his *Olmstead* holding] suggests that Justice Brandeis thought an individual possessed these rights only as to *sensible* beliefs, *valid* thoughts, *reasonable* emotions, or *well-founded* sensations. I suggest he intended to include a great many foolish, unreasonable and even absurd ideas which do not conform, such as refusing medical treatment even at great risk.⁵³

Respect for persons and their individual bodily integrity is firmly entrenched in much of U.S. law. As the Supreme Court opined in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, personal decisions that profoundly affect bodily integrity should be largely beyond the reach of government.⁵⁴

The weight of this moral and jurisprudential tradition establishes persons as in authority over themselves and as the presumed authoritative judge of their own best interests. Persons are in authority to make their own judgments regarding acceptable risks and benefits as they collaborate with

51. *Schloendorff v. Soc'y of N.Y. Hosp.*, 211 N.Y. 125, 129-130 (Ct. App. 1914) (internal citations omitted).

52. *Olmstead v. United States*, 277 U.S. 438, 478 (1928).

53. *In re President and Dirs. of Georgetown Coll., Inc.*, 331 F.2d 1010, 1017 (D.C. Cir. 1964).

54. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 926-27 (1992).

others through freedom of association and contract (e.g., becoming an experimental subject in a surgery protocol or choosing to donate a kidney while living). Persons may grant permission to be touched or used in ways that absent their permission would be profoundly harmful (e.g., assault vs. surgery, rape vs. consensual sex). While persons may not typically be treated medically without permission, they may consent to more-or-less risky—even life endangering—activities such as joining the military or the police, working on oil rigs, climbing mountains, moving to a more dangerous city,⁵⁵ parachuting out of airplanes, undergoing elective plastic surgery, engaging in promiscuous sex, piercing various body parts, having oneself tattooed, donating a kidney or liver lobe while living, and so forth, setting life and health at risk for national patriotism, career advancement, monetary profit, recreational or altruistic interests, personal pleasure, or to enhance one's attractiveness to potential sexual partners. In each case, neither the decisions nor the outcomes are necessarily approved as "good"—some may judge the choices as imprudent, or decry the consequences as unwelcome. Rather, there is a *prima facie* lack of moral authority to interfere in the free choices of persons who act with consenting others. Such moral and jurisprudential considerations constitute, for example, one of the central justifications for the practice of informed consent in medicine.⁵⁶

Such judgments recognize as well the difficulty of choosing correctly in a secular, morally pluralistic society. Which choice is morally preferable: working at a higher risk job with greater pay or accepting a lower paying, less risky job? Individuals frequently choose risky forms of entertainment (e.g., mountain climbing, body tattoos, and multiple sexual partners) and risky employment (e.g., joining the Marine Corps or playing professional football) to satisfy personal preferences, career goals, or individual temperament. Why would those who choose riskier forms of employment be either irrational or immoral? Absent agreement regarding what God demands or moral rationality conclusively demonstrates, individuals act within rather broad side constraints as the best judges of their own best interests and of their own preferred methods for attempting to realize such

55. For example, many residents of New Orleans, who were relocated to other cities in the wake of hurricane Katrina, are returning to live in New Orleans, even though New Orleans is ranked by *City Crime Rankings 2008-2009* as having the highest per capita crime rate among U.S. cities, including a 199.1% increase in violent crime during the past year. Similarly, students who move from Austin, Texas to St. Louis, Missouri to attend graduate school consent to move from a less risky to a more risky urban environment. In terms of crime rates St. Louis ranked fourth highest in 2008, where Austin ranked 187th. CITY CRIME RANKINGS 2008-2009: CRIME ACROSS METROPOLITAN AMERICA (Kathleen O'Leary Morgan et al. eds., 2008).

56. Cherry & Engelhardt, *supra* note 50, at 241-42.

interests.⁵⁷ This is the affirmation of a liberty interest (i.e., the endorsement of the value of individual freedom or autonomy) which constitutes another central element in the justification of the practice of informed consent.

Persons convey authority to common projects by granting permission or giving consent. This includes both consent to and refusal of life-enhancing or life-saving medical care. It also includes living organ donation, where persons consent to surgery from which they will receive absolutely no medical benefit, but which will presumably benefit others. Here, I believe, Mr. Linford, citing Sally Satel and Benjamin Hippen, somewhat mischaracterizes the issue:

[I]kewise, the choice of some advocates of incentive programs to couch their arguments in terms of autonomy instead of market forces or efficiency appears to be a conscious choice to shape the debate in a fashion that makes their position more acceptable to those who might mistrust markets, but embrace concepts of human dignity and liberty.⁵⁸

While it is true that Satel and Hippen wish to recast the debate in what they perceive as more favorable terms, they are also pointing to a hidden contradiction at the core of public policy forbidding the sale of human organs for transplantation. On the one hand, persons are usually conceived of as in authority over themselves and as the best judges of their own best interests. On the other hand, prohibition of financial incentives for organ donation coercively denies such individual authority.⁵⁹ Current organ transplantation law both affirms the authority of persons over themselves, thereby justifying organ procurement from living donors, and denies such authority, thereby prohibiting living donors from accepting financial incentives. To emphasize, the goal of informed consent to medical treatment is not simply to endorse patient autonomy as a positive value; rather, it respects patient autonomy as a side constraint⁶⁰—an

57. *Id.* at 239.

58. Linford, *supra* note 1, at 288.

59. See Thomas J. Bole, III, *The Sale of Organs and Obligations to One's Body: Inferences from the History of Ethics*, in *PERSONS AND THEIR BODIES: RIGHTS, RESPONSIBILITIES, RELATIONSHIPS* 331, 350 (Mark J. Cherry ed., 1999) (noting that the federal government does not possess the legitimate authority to constrain persons from selling their kidneys or to prohibit the purchase of kidneys for transplantation).

60. "Side constraints express the inviolability of others, in the ways they specify. These modes of inviolability are expressed by the following injunction: 'Don't use people in specified ways.' An end-state view, on the other hand, would express the view that people are ends and not merely means (if it chooses to express this view at all), by a different injunction: 'Minimize the use in specified ways of persons as means.' Following this precept itself may involve using someone as a means in one of the ways specified. Had Kant held this view, he would have given the second formula of the categorical imperative as, 'So act as to minimize the use of humanity simply as a means,' rather than the one he actually used: 'Act in such a way that you

acknowledgement that the burden of proof on others, including governments, bioethicists, and bureaucratic policy makers, to interfere in the free choices of persons with regard to their bodies, is significant indeed.

Forbidding the sale of human organs for transplantation forbids competent adults from engaging in a commercial transaction from which both parties expect to benefit. Morally permissible legislation does not extend to the coercive imposition of paternalistic regulations on free citizens as if they were mere children. One may not approve of the choices of persons, but they are in authority to make such decisions regarding their own lives. The moral authority that persons possess over themselves and their bodies is not the creation of the state; the state is no more than an organization of persons trusted with specific powers, including the protection of free persons from assault and battery.⁶¹ It is inaccurate to say that the state permits or tolerates certain unpalatable choices of persons; rather, the state does not usually have the legitimate moral authority to interfere in the free choices of persons regarding the use of their own bodies and minds. The burden of proof is on the state to show that it acts within its limited moral authority when it interferes with the free choices of persons regarding the use of their bodies, and that it so acts for significantly strong reasons to satisfy that burden.

V. CONCLUSION

Financial and other market incentives encourage persons to raise resources to further personal as well as social interests and goals. Here, suggestive data need not be limited to attitudinal studies, with their potential for limited sampling and biased questioning. There are plentiful economic data regarding the role of financial and other valuable incentives in motivating human behavior in a wide range of activities: from student grade

always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.” ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 32 (1974).

61. “Whatever their differences, at the core all theories of natural rights reject the idea that private property and personal liberty are solely creations of the state, which itself is only other people given extraordinary powers. Quite the opposite, a natural rights theory asserts that the end of the state is to protect liberty and property, as these conceptions are understood independent of and prior to the formation of the state. No rights are justified in a normative way simply because the state chooses to protect them, as a matter of grace. To use a common example of personal liberty: the state should prohibit murder because it is wrong; murder is not wrong because the state prohibits it. The same applies to property: trespass is not wrong because the state prohibits it; it is wrong because individuals own private property.” RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 5-6 (1985). The role of the state is to enforce “the rights and obligations generated by theories of private entitlement.” *Id.*

improvement, choice of career, and pollution reduction, to pharmaceutical development and choice of research interests.⁶² The competitive stimulus to gain personal, financial, and professional rewards frequently drives technological and medical innovation; it possesses a significant motivational force that is independent of a disinterested concern for civic mindedness, social solidarity, or generalized altruism.⁶³ It is highly plausible that such incentives would be similarly successful in motivating the availability of human organs for transplantation.

With the creation of a market in human organs, organ availability need not be limited to acts of altruism or depend on state coercion. Profits from organ sales would allow the private pursuit of business and educational opportunities or more public agendas. Given that social and personal advantage is often tied to educational and business success, such incentives may be significant. However, even short-term welfare maximization, such as the purchase of housing or health care, may provide some with sufficient incentives to sell a redundant kidney. Adequate commercialization would create opportunities, which some may view as attractive, to secure resources for pursuing their own educational, business, political, and welfare interests.

Financial incentives would allow families to sell the organs of a deceased loved one, rather than simply to donate the organs. Knowing that their families would benefit financially might persuade many more people to state their intention to be organ donors. Potential donors might be willing to consider a futures contract in which they agree to sell any usable organ upon their death to a particular buyer and have the money paid as a death benefit to their descendents. Others might be willing to sell a redundant internal organ such as a kidney while still living. Indeed, some might see it as heroic—saving the life of another at some risk to oneself. In general, public policy that expands the number of living donors would multiply the availability of transplantable organs, such as kidneys, bone marrow, and liver lobes. If public policy also encouraged families to make available organs from recently deceased relatives, this would also increase availability

62. See DAVID FRIEDMAN, *HIDDEN ORDER: THE ECONOMICS OF EVERYDAY LIFE* (1996).

63. See, e.g., Mark J. Cherry, *Scientific Excellence, Professional Virtue, and the Profit Motive: The Market and Health Care Reform*, 28 *J. MED. & PHIL.* 259, 268 (2003) (noting that “the market creates social and political space to allow additional opportunities and incentives for health care procurement and allocation”); see generally Richard A. Epstein, *Why America Does Not Have a Second Drug Problem*, in *INNOVATION AND THE PHARMACEUTICAL INDUSTRY: CRITICAL REFLECTIONS ON THE VIRTUES OF PROFIT* (H. Tristram Engelhardt, Jr. & Jeremy R. Garrett eds., 2008) (arguing that capitalism provides significant financial incentives to drive quality pharmaceutical innovation). See generally, R. Garrett, *Pharmaceutical Innovation and the Market: The Pursuit of Profit and the Amelioration of the Human Condition* in *INNOVATION AND THE PHARMACEUTICAL INDUSTRY: CRITICAL REFLECTIONS ON THE VIRTUES OF PROFIT* (H. Tristram Engelhardt, Jr. & Jeremy R. Garrett eds., 2008).

of non-redundant organs, such as hearts from brain-dead and cadaver donors. Expanding the pool of living and deceased donors would then save lives and reduce suffering.

Financial incentives would not preclude the liberties of the altruistically inclined to realize their need charitably to take care of others. Social and political institutions that support the free choices of persons to interact with free and consenting others are formally neutral with regard to the expression of charity. Or, to rephrase the conceptual point: market-liberties include, but are not limited to, profit-seeking interests. Unless legally prohibited, even with a free-market system, private individuals could still donate organs out of charity to family members or to others in need.

Mr. Linford's conclusion that the current altruism-based system of organ donation is not working adequately, whereas the use of incentives, such as college scholarships, would likely increase access to kidneys for transplantation, saving lives and reducing human suffering,⁶⁴ is correct. But, given the innovative possibilities of the market, I see no legitimate reason why public policy should starkly limit the valuable opportunities for encouraging organ donation to college scholarships—although, I suppose, one could see college scholarships as a small step in the right direction. Embracing the language and practice of commodification as a positive good and denying the illicit intuition that commodification of body parts is immoral, would benefit donors and recipients alike while also encouraging honesty in transplantation practice and public policy. Utilizing market-based incentives, including, but not limited to, barter exchanges (e.g., college scholarships and organ swaps), would shed light on what is often a hazy and shrouded policy setting. At stake is not solely the efficiency and effectiveness of human organ procurement for transplantation, but also the recognition of the moral authority of persons over themselves—both mind and body.

64. Linford, *supra* note 1, at 325-26.

