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GIVING, SELLING, AND HAVING TAKEN: CONFLICTING VIEWS OF ORGAN TRANSFER*

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INTRODUCTION: RETHINKING THE FOUNDATIONS OF ORGAN TRANSFER POLICY

This essay does not seek directly to solve the contemporary health care policy challenges regarding the availability of organs for transplantation.¹ Instead, the goal is to re-examine the moral and political theoretical foundations of current approaches to the acquisition of organs for transplantation. It steps back from generally accepted policy so as to pose basic questions regarding how organs may be acquired. This undertaking is critical in the sense of exploring what is taken for granted in order better to judge whether current policy ought to be accepted. The prevailing view is that organs may be donated but not sold, despite the shortfall in organs and the consequent loss of life.² This essay assesses the prohibition of organ sales in terms of the constraints of a plausible secular moral framework,³ not to defend the moral

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1. For the basis of current American public policy concerning organ transplantation, see DEP'T OF HEALTH & HUMAN SERVS., REPORT OF THE TASK FORCE ON ORGAN TRANSPLANTATION: ISSUES AND RECOMMENDATIONS (1986). See also HASTINGS CTR., ETHICAL, LEGAL, AND POLICY ISSUES PERTAINING TO SOLID ORGAN PROCUREMENT: A REPORT TO THE PROJECT ON ORGAN TRANSPLANTATION (1985); UNESCO, HUMAN RIGHTS ASPECTS OF TRAFFIC IN BODY PARTS AND HUMAN FETUSES FOR RESEARCH AND/OR THERAPEUTIC PURPOSES (1989); WORLD HEALTH ORG., LEGISLATIVE RESPONSES TO ORGAN TRANSPLANTATION (1994); OFFICE OF TECH. ASSESSMENT, U.S. CONGRESS, OTA-BA-337, NEW DEVELOPMENTS IN BIOTECHNOLOGY: OWNERSHIP OF HUMAN TISSUES AND CELLS—SPECIAL REPORT (1987); COMM. ON ORGAN PROCUREMENT & TRANSPLANTATION POLICY, INST. OF MED., ORGAN PROCUREMENT AND TRANSPLANTATION: ASSESSING CURRENT POLICIES AND THE POTENTIAL IMPACT OF THE DHHS FINAL RULE (1999); James F. Childress, *Some Moral Connections Between Organ Procurement and Organ Distribution*, 3 J. CONTEMP. HEALTH L. & POL'Y 85 (1987); Massachusetts Task Force on Organ Transplantation, *Excerpts from the Report of the Massachusetts Task Force on Organ Transplantation*, in HUMAN ORGAN TRANSPLANTATION: SOCIETAL, MEDICAL-LEGAL, REGULATORY, AND REIMBURSEMENT ISSUES 211 (Dale H. Cowan et al. eds., 1984). For the basis for current federal legal constraints on organ sales, see National Organ Transplant Act § 301, 42 U.S.C. § 274e (2003).

2. Mark J. Cherry, *Persons and Their Bodies*, in PERSONS AND THEIR BODIES: RIGHTS, RESPONSIBILITIES, RELATIONSHIPS 1 (Mark J. Cherry ed., 1999).

3. The purpose of this paper is not to establish the correct approach to the distribution of organs grounded in a rightly-directed understanding of the human good and of human flourishing, but rather to explore what can be established within the resources of a general

goodness or rightness of organ sales, but merely to show why such sales cannot plausibly be prohibited by secular moral authority.

A critical assessment of our prevailing cultural commitments and assumptions⁴ requires asking why many humans die because of the unavailability of organs for transplantation, while at the same time many others die without ever making their organs available for those whose lives could have been prolonged by a donation.⁵

It begins by recognizing three policy options:

- (1) Encouraging altruism—persons might be induced to think more of the suffering of their fellows and thus make their organs available to those in need not only at death, but even as living donors. The accent here is on the autonomy and altruism of the donors;⁶

secular moral argument. See, e.g., H. TRISTRAM ENGELHARDT, JR., *THE FOUNDATIONS OF BIOETHICS* (2d ed. 1996).

4. There is considerable literature exploring the issue of organ sales. See, e.g., *Preface to PERSONS AND THEIR BODIES: RIGHTS, RESPONSIBILITIES, RELATIONSHIPS* (Mark J. Cherry ed., 1999); G.M. Abouna et al., *Commercialization in Human Organs: A Middle Eastern Perspective*, 22 *TRANSPLANTATION PROC.* 918 (1990); A. Frank Adams, III et al., *Markets for Organs: The Question of Supply*, 17 *CONTEMP. ECON. POL'Y* 147 (1999); Nicholas Capaldi, *A Catholic Perspective on Organ Sales*, 6 *CHRISTIAN BIOETHICS* 139 (2000); Mark J. Cherry, *Body Parts and the Market Place: Insights from Thomistic Philosophy*, 6 *CHRISTIAN BIOETHICS* 171 (2000) [hereinafter Cherry, *Body Parts*]; Mark J. Cherry, *Is a Market in Human Organs Necessarily Exploitative*, 14 *PUB. AFF. Q.* 337 (2000) [hereinafter Cherry, *Exploitative*]; Paul Hughes, *Exploitation, Autonomy, and the Case for Organ Sales*, 12 *INT'L J. APPLIED PHIL.* 89 (1998); Leon Kass, *Organs for Sale? Propriety, Property, and the Price of Progress*, 107 *PUB. INT.* 65 (1992); P. Manga, *A Commercial Market for Organs? Why Not?*, 1 *BIOETHICS* 321 (1987); Clifton Perry, *Human Organs and the Open Market*, 91 *ETHICS* 63 (1980); Janet Radcliffe-Richards et al., *The Case for Allowing Kidney Sales*, 351 *LANCET* 1950 (June 27, 1998); Janet Radcliffe-Richards, *Nephrological Goings On: Kidney Sales and Moral Arguments*, 21 *J. MED. & PHIL.* 375 (1996); K.C. Reddy et al., *Unconventional Renal Transplantation in India*, 22 *TRANSPLANTATION PROC.* 910 (1990); D.J. Rothman et al., *The Bellagio Task Force Report on Transplantation, Bodily Integrity, and the International Traffic in Organs*, 29 *TRANSPLANTATION PROC.* 2739 (1997); C.M. Thiagarajan et al., *The Practice of Unconventional Renal Transplantation (UCRT) at a Single Centre in India*, 22 *TRANSPLANTATION PROC.* 912 (1990); Danilo C. Tiong, *Human Organ Transplants*, in *BEYOND A WESTERN BIOETHICS* 89 (Angeles Tan Alora & Josephine Lumitao eds., 2001); Larry Torcello & Stephen Wear, *The Commercialization of Human Body Parts: A Reappraisal from a Protestant Perspective*, 6 *CHRISTIAN BIOETHICS* 153 (2000). For a study of many of the background philosophical issues, see *OFFICE OF TECH. ASSESSMENT, U.S. CONGRESS, NEW DEVELOPMENTS IN BIOTECHNOLOGY: OWNERSHIP OF HUMAN TISSUES AND CELLS, OTA-8A-337 & OTA-BP-8A-45* (U.S. Gov't Printing Office 1987).

5. From 1995 to 2002, more than 39,600 patients in the United States died waiting for an organ to be available for transplantation. MARK J. CHERRY, *KIDNEY FOR SALE BY OWNER: HUMAN ORGANS, TRANSPLANTATION, AND THE MARKET* (forthcoming 2004).

6. For a classic defense of the importance of the gift relationship over the commercial relationship, see RICHARD M. TITMUS, *THE GIFT RELATIONSHIP* (1971) (focusing on the acquisition of blood for transfusion).

- (2) Confiscating organs—state force might be used to transfer organs from those who have to those who have not, either at death or perhaps even through an organ draft of non-paired organs.⁷ State force could be clothed as a kind of “giving,” similar to when the burden of proof is shifted by presumed-consent laws from the acquirer of the organ to the source of the organ, thus putting all persons at jeopardy of having their organs taken as a “gift” if they fail to take effective steps to the contrary.⁸ Under such circumstances, all persons are forced to make a decision or have their organs put at the risk of being taken. The accent in this policy is on state authority and the good of saving lives.
- (3) Paying for organs—the market might be employed to engage the interest of potential providers of organs and/or their families by offering incentives ranging from covering funeral expenses, paying a death benefit, or giving a credit against estate taxes, to substantial payments to the families or even to living sellers to encourage organ transfer at death or while still alive.⁹

7. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 206-07 (1974).

8. See, e.g., PRESUMED CONSENT SUBCOMM. OF THE UNOS ETHICS COMM., UNITED NETWORK FOR ORGAN SHARING, AN EVALUATION OF THE ETHICS OF PRESUMED CONSENT AND A PROPOSAL BASED ON REQUIRED RESPONSE (1993); Jose Mainetti et al., *Bioethics in Argentina*, in REGIONAL PERSPECTIVES IN BIOETHICS 71 (John Peppin & Mark Cherry eds., 1990); G.R. Schütt, *25 Years of Organ Donation: European Initiatives to Increase Organ Donation*, 34 TRANSPLANTATION PROC. 2005 (2002); A. Spital, *Mandated Choice for Organ Donation: Time to Give it a Try*, 125 ANNALS INTERNAL MED. 66 (1996); L. Roles et al., *Effect of a Presumed Consent Law on Organ Retrieval in Belgium*, 22 TRANSPLANTATION PROC. 2078 (1990).

9. The American Medical Association’s Council on Ethical and Judicial Affairs, for example, recently announced that it would likely be morally permissible for competent adults to enter into a future contract for payment to an individual’s family or estate after death, once the organs are retrieved and judged medically suitable for transplant:

The voluntary donation of organs in appropriate circumstances is to be encouraged. However, it is not ethical to participate in a procedure to enable a living donor to receive payment, other than for the reimbursement of expenses necessarily incurred in connection with removal, for any of the donor’s non-renewable organs.

Procedures involving financial incentives for cadaveric organ donors should have adequate safeguards to ensure that the health of donors and recipients is in no way jeopardized, and that the quality of the organ supply is not degraded. Incentives should be limited to future contracts offered to prospective donors. By entering into a future contract, an adult would agree while still competent to donate his or her organs after death. In return, the donor’s family or estate would receive some financial remuneration after the organs have been retrieved and judged medically suitable for transplantation. Several other

The question then becomes why public policy should embrace or exclude any one of these three policy options or a combination thereof.

A number of background empirical assumptions, as well as very particular moral and philosophical understandings, support endorsing or condemning particular combinations of these approaches. There are at least five crucial areas of dispute regarding appropriate approaches to the organ shortage.

First, there are conflicting views regarding the moral authority of individuals. The more humans are regarded as having authority over themselves, including their bodies, the more it will be morally necessary to gain explicit permission for the transfer of their organs, and the more difficult to justify the use of state coercion in prohibiting peaceable, non-fraudulent sales and transfers of organs.

Second, there are conflicting views regarding the moral authority of states. Depending on the extent to which states are regarded as having an original moral authority over their subjects, such that the state in some sense (or senses) presumptively owns and/or controls citizens and their possessions in the state's sovereign territory, including their organs, it will appear plausible to prohibit peaceable, voluntary transfers and sales of organs. There is a range of views regarding the appropriate moral authority of states over their citizens or subjects, spanning from endorsing outright tyrannies in which the wishes of the few are imposed on the many, to social democratic regimes where the views of a majority are imposed on minorities,¹⁰ to limited democratic regimes that protect a considerable space for peaceable interactions, which many, often even the majority, may find to be morally abhorrent.¹¹

conditions would apply: (1) Only the potential donor, and not the donor's family or other third party, may be given the option of accepting financial incentives for cadaveric organ donation. In addition, the potential donor must be a competent adult when the decision to donate is made, and the donor must not have committed suicide. (2) Any incentive should be of moderate value and should be the lowest amount that can reasonably be expected to encourage organ donation. By designating a state agency to administer the incentive, full control over the level of incentive can be maintained. (3) Payment should occur only after the organs have been retrieved and judged medically suitable for transplantation. Suitability should continue to be determined in accordance with the procedures of the Organ Procurement and Transplantation Network. (4) Incentives should play no part in the allocation of donated organs among potential transplant recipients. The distribution of organs for transplantation should continue to be governed only by ethically appropriate criteria relating to medical need.

CODE OF MEDICAL ETHICS, op. E-2.15 (Am. Med. Ass'n 2003).

10. Consider the apt characterization by Nozick of more than limited governments as committed to an ownership of the people, by the people, for the people. *See* NOZICK, *supra* note 7, at 289-90.

11. At stake is the significant cleft between formal-right constitutions and material-right constitutions, where the former seek to establish procedural mechanisms for the peaceable collaboration of citizens in the absence of a thick, common understanding of justice or fairness, and the latter seek to establish a particular view of the human good and human flourishing through endorsing constitutionally recognized claim rights.

Third, there are conflicting views regarding the moral significance of commodifying¹² human body parts. Depending on the extent to which market exchanges are regarded as paradigmatic of peaceable mutual respect, the acquisition of organs through sales will appear noble or demeaning. This judgment will be limited by the consideration that some humans hold that the commodification of human body parts involves an intrinsic evil.¹³ Fourth, there are conflicting views regarding the nature and moral implications of exploitation. Depending on the extent to which personal autonomy is regarded as cardinal, or the commodification of organs as evil, there will be different views about who would be exploiting whom, given different policies for organ transfer. For example, those who accent the authority of individuals over themselves may regard presumed consent policies as a form of state exploitation of human vulnerability, since humans often do not plan in advance and thereby effectively fail to record their opposition to having their organs transferred. Some regard offering payments to the poor for selling organs to the rich as exploiting the poor, while others hold that the legal prohibition of such sales exploits the poor by paternalistically and coercively imposing the values of the rich on the attempts of the poor peaceably to advantage themselves. Still others would hold that the healthy poor exploit the rich, sick, and dying by offering to sell them necessary organs at high prices.¹⁴ It will be necessary to determine when exploitation is, with justification, morally endorsed or disapproved. After all, one can speak of exploitation in a positive sense, as when one exploits beneficent sentiments on the part of disputing parties in order to bring about a reconciliation.

12. The term "commodify" is often engaged in order to suggest that payments for a particular service or good render the provision of such service or good morally inappropriate. Consider, for example, those who would hold that taking money for fornicating renders the act more grievous. For a discussion of some issues bearing on commodification, see CONSUMING HEALTH: THE COMMODIFICATION OF HEALTH CARE (Saras Henderson & Alan R. Petersen eds., 2002); MARGARET JANE RADIN, CONTESTED COMMODITIES (1996); W.B. Arnason, *Directed Donation: The Relevance of Race*, HASTINGS CENTER REP., Nov. 1991, at 13; Eric Mack, *Inalienable Rights in the Moral and Political Philosophy of John Locke: A Reappraisal*, in PERSONS AND THEIR BODIES: RIGHTS, RESPONSIBILITIES, RELATIONSHIPS, *supra* note 2, at 143.

13. One of the philosophical theorists opposing not just the sale of organs but the gift of organs from living donors is Immanuel Kant, who condemns such transfers in terms of his account of morality, not because those transfers are intrinsically evil, but more fundamentally because they are alleged to have a wrongness independent of any concern regarding benefits and harms. At issue is the existence of a wrong-making condition supposedly independent of concerns with consequences and which cannot be defeated by consent—Kant's account of a categorical imperative. IMMANUEL KANT, GRUNDLEGUNG ZUR METAPHYSIK DER SITTEN, AK IV 416 (de Gruyter 1968). Kant's account of autonomy is thus grounded in his account of moral rationality and is independent of what one might wish or desire to do. *Id.* at AK IV 432-33. This account of morality is grounded in Kant's identification of morality with rationality, which lies at the heart of his solution to the seeming conflict between determinism and freedom. IMMANUEL KANT, CRITIQUE OF PURE REASON, A538=B560-A559=B587.

14. Cherry, *Exploitative*, *supra* note 4.

Finally, there are conflicting views regarding the likely impact of particular policies. Depending on the extent to which altruism prompts donations, sales undercut donations, or the commodification of organs involve untoward moral and/or other consequences, many will invoke the specter or premise of alleged dangers or benefits to favor one policy over others. Such empirical concerns are often highly speculative and very difficult to assess objectively.

For purposes of this essay, it is assumed that philosophical concerns are more decisive than empirical ones: empirical concerns must be placed in a moral interpretive context before their implications can be determined.

I. WHY SHOULD THE AUTHORITY OF INDIVIDUALS CARRY SUCH WEIGHT?

Humans are a morally contentious breed. In the absence of a state-imposed orthodoxy, humans tend not only to engage in open foundational moral disputes, but also lack the intellectual resources to resolve their moral controversies by sound rational argument. In bioethics, there is both passionate and persistent disagreement. Humans disagree regarding (1) the moral significance of their sexuality in disputes about surrogate motherhood and artificial insemination by donors, (2) the moral significance of interferences with and termination of early human life with regard to embryo research and abortion, (3) the nature of justice, (4) the claims of equality, and (5) the status of private possessions as bearing on the allocation of resources for health care, as well as (6) end-of-life decision-making, as in the case of physician-assisted suicide and euthanasia. Bioethical matters occasion significant battles in the culture wars.¹⁵ Disputes with respect to organ transfer are no exception.

Humans not only dispute the ranking of cardinal values such as liberty, equality, prosperity, and security, they disagree regarding the powers of human rationality and the existence of ultimate meaning, regarding God's existence and God's requirements, and regarding the character of morality, rationality, and reasonableness. Consequently, there is no common basis in terms of which such foundational disputes can be resolved by sound rational argument. That is, there are strong grounds for concluding that these disagreements are irresolvable through discursive secular reflection, because the disputants fail to agree about basic moral premises and rules of moral evidence and inference. This state of affairs has been well recognized for over two thousand years.¹⁶ According to T. Flavius Clement (circa 150-215 A.D.) of Alexandria, Egypt, everything depends on the basic premises from which one starts. As Clement puts it, "Should one say that Knowledge is founded on demonstration by a

15. JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991).

16. The irresolvability of moral controversies was well appreciated by Protagoras (481-411 B.C.), who, as Diogenes Laertius observed, "was the first to maintain that there are two sides to every question, opposed to each other, and he even argued in this fashion, being the first to do so" (IX.8.51). *DIOGENES LAERTIUS, 2 LIVES OF EMINENT PHILOSOPHERS* 463 (R.D. Hicks trans., Harvard Univ. Press 2000) (1925).

process of reasoning, let him hear that first principles are incapable of demonstration; for they are known neither by art nor sagacity."¹⁷

In the face of fundamental disagreement about the existence of God and the nature of morality, one is left with a default strategy of deriving authority neither from God nor from a canonical understanding of moral rationality, but instead from individuals. If one cannot agree about God's wishes, or as to which moral understanding or account of rationality ought to govern, one can at least derive authority from the peaceable consent of those who participate in a project. This strategy lies behind the moral authority on its face of uncoerced, non-fraudulent market exchanges, contracts, and agreements. Given disagreements about God's wishes and the nature of moral obligation, individuals can recognize themselves as the source of authority for peaceable collaboration. If one cannot uncontroversially draw authority from God or from a particular account of the morally rational or reasonable, then one can at least derive authority from those individuals who convey that authority through consent.¹⁸

This state of affairs has at least two important consequences. First, it condemns humans to a moral pluralism, although not necessarily a moral relativism. Second, it condemns humans to a moral-epistemological skepticism, albeit not to a moral-metaphysical skepticism.¹⁹ If definitive moral knowledge is to be possessed by humans, it must be acquired by some special route to knowledge and will not be open to all.²⁰ By default, a general secular defense of the moral authority of governments will at best secure authority for a limited government with limited authority to intrude into the peaceable agreements of citizens. In particular, these observations regarding moral controversies and the centrality of individual consent in resolving controversies in the face of moral disagreement give strong grounds for presuming that

17. Clement of Alexandria, *The Stromata* II.4, in 2 ANTE-NICENE FATHERS 350 (Alexander Roberts & James Donaldson eds., Hendrickson Publishers 1994).

18. The point of relying on permission, given deafness to God's wishes and numerous competing secular accounts of moral rationality, is that this source of authority involves the least initial presupposition as the basis for a common secular morality—namely, the sparse agreement that there are persons who can consent to common, collaborative undertakings. See H.T. ENGELHARDT, JR., *BIOETHICS AND SECULAR HUMANISM: THE SEARCH FOR A COMMON MORALITY* (1991).

19. The circumstance that one cannot resolve moral controversies by discursive rational analysis and reflection does not give grounds for denying the existence of an objective moral truth, only of the ability of discursive rationality to identify that truth. For a further exploration of these issues, see H.T. ENGELHARDT, JR., *THE FOUNDATIONS OF CHRISTIAN BIOETHICS* ch. 4 (2000).

20. The traditional Christian anthropology recognizes fallen man as unable to exercise a fundamental human cognitive faculty: the heart or the nous, through which the knower can know the known without mediation. See, e.g., ST. SYMEON THE NEW THEOLOGIAN, *ON THE MYSTICAL LIFE*, (Alexander Golitzin trans., 1995); STS. NIKODIMOS AND MAKARIOS, *1 THE PHILOKALIA* (G.E.H. Palmer et al. eds. & trans., 1979). Only those whose heart or nous is spiritually healthy are able to know in a morally reliable fashion. Such knowledge will not be available for the general secular resolution of moral controversies. See, e.g., JOHN S. ROMANIDES, *THE ANCESTRAL SIN* (George S. Gabriel trans., Zephyr Publishing 2002) (1957).

individuals may, within the horizon of imminence, morally act on their own not only to give their organs, but to sell them as well.

II. PUZZLES REGARDING THE AUTHORITY OF STATES OVER THEIR CITIZENS

How can one explain the tendency to prohibit organ sales? What would make it plausible to embrace such a prohibitive policy, since it may cost human lives in making fewer organs available? First, despite the foregoing observations regarding profound moral, philosophical, and theological disagreements, which favor placing persons and their moral authority central to any account of the transfer of organs, humans nevertheless have a strong proclivity to deny their robust moral disagreements or otherwise discount them. They do so through various invocations of rationality, reasonableness, and consensus. That is, despite profound disagreements regarding the moral significance of sexuality, reproduction, property, suffering, dying, and death, particular public policies are justified by claiming one particular moral perspective to be grounded in a consensus or to be otherwise normative. In the process, contrary views are often dismissed as non-mainstream or unreasonable, even if disagreement is robust, and there is no conclusive sound rational argument to establish any one particular view.²¹

The appeal of such strategies is manifest. They serve to establish the intellectual class as authorities who can disclose the content of morality and the foundations of appropriate public policy.²² If moral reflection were not beset by the fundamental controversies that plague it, philosophers would be specially advantaged in being able to justify the originary moral authority of the state and its policies through their account of rationality. Philosophers could then show that coercion on behalf of this rationality is really restorative of true human rational autonomy.²³ In addition, philosophers could declare

21. For example, although John Rawls admits that his account of justice is not grounded in a rational foundationalism but instead in a freestanding view, he dismisses from the domain of reasonable pluralism those accounts of polity that do not conform with his social-democratic understanding (this would exclude from the scope of a reasonable pluralism both those supporting libertarian accounts and limited democratic accounts of polity). JOHN RAWLS, *POLITICAL LIBERALISM* 36 (1996).

22. The claim of moral knowledge involves the arrogation (justifiably or not) of authority and therefore power over others. See, e.g., MICHEL FOUCAULT, *POWER/KNOWLEDGE* (Colin Gordon ed., Colin Gordon et al. trans., 1980). Claims to knowledge can also establish and protect political power. This is a point also made by Karl Marx and Friedrich Engels regarding those intellectuals who support the reigning ideology, that is, those who are "conceptive ideologists, who make the perfecting of the illusion of the class about itself their chief source of livelihood." KARL MARX & FRIEDRICH ENGELS, *THE GERMAN IDEOLOGY* 40 (C.J. Arthur ed., Int'l Publishers 1st ed., 1972).

23. A classical statement of this view regarding the rational justification for coercive state authority is provided by Immanuel Kant:

Any opposition that counteracts the hindrance of an effect promotes that effect and is consistent with it. Now, everything that is unjust is a hindrance to freedom according to universal laws. Coercion, however, is a hindrance or opposi-

that all humans are really members of one moral community, grounded in the moral commitments affirmed by those philosophers, fundamental disagreements to the contrary notwithstanding. To accomplish this feat, however, others must also grant the needed initial moral premises and rules of moral inference.

As the third-century skeptic Agrippa appreciated, philosophical disputes involving competing basic moral premises and rules of moral evidence inevitably beg the question, argue in a circle, or engage an infinite regress.²⁴ Claims of the triumph of a particular moral rationality to the contrary notwithstanding, it is not possible to provide a conclusive secular rational warrant for a particular moral rationality, thus supplying unique rational moral authority to a particular public policy. We are left asking whose moral rationality and which view of human good and human flourishing should govern. Sound rational argument is unable to deliver a conclusive answer.²⁵ Yet, out of interests of power over others, one can appreciate why the controversial character of human morality is often discounted, if not denied, by those in authority. For example, despite the controversial character of morality, many doggedly invoke particular normative senses of the secularly reasonable or the fair as unquestionably canonical in order to anoint their favored policies.²⁶

John Rawls and Jürgen Habermas, for example, embrace a particular view of the reasonable or the ethics of discourse.²⁷ They pack their own parti-

tion to freedom. Consequently, if a certain use of freedom is itself a hindrance to freedom according to universal laws (that is, is unjust), then the use of coercion to counteract it, inasmuch as it is the prevention of a hindrance to freedom, is consistent with freedom according to universal laws; in other words, this use of coercion is just. It follows by the law of contradiction that justice [a right] is united with the authorization to use coercion against anyone who violates justice [or a right].

IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 35-36 [AK VI 231] (John Ladd trans., Bobbs-Merrill 1965) (1797).

24. From classic times it was appreciated that arguments could not be settled among parties who did not share a common understanding of the problem at hand, the basic premises that should be embraced, and the rules of evidence that should be engaged. This led to the affirmation of what was referred to as the *pente tropoi*, or five modes of appreciating the irresolvability of such controversies due to (1) the *de facto* interminability of philosophical disputes, (2) arguments involving an infinite regress, (3) the differences in perspective of the disputants, (4) the begging of what is at issue due to what initial premises are accepted, and (5) the circularity of most foundational reasoning. See SEXTUS EMPIRICUS, *1 OUTLINES OF PYRRHONISM* I 95 (1976). This view was attributed to the school of Agrippa. DIOGENES LAERTIUS, *2 LIVES OF EMINENT PHILOSOPHERS* IX 8, p.501 (R.D. Hicks trans., 2000) (1925).

25. For a study of the ambiguities involved in identifying a canonical account of moral rationality and/or justice, see ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (1988).

26. One might consider the invocation by Francis Fukuyama of "factor X" as a ground for human dignity. FRANCIS FUKUYAMA, *OUR POSTHUMAN FUTURE: CONSEQUENCES OF THE BIOTECHNOLOGY FUTURE* 149 (2002).

27. See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* (1996); JÜRGEN HABERMAS, *THEORIE DES KOMMUNIKATIVEN HANDELNS* (1981).

cular moral and metaphysical commitments into their sense of reasonableness or proper discourse, without a grounding justification. Rawls begins by accepting "a pluralism of incompatible yet reasonable comprehensive doctrines."²⁸ However, what he gives with the one hand he takes back with the other. In a seemingly innocuous fashion, Rawls acknowledges that his understanding of political liberalism and reasonableness "supposes that a reasonable comprehensive doctrine does not reject the essentials of a democratic regime."²⁹ The essentials of Rawls' democratic regime turn out to be the particular essentials of a social democratic regime that requires ensuring in a fairly comprehensive fashion to "all citizens adequate all-purpose means to make effective use of their freedoms."³⁰ Cardinal terms are interpreted so as to include and exclude particular understandings of fairness and rationality. For instance, Norman Daniels (a student of Rawls) and James Sabin define fair-mindedness and fair-minded people as those "who in principle seek to cooperate with others on terms they can justify to each other."³¹ However, here again we face the core difficulty: humans are separated by incompatible moral views and metaphysics. Consequently, individuals in a secular society will not be able to establish how others should collaborate with each other unless they already grant foundational premises and rules of moral evidence.

In the face of this difficulty, the notion of consensus is nevertheless often invoked.³² There is, though, a crucial disparity between the etymological meaning of consensus as unanimous agreement and the way in which consensus is invoked as a rhetorical ploy.³³ At least four senses of consensus must be distinguished:

- (1) consensus as an agreement among all parties as to the authority of a policy and the reasonableness of compliance;³⁴

28. RAWLS, *supra* note 21, at xvi.

29. *Id.*

30. *Id.* at 6.

31. NORMAN DANIELS & JAMES SABIN, SETTING LIMITS FAIRLY: CAN WE LEARN TO SHARE MEDICAL RESOURCES? 44 (2002).

32. THE CONCEPT OF MORAL CONSENSUS (Kurt Bayertz ed., 1994); H.T. Engelhardt, Jr., *Consensus Formation: The Creation of an Ideology*, 11 CAMBRIDGE Q. OF HEALTHCARE ETHICS 7 (2002).

33. In Latin, consensus means feeling together, or being of one mind, as an "agreement, accordance, unanimity, concord." CHARLTON T. LEWIS, A LATIN DICTIONARY 428 (rev. ed. 1980). The first edition of the Oxford English Dictionary defines consensus as "agreement in opinion; the collective unanimous opinion of a number of persons." 2 OXFORD ENGLISH DICTIONARY 851 (1st ed. 1933). Webster's New Collegiate Dictionary primarily defines consensus in terms of "group solidarity in sentiment and belief" and "general agreement . . . the judgment arrived at by most of those concerned." WEBSTER'S NEW COLLEGIATE DICTIONARY 238-39 (1981).

34. Consensus in this sense comports with its etymology and identifies unanimous agreement: a social condition rare, if not non-existent, in moral and political debates.

- (2) consensus as an agreement among rulers, among those in political power, regarding the morality to which their subjects may rightfully be forced to comply. Consensus focuses on the rulers' self-appreciation as being in moral authority to effect the policy they endorse. Consensus in this case usually functions as an ideology.³⁵
- (3) The third sense is consensus as an agreement among rulers, among those in political power, regarding the public policy to which their subjects will be forced to comply. Consensus focuses on a political program embraced because of its political usefulness with respect to political stability or the particular goals embraced by the rulers apart from any general moral justification, so that the political is separated from morality, as it can be justified in general terms.³⁶
- (4) Consensus as an agreement among a sufficient majority so as to ensure political compliance of the minority. The minority is pressured to appreciate the prudence of submitting to the morality and public policy imposed by the majority. Consensus functions as *Realpolitik*.³⁷

A further puzzle is that many invoke consensus in matters moral and political as an indication of the truth of such propositions, although broad agreements among humans regarding medical and scientific views do not appear closely connected to the truth. Public consensus regarding the nature of the universe seems unconnected to the actual nature of the universe.³⁸

There are good grounds to be quite skeptical about the ability to draw secular moral authority for health care policies from a particular view of the morally rational or from a doctrine of the divine right of democratic majorities. This state of affairs should not bring one to embrace moral relativism or a moral-metaphysical skepticism regarding human morality. Rather, one should recognize that, without special knowledge not open to all, it is impossible for humans to know when they know truly regarding a wide range of moral

35. "The ruling ideas are nothing more than the ideal expression of the dominant material relationships, the dominant material relationships grasped as ideas; hence of the relationships which make the one class the ruling one, therefore the ideas of its dominance." MARX & ENGELS, *supra* note 22, at 39.

36. This use of consensus identifies a workable coalition, against which there will always be minority opposition.

37. Consensus here identifies a coalition powerful enough radically to reshape law and public policy, even if it fails to achieve unanimity.

38. Public consensus in matters scientific is never sought as a basis for supporting scientific truth claims, for no one would hold that the general public consensus regarding the nature of the atom, of the character of infectious disease entities, would carry weight regarding the actual truth embraced.

claims. The more one confronts this defining state of affairs, the more one is pressed by default to acquiesce in limited governments that will, in general secular moral terms, be constrained to tolerate peaceable agreement, including a market in organs. Because governments will not be able to justify by sound rational argument a morally canonical, totalizing, public policy, persons and regimes will be constrained by default to recognize moral rights of privacy within which peaceable collaboration, including the buying and selling of organs, will need to be tolerated.

III. THE MORAL SIGNIFICANCE OF THE COMMODIFICATION OF ORGANS

Many authors nevertheless criticize certain market transactions as improperly commodifying particular services or resources.³⁹ Others regard such commodification as, at the very least, useful, if not noble, emphasizing that the market treats individuals as autonomous agents able to freely and peaceably collaborate with others so that market exchanges constitute a special example of the triumph of human freedom.⁴⁰ Still others hold that the market improperly objectifies particular services, such as medical services, while others celebrate the market distribution of medical services as the means that most efficiently makes available health services without compromising human freedom.⁴¹

Matters are surely complex with regard to commodification and sales. For example, voluntary military service offers a robust example of voluntary servitude in which persons give to others the right to enforce performance of services in exchange for food, pay, and special benefits. In contrast, when persons decide to sell their organs or tissues, it is not they who are commodified, but a part of their bodies which they freely decide to objectify and to trade in order to secure particular benefits. Remarkably, there is less secular moral objection to the sale of renewable tissues such as blood, sperm, and ova than to the sale of organs, although many recognize the use of donor sperm and ova as involving a kind of adultery or at least fornication.⁴² However, the distinction between being a renewable or non-renewable tissue

39. Waltzer, for example, argues that while the proper sphere of money includes "all those objects, commodities, products, services, beyond what is communally provided, that individual men and women find useful or pleasing," certain exchanges ought to be prohibited in order to set limits on the dominion of wealth. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 103 (1983). See also M.J. RADIN, CONTESTED COMMODITIES (1996); M.J. RADIN, REINTERPRETING PROPERTY (1993); M.J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

40. See CHERRY, *supra* note 5.

41. For an analysis of issues involved in the commodification of medical or health care, see David Friedman, *Should Medicine be a Commodity? An Economist's Perspective*, in RIGHTS TO HEALTH CARE 259 (Thomas J. Bole, III & William B. Bondeson eds., 1991).

42. For an account of the traditional Christian objection to artificial insemination from a donor, see CHARLES J. MCFADDEN, MEDICAL ETHICS 53 (5th ed. 1961); HARMON L. SMITH, ETHICS AND THE NEW MEDICINE 62 (1970).

would appear to bear not on the matter of commodification, but more on the risk of losing a tissue or organ one might later need.⁴³

Two contrasting moral visions or life-worlds are at stake. On the one hand, there is an affirmation of a set of intuitions supporting the view that the dignity of humans is harmed when human organs or important services are made objects of market transactions.⁴⁴ Others recognize that the market affirms the dignity of persons, in that participants are treated as moral agents with the capacity to responsibly trade goods and services.⁴⁵ At issue are conflicting visions of moral dignity. The first interpretation supports condemning the sale of organs as undermining the dignity of humans, whereas the second supports recognizing the sale of organs as an expression of human autonomy and dignity. Given the difficulty of resolving moral controversies and of establishing the authority of the secular state, the default position would again appear to be in the favor of those who affirm the market, because the market can be justified in terms of the consent of its participants. When there is no common view of what God requires or which moral vision, rationality, or account of reasonableness should govern, one is, by default, left with allowing individuals peaceably to choose and collaborate as they agree: hence the salience of the free market, contracts, and limited democracies. This acquiescence in free choice need not imply approval of what is allowed to be chosen or undertaken. One may have a special insight into the evils of particular choices, yet recognize no secular moral authority to interfere with coercive state force.

Many of the strong intuitions against a market in organs derive from a secular displacement of prior religious views. The earth's dominant culture is post-Christian; the major imperial powers of the nineteenth and twentieth centuries passed from being Christian to being post-Christian cultures. One would expect to find shards and pieces of Christian religious moral views that might give grounds to opposing a market in organs, considering the traditional Christian opposition to mutilation. Matters are complex. Opposition by the Church of the first thousand years to mutilation of the human body was based on a recognition of the sanctity of the body as a temple of the Holy Spirit and the necessity of accepting and honoring the gendered body given to one by

43. Whether a kidney or a pint of blood is sold, in each case the object is rendered a commodity in trade. A crucial difference lies in the renewability of the blood sold. Stephen Wear et al., *The Commercialization of Human Body Parts: Public Policy Considerations, in PERSONS AND THEIR BODIES: RIGHTS, RESPONSIBILITIES, RELATIONSHIPS*, *supra* note 2, at 377.

44. For studies of these issues, see, e.g., Perry, *supra* note 4; R. Arneson, *Commodification and Commercial Surrogacy*, 21 PHIL. & PUB. AFF. 132 (1992). See, also, JEFFREY M. PROTTAS, *THE MOST USEFUL GIFT: ALTRUISM AND THE PUBLIC POLICY OF ORGAN TRANSPLANTS* (1st ed. 1994).

45. See CHERRY, *supra* note 5.

God: the focus was primarily on castration.⁴⁶ This view was transformed by Western Christianity into the Roman Catholic moral and theological-philosophical doctrine of the principle of totality, which came to affirm that a tissue or organ ought to be removed only when the excision supported the health of the body as a whole.⁴⁷ This view found a classical articulation in the arguments of Thomas Aquinas, who in his *Summa Theologica* held that a part of the body could be removed only if this was necessary to preserve the health of the body as a whole.⁴⁸ This doctrine led some Roman Catholic medical-moral theologians to worry about the permissibility of incidental appendectomies: the removal of a healthy appendix when performing another operation with the goal of avoiding the possible risks of a future appendicitis.⁴⁹

Despite rather robust concerns, given the principle of totality regarding the removal of healthy organs, Western Christian reflection until the latter part of the twentieth century was not opposed in principle to financial

46. For example, Canon XXII of the Apostolic Canons (canons attributed to the Apostles and well known in the fourth century) specifies: "Let no one who has mutilated himself become a clergyman; for he is a murderer of himself, and an enemy of God's creation." JOHN NICOLEDIAS, *THE RUDDER OF THE ORTHODOX CATHOLIC CHURCH: THE COMPILATIONS OF THE HOLY CANONS BY SAINTS NICODEMUS AND AGAPIUS* 34 (D. Cummings trans., Orthodox Christian Education Society 1957, repr. 1983) (1800). As Canon VIII of the First-and-Second Council argues, "Such a person [is] quite guilty of insulting creation itself." *Id.* at 465. This canon makes reference to a similar canon (Canon I) from the Council of Nicea (A.D. 325), which states that it is not the mutilation itself that is forbidden, but mutilation for particular prohibited reasons, in that the canons specifically exempt castration when it is part of the surgical treatment of a disease.

For precisely as the first Canon of the Council held in Nicaea does not punish those who have been operated upon for a disease, for having the disease, so neither do we condemn priests who order diseased men to be castrated, nor do we blame laymen either, when they perform the operation with their own hands. For we consider this to be a treatment of the disease, but not a malicious design against the creature or an insult to creation.

Id.

47. For a manualistic encapsulation of the principle of totality, see GERALD KELLY, *MEDICO-MORAL PROBLEMS* 8-11, 246 (1958). See also MCFADDEN, *supra* note 42, at 255-58.

48. Since a member is part of the whole human body, it is for the sake of the whole, as the imperfect for the perfect. Hence a member of the human body is to be disposed of according as it is expedient for the body. Now a member of the human body is of itself useful to the good of the whole body, yet, accidentally it may happen to be hurtful, as when a decayed member is a source of corruption to the whole body. Accordingly so long as a member is healthy and retains its natural disposition, it cannot be cut off without injury to the whole body. . . . If, however, the member be decayed and therefore a source of corruption to the whole body, then it is lawful with the consent of the owner of the member, to cut away the member for the welfare of the whole body, since each one is intrusted with the care of his own welfare. The same applies if it be done with the consent of the person whose business it is to care for the welfare of the person who has a decayed member: otherwise it is altogether unlawful to maim anyone.

THOMAS AQUINAS, *SUMMA THEOLOGICA* II-II, q.65, a.1 (1947).

49. See, e.g., PATRICK FINNEY & PATRICK O'BRIEN, *MORAL PROBLEMS IN HOSPITAL PRACTICE* (1956); KELLY, *supra* note 47, at 252-54; MCFADDEN, *supra* note 42.

compensation, and especially not to compensation for providing tissues and organs after death. One might consider, for example, the statement by Pope Pius XII to a group of ophthalmologists regarding corneal transplantation:

Moreover, must one, as is often done, refuse on principle all compensation? This question remains unanswered. It cannot be doubted that grave abuses could occur if a payment is demanded. But it would be going too far to declare immoral every acceptance or every demand of payment. The case is similar to blood transfusions. It is commendable for the donor to refuse recompense; it is not necessarily a fault to accept it.⁵⁰

By making reference to payments for blood transfusions, Pius XII opened the possibility for payments for the sale of organs and tissues from live donors (as long as this would not offend the Roman Catholic principle of totality). In short, Pius XII's attitude toward the provision of, not to mention compensation for, blood and tissue sales was less prohibitory than the position taken by philosophers such as Immanuel Kant.⁵¹ It must be noted that Immanuel Kant did not distinguish between buying and giving body parts, holding that in each case there is a violation of persons as ends in themselves.⁵²

The cardinal difficulty for a position such as Kant's is that it depends not on the general requirements of universal moral rationality as he alleges, but instead on a very particular content-rich account of moral rationality. Kant employed this rationality in order to attempt a secular reconstruction of his Protestant pietist sensibilities. This content was then assumed as a part of his view of what can consistently be willed, not what can actually be willed

50. Pius XII, Address to a Group of Eye Specialists (May 14, 1956), in *PAPAL TEACHINGS: THE HUMAN BODY* 381-82 (Monks of Solesmes eds., 1960).

51. Roman Catholic moral theologians have come to view market solutions as compatible with acts of charity, as when one would sell an organ at below-market price, or when the purchaser benefits the poor person by paying in excess of what the market might demand. "[I]n a wide sense, almsgiving includes selling on credit as a favor to a poor customer; a loan granted at a low rate of interest or without interest, help in securing employment, etc." JAMES MCHUGH & C. CALLAN, *MORAL THEOLOGY* 495 (1960). A similar position is taken by Mark Cherry:

Removal of a healthy human organ would be permissible even if one accepts or requests monetary compensation, or other valuable consideration, provided that one does not exploit those in need by demanding too great a fee, although, presumably, a poor individual could ask for greater compensation from a rich recipient. One could view this possibility as consonant with the reflections of certain theologians on the priority one should give the poor.

Cherry, *Body Parts*, *supra* note 4, at 186.

52. "To give away or sell a tooth so that it can be planted in the jawbone of another person . . . belongs to partial self-murder." IMMANUEL KANT, *THE METAPHYSICAL PRINCIPLES OF VIRTUE* 84 [AK VI 423] (James Ellington trans., Bobbs-Merrill 1964).

without contradiction.⁵³ Thus, for example, Kant argued that masturbation was worse than suicide.⁵⁴ In this vein, he argued that selling one's hair is not without moral fault.⁵⁵ Among the many difficulties with Kant's arguments is that in these particular areas they are underdeveloped. More crucially, because of Kant's dependence on a particular view of moral rationality, the default position places consent centrally so that, *pace* Kant, using persons as means merely becomes using them without their consent.⁵⁶ In this context, a strong argument against the commodification of organs collapses.

One must suspect that the contemporary opposition to the sale of organs may represent a late twentieth- and early twenty-first-century response to a number of phenomena. On the one hand, opposition may reflect particular non-market ideologies that in the case of organ sales recognize an opportunity to limit the role of market transactions. Opposition may also reflect the outcome of disconnecting Western Christian moral intuitions and sentiments from the comprehensive moral-metaphysical-theological system that once placed these intuitions and sentiments within a framing metaphysical account of deep meaning. Those sentiments are then without a context to guide them and become merely taboos in the sense of oppositional moral intuitions lacking a sustaining justification. As a consequence, in the post-traditional ruins of Christendom, these intuitions and sentiments can lead to paradoxical moral positions. For example, there is often a greater opposition to organ sales involving the consent of all parties than to abortion, which involves the unconsented-to killing of an unborn child. From a traditional Christian moral perspective, the secular ordering of moral concerns in this matter is at best perverse: it is more concerned with an alleged evil in the sale of organs than

53. Kant, who identifies morality with rationality by establishing certain categories of behavior as irrational, invokes three kinds of contradictions in order to establish the constraints of his categorical moral account: (1) undertakings that would be strictly logically contradictory, such as invoking the practice of truth-telling while intending to lie; (2) undertakings such as suicide that would, if universalized, cause the kingdom of ends no longer to be instantiated; and (3) undertakings that can be willed without contradiction and without having as its implication the disappearance of the kingdom of ends, but that still involve a commitment that Kant holds persons are not capable of consistently affirming, such as willing never to give to those in need while supposedly willing as well to forgo charity, should one be in need. Often, Kant fails to make clear where the contradiction is supposed to lie. For example, Kant argues, regarding the transfer of an organ, that "to dispose of oneself as a mere means to some end of one's own liking is to degrade the humanity in one's person, which, after all, was entrusted to man to preserve." See KANT, *supra* note 52, at 84 [AK VI 423]. It is clear that Kant holds that it involves treating oneself as a means merely, if one deprives "oneself of an integral part or organ (to mutilate oneself)." *Id.* at 84. However, he does not show where the logical contradiction in such use lies.

54. "But this does not make evident the high degree of violation of the humanity in one's own person by the unnaturalness of such a vice, which seems in its very form (disposition) to transcend even the vice of self-murder." *Id.* at 86-87 [AK VI 425].

55. "Also, it cannot be reckoned a crime against one's own person to cut off something which is, to be sure, a part, but not an organ of the body, e.g., the hair, although selling one's hair for gain is not entirely free from blame." *Id.* at 84.

56. H.T. ENGELHARDT, *supra* note 3, at ch. 4.

in the taking of unborn life. In any event, it is not apparent how organ sales could be forbidden on the basis of concerns regarding the commodification of human persons in the absence of conceding a set of very particular initial moral premises.

IV. EXPLOITATION

A candid assessment of the character of moral claims in a secular, post-traditional, post-modern culture by default renders the authority of individuals over themselves salient, while bringing into question the authority of governments over their citizens, so as substantially to limit the plausible secular moral authority to prohibit the sale of human tissues and organs. If there is to be a general secular basis for a prohibition in principle of organ sales, it will need to be grounded in finding such a market to be in some sense improperly using or exploiting would-be sellers. Towards that end, one can display at least three senses of exploitation in the market:⁵⁷ First, offering a financial inducement that overrides the would-be seller's capacity freely to consent; second, offering a financial inducement that brings the would-be seller to assume a morally unacceptable risk of death, harm, and disability; and third, offering a financial inducement to engage in an activity that is either (a) morally prohibited or (b) held to be morally wrong by the person subject to the inducement. Each engages a different sense of the *malum* involved in offering a financial inducement to would-be sellers.

The first concern, that a financial inducement will override the capacity to consent freely, must be distinguished from the circumstance that offering an inducement, all else being equal, will assuredly entice a person to accept that inducement. Imagine being offered a million dollars to sweep the sidewalk in front of one's house. Presuming no special religious prohibitions concerning laboring on that particular day, etc., one can be confident that such a financial inducement will always, or nearly always, produce agreement. This circumstance does not argue against free choice, even if only multi-billionaires are likely to decline. Instead, the near-inevitability of consent discloses that certain benefits associated with low levels of harms will usually be embraced by most rational decision-makers. The circumstance that a monetary inducement to a person in financial need will nearly certainly produce agreement does not establish that the person's freedom has been overridden.

57. Complex issues are at stake in concerns regarding exploitation, including the role of coercion and manipulation. See ARTHUR CAPLAN, IF I WERE A RICH MAN, COULD I BUY A PANCREAS? (1992); ALAN WERTHEIMER, EXPLOITATION (1996); Joel Feinberg, *Non-Coercive Exploitation*, in PATERNALISM 201 (Rolf Sartorius ed., 1983); M. Gorr, *Toward a Theory of Coercion*, 16 CAN. J. PHIL. 383 (1986); D. Miller, *Exploitation in the Market*, in MODERN THEORIES OF EXPLOITATION 149 (Andrew Reeve ed., 1987); Robert Nozick, *Coercion*, in PHILOSOPHY, SCIENCE, AND METHOD 44 (Sidney Morgenbesser et al. eds., 1969); Joel Rudinow, *Manipulation*, 88 ETHICS 338 (1978); David Zimmerman, *Coercive Wage Offers*, 10 PHIL. & PUB. AFF. 121 (1981).

Second, a moral assessment of the licitness of financial inducements on the grounds that the inducements will likely entice a person to assume a risk of death or disability must consider two crucial issues: (1) the magnitude of the risk of death and disability, as well as (2) what the person's risk would have been, absent being induced to assume the new profiles of risk. First, with regard to the sale of organs after death, the risk of having the time of one's death improperly advanced would appear no greater than under circumstances of "donation." Second, the risk from selling one of a paired organ or some other conveyance of tissue compatible with continued life should *ceteris paribus* be no greater than that involved in the donation of such organs. Third, with respect to the issue of organ sales, the assessment of risk requires not just an assessment of the risk associated with having an organ removed, but also a judgment as to whether the consequences of the financial gain from the sale will on sum lower the seller's morbidity and mortality risks.

The point is this: If in a developing country a person will, by selling a kidney, move from near-poverty with a high risk of disability and early death to a middle-class position with a lower risk of disability and early death (e.g., by allowing the organ seller to open a bicycle shop so as not to need to engage in high-risk manual labor), then on any rational assessment the sale will advantage the individual. This judgment is bolstered by the circumstance just noted. Namely, one generally allows persons out of altruism to donate kidneys to their relatives, and there is no reason to infer that there will be a higher risk to sellers than to donors. The risk assumed by donors is one that surgeons generally consider acceptable. Organ sales differ from organ donations only in that the benevolence involved is directed not to the recipient, but to the seller and the family of the seller, while the purchaser still receives an important good. *Ceteris paribus*, the seller of the organ should be at no greater risk than a living donor. The bottom line of these considerations is that there is no basis to hold that in principle morally inappropriate exploitation will occur. There is no good evidence that allowing sales under the same oversight as the current practice of organ donation would produce excess risks. All would seem to turn on developing particular policies with particular protections for sellers and donors against fraud, coercion, and poor-quality medical procedures.

The remaining concern regarding exploitation, namely, that there is exploitation because of the character of the sale itself, requires a showing that the sale of an organ is intrinsically wrong or on balance harmful in a way in which organ donation is not. Given the failure by sound rational argument to establish the canonical governance of a particular content-rich moral vision, such as that of Immanuel Kant, this does not seem feasible. The default position for determining whether it is proper or improper for competent adult individuals to engage in particular peaceable endeavors is to rely on their consent, at least when the endeavors do not appear on balance to involve harms beyond those regularly accepted in the society (e.g., riding motorcycles, using hang-gliders, etc.). Again, if the crucial matter is that of risk, the

potential for harm exists whenever living donors are utilized, regardless of whether money changes hands.⁵⁸

V. RETHINKING ORGAN TRANSFER POLICY

These reflections have not shown that it would be good to establish a market in human organs. Rather, they bring into question the plausibility of a secular moral ground for the coercive state prohibition of such transfers. The more it appears empirically plausible that a market in organs from corpses, from sales of the future right to take an organ at death, or from sales from living vendors will make more organs available and therefore save the lives of persons at risk, while involving no secularly cognizable harms, then the more difficult it becomes in secular moral terms to prohibit such a market, especially given the moral-philosophical reflections just advanced. This analysis is not meant to deny that there may be important religious moral insights into these matters that might morally limit participation in a market.⁵⁹ Rather, it confronts the circumstance that secular morality by default places the authority of persons centrally, thus bringing into question the moral authority of states to prohibit peaceable, voluntary agreements, such as those involved in organ sales. It is difficult to establish a clear secular moral *malum* associated with the commodification of organs, or that such markets must involve the exploitation of sellers. These considerations do not militate against establishing safeguards for sellers.⁶⁰ Indeed, there are very strong grounds for establishing public policy that would assure that sellers are operated on under safe conditions and that they are actually paid that for which they contracted, commensurate with the contract price. These, and a rich set of other considerations, provide substantive grounds for protecting sellers. These considerations do not provide general secular moral grounds for a prohibition in principle.

58. For the relative medical (i.e., morbidity and mortality) costs and benefits of utilizing living donors see Patricia L. Adams et al., *The Nondirected Live-Kidney Donor: Ethical Considerations and Practice Guidelines: A National Conference Report*, 74 *TRANSPLANTATION* 582 (2002); C.O. Callender et al., *Increasing Living Donations: Expanding the National MOTTEP Community Grassroots Model*, 34 *TRANSPLANTATION PROC.* 2563 (2002); Lainie Friedman Ross et al., *Should All Living Donors be Treated Equally?*, 74 *TRANSPLANTATION* 418 (2002).

59. See ENGELHARDT, *supra* note 3.

60. For an account of a program to protect live sellers of organs, see K.C. Reddy et al., *Unconventional Renal Transplantation in India*, 22 *TRANSPLANTATION PROC.* 910 (1990).

