

**Consent With Inducements:
The Case of Body Parts and Services**
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1. INTRODUCTION

Some years ago, when news of kidney selling by live vendors first broke in the West, politicians from all points of the political compass rushed to declare it illegal, and medical organizations were equally quick to pronounce their professional anathema. The reaction was so immediate as to allow hardly any time for debate, but as challenges appeared to this first response justifications for prohibition of organ sales began to proliferate, and many of the arguments depended on claims about invalidity of consent. Analysis of these arguments can throw light on the matter of consent in general, as well as on the broader issue of payment for the use of bodies and body parts.

Consent derives its importance from the fact that law and convention place a circle of presumptive inviolability around individuals. There is of course endless scope for difference of opinion about how wide and how impregnable that circle should be, and societies differ in their judgments about where the rights of the individual should end and where those of other individuals or the wider society should begin. In some societies many individuals may lack full rights even over such fundamental matters as bodily integrity (for instance, there may be no such thing as rape within marriage) while in others the range of individual rights stretches far beyond this. But wherever the boundary of individual control is established, consent is presumptively necessary for its transgression. And, specifically to the point here, it is also generally sufficient. Because the purpose of the boundary is to protect the bounded individual, the consent of that individual for any breach generally settles the matter of its acceptability. To whatever extent the law gives you a right to privacy within your own home, others may not intrude without your consent; but if you do consent, that provides exemption from whatever blame or penalties their intrusion would otherwise incur, and makes legitimate what would otherwise be an offence against you.

There are, however, a few contexts where this prima facie sufficiency of consent seems to be regarded as breaking down. Even though some matter looks as though it should come well within the accepted circle of individual control, and even though apparently valid consent has been given for its breach, it may be illegal, or regarded as unacceptable or wrong, for others to act on this consent.

The most familiar cases of this kind concern actions that would not involve illegality if you did them yourself, but which others may not do to you even with your consent. So, for instance, suicide and attempted suicide ceased to be criminal offences in the UK when the 1961 Suicide Act was passed, and they were to that extent moved out of the area of public interest and returned to the circle of individual control. But the same Act explicitly stated that 'aiding, abetting, counselling or procuring' the suicide of another remained criminal offences, and it also left untouched the classification of euthanasia as murder even if the person killed had consented to, or even pleaded for, death. Similarly,

self harm is not generally regarded as a criminal offence, unless its purpose is to commit some other offence such as avoiding conscription or defrauding an insurance company, and to that extent the law regards individuals' treatment of themselves as a matter for personal decision. But there are still limits to the amount of harm others legally can do to you, even with your consent. This shows in legal rulings about harm caused during consensual sado-masochistic activity, and in the uncertain legal situation of surgeons who operate on patients seeking the amputation of normal but unwanted limbs. Even willing organ donation for the benefit of others is restricted. Surgeons refused to accept the consent of a man whose first kidney donation to his son had failed, and now wanted to sacrifice his second kidney for another attempt, and the sacrifice of an organ essential for life is legally out of the question. "A man may declare himself ready to die for another, but the surgeon must not take him at his word."

There are well-known problems of principle about such matters. Should they be regarded as remnants of paternalism, arguably out of place in a liberal society that regards individuals as the appropriate judges of what constitutes their own interests, or can they be given some other justification in terms of public interest? Interesting as this problem is, however, I shall not discuss it here, because the subject of this chapter is an even more puzzling one. It concerns contexts where it is already accepted, in general, that consent should be sufficient to allow what has been consented to, but where the situation is regarded as radically changed by the involvement of payment.

This is what makes the kidney selling issue so interesting. Although some kinds of organ donation are forbidden outright by law, living kidney donation does not come into that category. You may give one of your kidneys to a friend or relative who needs one, because your other kidney will be able to take over the function of the missing one, and the law has accepted that the minimal risk of long-term harm is justified by the gain to the recipient. In most countries, however, consent to the very same operation may not be accepted if money is involved in the transaction. And although this issue provides a particularly striking illustration of the matter, it is part of a much wider controversy about payment for body parts or services involving bodies. It arises in debates about organ, tissue and blood donation, as well as gamete donation, surrogacy, prostitution, and non-therapeutic medical research. ...

[T]he central problem here ... is one of general principle. It can be understood as concerning a particular kind of conditional. *If* you regard it as appropriate that some matter (e.g. living kidney donation) should normally be regarded as lying within the circle of individual decision, so that the individual's consent is both necessary and sufficient for the appropriate action by others (the surgeon may proceed on its basis), *but* you also think that payment should not be allowed (the surgeon may not accept the consent if payment is involved), how can you justify the distinction?

It will be useful to concentrate the discussion on the sale of kidneys by living vendors, because this is the context in which there is most unanimity of feeling and where the debate has been most intensively developed. The discussion should, however, be regarded as applicable to all these topics.

The problem

Once it had been established that a kidney could be removed with minimal risk of lasting harm to the donor, and immunosuppression had solved the problem of rejection, it was only a matter of time before commercial opportunities were spotted. Since anything that can be given can also be sold, and most things that are ours to give are also ours to sell, the rapid development of a trade between people who were desperate for kidneys on the one hand and money on the other should probably have been anticipated from the start. Apparently, however, it was not; and when the issue first came to widespread public attention in the West the reaction was one of horror. In the UK this happened in 1991, when it was revealed that two Turkish peasants had come to Harley Street – the London abode of expensive doctors with correspondingly affluent patients – to sell kidneys for patients in need of transplants. There was no law against such transactions at the time, but the immediate reaction, from both politicians and the medical profession, was one of outrage. The exchange was immediately halted, the doctors concerned were struck off the medical register even though there had been no explicit pre-existing policy to prevent their acting in this way, and legislation to ensure it never happened again was rushed through the UK Parliament with almost unprecedented speed. Professional bodies rapidly declared their absolute opposition, and soon payment for kidney donation was illegal in most of the world.

But what exactly was the objection? The rhetoric was about the greedy rich and exploited poor, but although the Harley Street connection provided a plausible connection with the rich, not many people would say that using whatever money you had to try to save your life – or even to escape the crushing constraints of life on dialysis – constituted a paradigm case of greed. Most people would probably scrape together everything they had for the chance of escaping death; and anyway, if greed were the issue, the objection should apply equally to all the treatments the rich can buy in Harley Street and other private clinics throughout the world. The real objection was obviously not about the access of the rich to treatment, but the poor as the source of the organs.

The trouble was, it was the poor themselves who had made the decision to sell. Later, when people became aware of the commercial value of transplant organs, rumours began to spread about kidnapping and murder, or people who had come to rich countries for jobs and then woken up in hospital with a kidney missing. But even if it had been reasonable to credit all these stories, they were about people whose kidneys had been stolen or taken by force. The Turkish men in London had not been murdered or kidnapped, or even, as far as we know, put under pressure by the intended recipients or their agents. They had volunteered their kidneys, and we even knew why – or at least, the reasons they gave. One of them had a daughter with leukemia, and was trying to save her life. He could not begin to afford the necessary treatment at home, and selling a kidney seemed to provide his only hope.

Furthermore, if his daughter had herself needed a kidney there would have been no problem about accepting his consent to donate one of his. In trying to sell his kidney to provide treatment for her, he was making exactly the same offer with exactly the same motivation. Why, then, was it regarded as obvious that the

transplant doctors should have known they should not accept his consent? Why was there such widespread support for the new laws prohibiting payment? How can the involvement of money justify distinguishing between the acceptability of consent for procedures that are otherwise identical?

Feelings about the matter were strong, and a great many attempts have been made to justify the prohibition of payment for organ donation. I have dealt with many of these elsewhere. Most of this article is specifically concerned with claims that the problem about payment lies in its invalidating the vendors' apparent consent.

2. INVALID CONSENT

The requirement that consent should be valid is an essential element of its being required at all. Since someone with your consent to act within your protected circle may do what would otherwise be an offence against you, a necessary element of protecting your rights is making sure that anyone who claims to have your consent really has it. The standards of validity required are themselves a substantive part of any society's specification of the extent of individual rights.

The overall challenge is to find a justification for rejecting consent to transactions that involve payment, when consent to the same transaction without payment would be acceptable. It is now generally accepted that, in order to be valid, consent must be given by a competent person, that it must be freely given, and that it must be informed. The consent-based arguments against organ selling make the connection with payment by claiming that the poverty of would-be vendors results in the failure of one or more of these criteria.

2.1 Competence

The first line of argument uses poverty as the basis for doubt about prospective vendors' competence. "Since paid organ donors will always be relatively poor, and may be underprivileged and undereducated, the donor's full understanding of [the] risks cannot be guaranteed".

In clinical practice, the requirements for mental competence (capacity) are that the consenter should be able to understand, retain, and weigh up the treatment information in order to reach a decision. At present, those requirements are interpreted as weighted strongly in favour of crediting the individual with capacity. Adults must be presumed competent until demonstrated otherwise, and the level of competence required must be no higher than is required for understanding the issue in hand. People of borderline competence should be helped to achieve as much understanding as possible. The requirements for understanding have themselves also become increasingly minimal. There are no requirements that beliefs should be true, or the weighing-up process regarded as rational.

Nobody seriously applying these standards could defend a non-competence justification of prohibition. The requirements allow no escape from the need to assess people individually, and the vast majority of potential vendors would certainly reach the required standards. And anyway, people from the same

uneducated groups are routinely treated as competent to consent in all other contexts – including unpaid organ donation. However, criteria for the assessment of competence are not morally neutral. They are themselves expressions of moral views, and the standard currently accepted reflects a particularly strong version of the liberal idea that all individuals should be free to determine both what constitutes their own good and how best to achieve it. But many people of broadly liberal inclinations think that even though individuals should always determine what *constitutes* their interests, it may be justifiable to go against their immediate wishes if a mistaken or inadequate understanding of the workings of the world results in mistaken beliefs about *how to achieve* those interests. It is arguable that such ‘weak paternalism’ may often be justified, and many doctors admit to sometimes acting without consent in order to achieve what patients themselves would count as their long-term interests. And, they claim, those patients are grateful afterwards.

Suppose, then, the non-competence argument against organ selling is interpreted as intending a claim that the criteria for competence should be narrowed, to the extent that a serious lack of education and knowledge may result in non-competence and justify paternalist intervention. There would still be a considerable leap to the conclusion that we should treat everyone who wanted to sell an organ as coming into this category, but could this at least make the first step, of showing that anyone non-competent in this way should not be allowed to consent to organ selling?

This seems to be the intention behind the non-competence claim. The trouble is, however, that a judgment of non-competence can never in itself entail that whatever was non-competently consented to should actually be prevented from happening. All it entails is that *consent* cannot be used as part of the justification of whatever action is proposed, and that the decision must be made on some other basis. And whereas in general it is accepted that “the absence of consent has much the same effect as a refusal”, this is not so in the case of the non-competent. If they are not able to decide for themselves, someone else must decide for them. The generally accepted principle is that the decision must be made in their best interests.

This may not seem to make much difference. It is widely believed that kidney selling cannot possibly be in anyone’s interests, and the impression is reinforced by frequent reports from campaigning organizations and investigative journalists who expose exploitation, cheating, shoddy operations, lack of counselling and follow-up, and a train of vendors with damaged health and no lasting benefit to compensate. Whether the would-be vendors recognize it or not, it may well be argued, the course they are trying to pursue is far too dangerous to be reasonable. We, who know better, must save them from themselves for (what we hope they will eventually agree is) their own sake. “State paternalism grounded in social beneficence dictates that the abject poor should be protected from selling parts of their bodies to help their sad lot in life”.

One difficulty about this line of argument is that there are problems about the claimed evidence. Even if there is little reason to doubt individual stories about harm to vendors, what is less clear is how representative they are. It is easy to find evidence if you look only on one side, and most of the research seems to

have been done by people strongly opposed to organ selling. As far as I know there is no systematic research into how many vendors are satisfied with the transaction – though there is anecdotal evidence to suggest that many are.

But even if most of the vendors do end up worse off, why exactly is this? Living organ donation is now so safe that many surgeons actively recommend it, which they would hardly do if they expected a string of dead or damaged donors. The only intrinsic difference between paid and unpaid donation is that the vendor receives something in return – which is, to all appearances, is a positive advantage. This suggests that if kidney vendors are in practice disproportionately harmed, the reasons must lie not in the loss of a kidney in itself, but in the surrounding circumstances. No doubt these are complex, but it is striking that all the harms alleged – cheating, careless medical practice and the rest – are exactly the ones you would expect of a black market. In a black market there can be no controls on standards of care. Vendors at present cannot rely even on assessments of their competence to consent, let alone on the care with health and well being currently given to most unpaid donors, or the financial and life-planning advice that could be enforced if their activities were legal.

There is of course some minimal risk in kidney donation, whether paid or not. Whether any risk is worth taking, however, depends on the reward balanced on the other side, and if the rewards are the amounts of money that could transform a family's life it is hard to see why the minimal risk of a properly performed nephrectomy should not be well worth taking. This chapter is being written during the financial crisis of 2008-9, and it is easy to imagine that many of its victims might willingly sacrifice a kidney to prevent something as catastrophic as the repossession of their homes. (You might consider what price would induce you to part with your own kidney.) The expected benefits would be even greater to the desperately poor, who might see in selling a kidney the only hope of making anything of their wretched lives, and perhaps even of surviving, than to the relatively rich with mortgage problems. You might rather think, *contra* Dossetor and Mackinavel, that the poorer you were the more rational it would be to risk selling a kidney, and that even if you were not competent to make that decision yourself a benevolent paternalist might well, in principle, push you in that direction.

This is why the non-competence case for prohibition could not be made even if it were conceded that the appropriate standard of competence was that of the weak paternalist, and even if some reasonable way could be found of making the leap from widespread non-competence to total prohibition. Prohibition prevents many people – both donors and recipients – from making an exchange that could in principle be enormously beneficial to both. The only thing that prevents these benefits from being realized is the illegality that abandons both sides to the mercies of the black market, and results in the harms that the campaigners report. ...

2.2 Voluntariness

The second requirement for valid consent is that it should be voluntarily (freely, autonomously) given. Arguments claiming that consent for kidney selling fails to

meet this standard depend on the idea of coercion, and they take two main forms: coercion by unrefusable offers and coercion by poverty.

Unrefusable offers

In another of his early papers on the subject, Robert Sells objects to any 'externally applied constriction of an individual's right to choose not to donate', and includes in this category 'all cases where a person sells one of his organs during life', because 'here the financial benefits have such an impact on the life of the donor and his family as to be irresistible: the element of voluntariness of donation must be at least compromised, or, in extreme cases, abolished.' The idea that a good enough offer constitutes a kind of coercion appears in many contexts where payment is at issue.

It is important to distinguish this line of argument from the previous one, about non-competence. The argument as presented here emphasizes the amount of money offered relative to the incomes of the people who might be tempted to sell, and one concern might be that the poor would be so dazzled by the prospect of riches as to become incapable of rational thought. If so, the appropriate kind of discussion would be the one outlined in the previous section. The argument here must be regarded as distinct, applying to people already deemed competent.

If significant financial benefits constitute a compromise or abolition of voluntariness in some sense, what is that sense? Presumably the idea is something along these lines. If you are a prospective vendor you do not actually *want* to lose your kidney; you are proposing to do it *only because* of the prospect of payment. If the offer is impressive it leaves you with *very little choice* about whether to accept it, and if it is impressive enough it leaves you with *no choice* at all. (This seems to catch Sells's intuitions about the difference between compromising and abolishing voluntariness.) All of these are, indeed, perfectly good colloquial descriptions of such a situation, which is why it may seem that the voluntariness criterion cannot be met. The relevant question here, however, is not whether the choice is in *some* sense nonvoluntary, but whether it is so any sense in that would work as a general criterion for invalidity of consent.

Consider first the idea that your consent is not truly voluntary because you do not really want to lose your kidney. If this is understood as a claim that you find the prospect of losing your kidney intrinsically undesirable, it is almost certainly true: nobody actually relishes the idea of being opened up and having organs cut out. But the whole point of offering any inducement, such as payment, is to get you to agree to something you do not like *in itself* by making it part of a package that is, *all things considered*, preferable to simply avoiding the element you do not like. If you dislike the idea of parting with your kidney, but are willing to do it in return for enough money to start a business or send your children to school, you have already decided that doing without the school or the business is *worse* than doing without the kidney. It would be extraordinarily perverse for anyone to claim, on the basis of a concern for voluntariness, that because you disliked one element of the package your consent should be declared invalid, and you should be left in a situation whose elements you liked even less. And of course our criteria for valid consent obviously imply nothing of the sort, or they would

prevent our accepting dreary jobs in return for good salaries, or selling anything that we did not positively want to get rid of. If the argument seems to work, it is only because of an equivocation between wanting something *in itself* and wanting *all things considered* a package that contains it.

What about the other idea, then, that a good enough offer cannot count as voluntary, because it leaves you with no choice about whether to accept it? Once again, however, ordinary English is unhelpful as a guide, since – oddly enough – the expression is never used except when there is in fact a choice. If you are asked why you jumped into a raging torrent and your choice did not come into the matter, you do not say ‘I had no choice’: you deny the implication that you made a choice and say, ‘I didn’t jump, I slipped’ – or whatever. If you say ‘I had no choice, my child had fallen in’, you obviously did have a choice: what you mean is that the option of not jumping in was unthinkable. Similarly, if you say ‘I had no choice about selling the kidney; they offered me enough money to get my family out of poverty’, what you mean you mean is that it would have been ridiculous for you to take the option – still open to you – of keeping your kidney and remaining in poverty. If having no choice in this sense compromised or abolished voluntariness in a way that invalidated consent, it would follow that valid consent could occur only when there was hardly anything to choose between the available options. You could not validly consent to marry the suitor whose merits were out of sight of his rivals: your consent to accept one of the available candidates would be valid only if they were so much of a muchness that there was nothing to choose between them.

This would actually be quite a useful line of argument for opponents of organ selling. It would mean that the only way to make consent voluntary and therefore valid would be to reduce the price until it was unclear that the transaction was worthwhile, by when the deal would have become so pointless that no one would consent to it anyway. But this is obviously a nonstarter as a serious account of voluntariness and validity of consent. The whole point of inducements is to make people willing to consent, and the more unrefusable the inducement, the more reason there would be to suspect any *other* choice of being invalid.

Coercion by poverty

It is really pretty obvious, as soon as the matter is addressed directly, that increasing someone’s range of options – which is what an offer payment always does – could not in itself constitute any kind of coercion or restriction of freedom. The next line of argument against organ selling – not usually differentiated, but in fact radically different – avoids this problem by seeing the coercion as lying not in *the offer of money*, but in *the background poverty* that makes the offer attractive. “Surely abject poverty... can have no equal when it comes to coercion of individuals to do things – take risks – which their affluent fellow-citizens would not want to take? Can decisions taken under the influence of this terrifying coercion be considered autonomous? Surely not.....”; and “A truly voluntary and noncoerced consent is also unlikely.... the desperate financial need of the donor is an obvious and clear economic coercion.” And, it is implied, since coerced consent is not genuine, the choice should not be allowed.

Coercion by circumstances, so described, involves a situation in which you consent to something intrinsically undesirable because it is the best of a severely limited range of options. Once again, however, this would be hopeless as a general criterion for invalidity of consent. It does not normally occur to us that people coerced by circumstances into doing things they would not otherwise do should have their consent regarded as invalid. If you have cancer, with the choice between risking its unchecked progression and putting up with pretty nasty treatments, nobody would think of arguing that the narrow range of options made your consent to the treatment invalid. Nor, closer to the point here, would anyone regard as invalid your consent to donate a kidney to your sister on the grounds that you had been as-it-were coerced into making the offer by the misfortune of her kidney failure. And, once again, it is obvious why a voluntariness criterion could not work as an invalidator of consent in such situations. If you are concerned by someone's being forced by constricted circumstances into making an intrinsically unwelcome choice, you cannot improve the situation by taking away the best of their options and leaving them with something even less welcome. (And if it is argued that the constriction of circumstances leaves people incapable of making rational decisions, the issue is once again competence and paternalism, not voluntariness.)

However, there obviously remains a puzzle. If none of these suggested interpretations of the voluntariness criterion for validity makes any sense, how should it be interpreted? A full understanding of what is going wrong in these (and many other) spurious coercion-by-circumstances arguments is probably best achieved through analysis of contexts in which coercion appropriately leads to a judgment of invalidity.

Paradigm cases of consent invalidated by coercion involve deliberate coercers who deliberately curtail the options of their victims until the best one left is the one the coercers want them to take. So, for instance, consider a girl on her way to school at the beginning of term, carrying her carefully finished summer project, and also her bag of marbles. A couple of boys from the same school waylay her, grab the project, and threaten to throw it into the river unless she agrees to hand over her marbles. Before this incident she could keep both the work and the marbles; now her options have been lessened, and she has to choose between them. She chooses to keep the work, and gives the boys the marbles. But if she can persuade the teacher of what happened, the teacher will say her agreement to hand them over was not valid, and insist on their being restored.

Or suppose your daughter is kidnapped and the kidnapper says he will shoot her unless you sign a document agreeing to sell your house, for next to nothing, to a company that wants the site for building. Beforehand you had the child and the house; now you have to choose between them. After the child is restored the company denies any knowledge of the kidnap and wants to enforce your signed agreement to sell, but if you can convince the judge of what happened, your consent to the sale will be declared invalid and your house returned to you. Or, if it is too late and the demolition has already gone ahead, you will be given compensation.

What is the essence of these cases, that justifies the decision that the consent is invalid and should not be accepted? How do they differ from the spurious arguments so far discussed? First, note that they have nothing whatever to do with overall range of options available. Maybe the girl was rich and the boys had hardly any toys; maybe you had dozens of houses and the developers wanted to build a much-needed clinic for a deprived area. Such facts would be entirely irrelevant to the question of whether the consent was valid. The essence of the paradigm cases is the involvement of actual coercers who set about a deliberate restriction of options in order to get their victims' consent to what they (the coercers) are trying to achieve, and which they could not achieve without that consent. Furthermore, restriction of options alone is not enough to invalidate the resulting consent: the restriction must also be illicit. If the boys had got the marbles by saying the girl could not come to their party unless she agreed to hand them over, or the developers persuaded you to sell by threatening lower the value of your house even further by using their outline planning permission to build a supermarket next door, they would have been within their accepted rights and there would have been no grounds for declaring the consent invalid. In other words, the essence of these cases is not the overall range of options or even the reduction of an existing set, but coercion in contravention of accepted standards by the person obtaining the consent.

This is quite unlike the matter of metaphorical coercion by poverty, for many reasons. For one thing, the declaration of invalidity in the paradigm cases refers to the existing standards of the relevant society, whereas the claim that society as a whole has left someone with too few options demands justification in terms of appropriate, highly contested, political theories. For another, the declaration of invalidity in the paradigm cases is intended as a means of restorative justice against the person who used from illicit coercion to achieve consent, which is quite different from general claims about an unfair situation for which the beneficiary of the resulting consent is in no way responsible.

Still, it may be argued, even if the situation of the poor is different from that of the people who have been wrongfully coerced in the paradigm cases, both do involve the unjust deprivation of options. If the coercion that leads to judgments of invalid consent involves lessening your range of options until the best one left is the one the coercer wants you to take, surely it is clear why poverty, although having no intentions of any kind, might count in an extended, metaphorical sense as a coercer. Poverty, it may be claimed, is like the bullies and the kidnapper, in making the victim choose what other people, 'affluent fellow-citizens' with a wider range of options, would not choose. That is why the consent of the poor to sell their organs should be regarded as invalid, just as your consent to sell your house and the girl's to hand over her marbles should be.

However, the relevant issue here is not just whether there is injustice of some sort in the situation, but the specific matter of invalidity: the *point* of declaring consent invalid. Once again, the concept of invalidity is an integral part of the requirement of consent. Anyone who acts within your protected boundary without consent has committed an offence against you, which – as an implication of society's giving you that set of rights in the first place – will incur sanctions. Someone who wants to act within your boundary therefore has an interest in

getting your consent, or at least giving others the impression that your consent has been given. The kidnapping syndicate wanted a document with your signature on it, authorizing their taking over your house, which without your consent they would not be allowed to do. What the court does in declaring your consent invalid is say that since the coercion that brought about your consent was illicit, the situation must be treated as *though the consent had not happened*. Society will support your keeping of the house and will probably also punish the coercer for wrongful pressure; or, if the house has already been demolished, will treat it as a wrongful taking of what was rightfully yours and demand restitution. The consent is discounted, your original range of options is (more or less) restored, and the illicit coercer, who was trying to benefit from it, is thwarted.

This may not seem enough to break down the analogy with coercion by poverty. Surely if people have been forced by wrongful poverty to make unwelcome choices, we should count their consent as invalid too? If this seems plausible, note two further points about the paradigm cases of coercion. First, because the root of the issue is the contravention of individual rights, the recognition of invalidity is sought by or on behalf of the people whose consent has been wrongfully obtained. They agreed to something they would not have agreed to but for the coercion, and they now want that agreement recognized as void. Second, this will happen only when the situation has changed, and the clutches of the coercer have been escaped. Once your child is free of the kidnapper you want to withdraw your consent to the sale of your house, *but until that happens you do not*. Suppose the police appeared on the kidnapping scene and prevented you from signing the document, perhaps with the outcome that your child was shot. They might have good public policy reasons for doing this – they might want to demonstrate to other would-be kidnappers that they could not get away with their nefarious plots – but it would be preposterous for them to claim that they were doing it because the consent you were trying to give would be invalid. Once again, the whole point of declaring invalidity is to protect the alleged consentor, and here the police would actually be compounding the wrong done to you by constricting still further the range of options already constricted by the kidnapper. The point of the invalidity declaration arises only later, when the coercers want society to hold you to the agreement you made when your options were unfairly constricted, and you want society to refuse and restore the status quo ante.

This shows why, even if you stretch to its limits the already tortured analogy between coercion by poverty and coercion by a wrongly-acting individual who is trying to get your consent by illicit means, you still cannot reach the conclusion that poverty-coerced consent should not be accepted. Since the metaphorical coercer (poverty) is still present, and the individual is making the best choice among a still-constricted range of options, disallowing the choice is like preventing you from meeting the demands of the kidnapper while he still has your child.

This is why it is quite wrong to say that the poor should be protected from selling their kidneys, “preferably, of course, by being lifted out of poverty”, but otherwise by the complete prevention of sales. It implies that prohibition and lifting out of poverty are unequally desirable variations on the same general theme, whereas

they are, in the relevant sense, direct opposites. Protecting the poor from kidney selling by removing poverty works by increasing the options until something more attractive is available – the equivalent of getting rid of the bullies or kidnapper. Prevention of sales, in itself, only closes a miserable range of options still further, which is like your being prevented by the police from making the choice that will save your child's life. To the metaphorical coercion of poverty is added the coercion of the supposed protector, who comes and takes away (what the prospective vendor sees as, and what may indeed well be) the best option that poverty has left. ...

To argue that consent to payment for such things as organ selling is invalidated by the poverty of the sellers, and therefore should not be accepted, is to make matters even worse for people whose range of options is alleged to be already too constrained, while giving the appearance – because the requirement of validity is a protection of individual rights – of actually helping them. ...

2.3 Information

In the light of this distinction between complaints about states of affairs and complaints about the actions of particular agents, it is also worth commenting briefly on the final condition for validity of consent, the information requirement – even though it does not seem to appear in the organ selling debate. The idea of adequate information, too, is capable of two interpretations, supporting two quite different kinds of possible complaint. One question is about *how much someone ought (ideally) to know*; the other is about *how much the person seeking the consent ought to tell them*.

Again, these are irreducibly different. You could know a great deal about some matter, but still not have been told something that someone else had a duty to tell you; conversely, the person receiving your consent could have told you all that was known about, say, the effects of some very new drug, and you would still know very little about it. And, as in the case of coercion, it is only the first that results in invalidity of consent. Obviously you can consent to something that nobody knows much about – going on expeditions to unexplored places, agreeing to innovative operations and so on – and anyone determined to prevent you from taking risks of these kinds would need to justify doing so on the basis of some other ground than invalidity of consent. The relevant matter is not how much the consenter knows, but how much information the person receiving the consent should have given. ...

It is interesting to note, given the failure of the competence and voluntariness criteria to establish any general invalidity of consent to body selling, that by the information criterion a good deal of the consent given by organ sellers may indeed be invalid. We know that vendors are often given inadequate support and counselling, and if such cases came to court their consent might well be judged invalidly given. But even if so, this could not be part of the overall argument for prohibition because it is – once again – the very illegality of organ selling, and its being confined to a black market, that means we cannot regulate the provision of information, and cannot provide restitution when not enough is given.

3. THE ROOTS OF THE PROBLEM

To return again to the beginning, the problem being addressed in this chapter concerns the puzzling matter of attitudes to payment where bodies, body parts and certain uses of bodies are concerned. In contexts where it is accepted that individuals may freely consent to the unpaid giving of these parts or services, there may nevertheless be objections to their consenting to exactly the same procedures where payment is involved. States vary in their laws – and individuals in their opinions – about which procedures come into this category, but the question here is just about the general conditional: *if* you think it is legitimate to give the body part or service in question, *but* you think it is not legitimate if money is involved, how can you justify the distinction?

In the context of organ selling, one set of attempts tries to make payment relevant by claiming that would-be vendors are bound to be poor and underprivileged, and that this makes their consent invalid. However, these arguments fail for the reasons already given, and this means that another justification must be sought for disallowing the sufficiency of consent by vendors when it is acceptable for donors. That presumably means showing either that the money somehow turns the matter into one of public interest rather than individual rights, or that it puts the matter into the category of harms that are not allowable even with the person's full consent. ...

Consider, for instance, one conference participant whom I heard defending prohibition by saying 'I don't want to live in a society where people sell their organs to live'. An expression of this sort can be interpreted in different ways. It might mean something like 'it is terrible that people are so poor that sacrificing a kidney for money is their best option'. But if the situation of the poor is the speaker's concern, prohibition – as already argued – should be recognized as making their position worse. The only thing that would improve matters would be (the far more difficult matter of) 'lifting them out of poverty' to until they had no temptation to sell. (And if that happened there would be no need for prohibition because no one would want to sell. The whole point of prohibition – of anything – is to prevent people's doing what they would otherwise choose to do.) But a quite different interpretation of the statement is something like 'I personally find the knowledge of people's selling their organs repulsive, and that is why I want it banned'. In that case, prohibition is being advocated for the benefit of the person whose sensibilities are being offended by awareness of such unpleasant goings-on – *at the cost of making things worse* for the badly off. If these two interpretations are not distinguished, the assertion may succeed in advocating what is really for the benefit of the feelings of the speaker, while giving the impression that it is for the badly off – who will, in fact, be paying the cost. It may be bad to live in a world where people sell their organs, but it is surely better than living in one where the rich make themselves feel more comfortable by further restricting the limited options of the poor, while claiming to do it out of concern for them. ...

Why do people – at least in Western societies – seem feel that there is such a great difference between the two, and that there is something seriously unpleasant about the idea of organ selling? What difference between the selling and giving situations actually prompts these feelings? If that could be pinned

down, it might throw light on the moral question of whether there was indeed some justification for prohibition. ...

So, for instance, we might try the hypothesis that we respond differently to the two kinds of case because giving involves generosity and altruism, and selling does not. But if that were the case, why do we not have similar feelings about all cases of selling as opposed to giving? We applaud giving, but do not generally feel uncomfortable about selling. And, furthermore, withholding is just as much a failure of generosity as is selling, but we do not feel revulsion about the fact that most of us never make a living kidney donation. Anyway, if generosity is the issue, why do we feel differently – as most of us intuitively do – about a father who donates a kidney to his daughter and one who sells it to buy other treatment she needs just as urgently? From the point of view of his motivation there is no difference. ...

Here is what seems to me the only possibility. The essential difference is that from the point of view of the unpaid kidney donor, the harm and risk to the donor are being accepted because a kidney is *the only thing that will meet the need*. But if you sell your kidney, it has become simply a means of getting money, and *anything else might in principle fulfil the same function*. That is true whatever your reason for wanting the money – even saving your daughter's life. Why should that cause such a horrified reaction? Presumably because it looks like a desperate, last-ditch attempt to find the essentials of life. We presume that people will find any other way they can of getting money before submitting to the deliberate infliction of bodily harm as a means. Even if there is no moral degradation involved, there is desperation, and its visibility may (depending on context) involve deep social degradation. It may be this that causes the response. ...

There is much more work to be done on these subjects, but whatever the eventual outcome, it is clear that our intuitive responses to payment for body parts represent a quick fix for uncomfortable feelings. The issue as a whole is still in a state of intellectual, and therefore moral, confusion.

Note: More reading below. Please scroll down.

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The Case for Allowing Kidney Sales

by Janet Radcliffe-Richards, et. al.

from *The Lancet*, 351/9120, pgs. 1950-1952 (1998)

... In this paper we outline our reasons for thinking that the arguments commonly offered for prohibiting organ sales do not work, and therefore that the debate should be reopened. Here we consider only the selling of kidneys by living vendors, but our arguments have wider implications.

The commonest objection to kidney selling is expressed on behalf of the vendors: the exploited poor, who need to be protected against the greedy rich. However, the vendors are themselves anxious to sell, and see this practice as the best option open to them. The worse we think the selling of a kidney, therefore, the worse should seem the position of the vendors when that option is removed. Unless this appearance is illusory, the prohibition of sales does even more harm than first seemed, in harming vendors as well as recipients. To this argument it is replied that the vendors' apparent choice is not genuine. It is said that they are likely to be too uneducated to understand the risks, and that this precludes informed consent. It is also claimed that, since they are coerced by their economic circumstances, their consent cannot count as genuine.

Although both these arguments appeal to the importance of autonomous choice, they are quite different. The first claim is that the vendors are not competent to make a genuine choice within a given range of options. The second, by contrast, is that poverty has so restricted the range of options that organ selling has become the best, and therefore, in effect, that the range is too small. Once this distinction is drawn, it can be seen that neither argument works as a justification of prohibition.

If our ground for concern is that the range of choices is too small, we cannot improve matters by removing the best option that poverty has left, and making the range smaller still. To do so is to make subsequent choices, by this criterion, even less autonomous. The only way to improve matters is to lessen the poverty until organ selling no longer seems the best option; and if that could be achieved, prohibition would be irrelevant because nobody would want to sell.

The other line of argument may seem more promising, since ignorance does preclude informed consent. However, the likely ignorance of the subjects is not a reason for banning altogether a procedure for which consent is required. In other contexts, the value we place on autonomy leads us to insist on information and counselling, and that is what it should suggest in the case of organ selling as well. ...

The risk involved in nephrectomy is not in itself high, and most people regard it as acceptable for living related donors. Since the procedure is, in principle, the same for vendors as for unpaid donors, any systematic difference between the worthwhileness of the risk for vendors and donors presumably lies on the other side of the calculation, in the expected benefit. Nevertheless the exchange of money cannot in itself turn an acceptable risk into an unacceptable one from the vendor's point of view. It depends entirely on what the money is wanted for.

In general, furthermore, the poorer a potential vendor, the more likely it is that the sale of a kidney will be worth whatever risk there is. If the rich are free to engage in dangerous sports for pleasure, or dangerous jobs for high pay, it is difficult to see why the poor who take the lesser risk of kidney selling for greater rewards—perhaps saving relatives' lives, or extricating themselves from poverty and debt—should be thought so misguided as to need saving from themselves.

...

[A]ll the evidence we have shows that there is much more scope for exploitation and abuse when a supply of desperately wanted goods is made illegal. It is, furthermore, not clear why it should be thought harder to police a legal trade than the present complete ban.

Furthermore, even if vendors and recipients would always be at risk of exploitation, that does not alter the fact that if they choose this option, all alternatives must seem worse to them. **Trying to end exploitation by prohibition is rather like ending slum dwelling by bulldozing slums: it ends the evil in that form, but only by making things worse for the victims. If we want to protect the exploited, we can do it only by removing the poverty that makes them vulnerable, or, failing that, by controlling the trade.**

Another familiar objection is that it is unfair for the rich to have privileges not available to the poor. This argument, however, is irrelevant to the issue of organ selling as such. If organ selling is wrong for this reason, so are all benefits available to the rich, including all private medicine, and, for that matter, all public provision of medicine in rich countries (including transplantation of donated organs) that is unavailable in poor ones. Furthermore, all purchasing could be done by a central organisation responsible for fair distribution.

It is frequently asserted that organ donation must be altruistic to be acceptable, and that this rules out payment. However, there are two problems with this claim. First, altruism does not distinguish donors from vendors. If a father who saves his daughter's life by giving her a kidney is altruistic, it is difficult to see why his selling a kidney to pay for some other operation to save her life should be thought less so. Second, nobody believes in general that unless some useful action is altruistic it is better to forbid it altogether.

It is said that the practice would undermine confidence in the medical profession, because of the association of doctors with money-making practices. That, however, would be a reason for objecting to all private practice; and in this case the objection could easily be met by the separation of purchasing and treatment. There could, for instance, be independent trusts to fix charges and handle accounts, as well as to ensure fair play and high standards. It is alleged that allowing the trade would lessen the supply of donated cadaveric kidneys. But although some possible donors might decide to sell instead, their organs would be available, so there would be no loss in the total. And in the meantime, many people will agree to sell who would not otherwise donate.

It is said that in parts of the world where women and children are essentially chattels there would be a danger of their being coerced into becoming vendors. This argument, however, would work as strongly against unpaid living kidney donation, and even more strongly against many far more harmful practices which do not attract calls for their prohibition. Again, regulation would provide the most reliable means of protection.

It is said that selling kidneys would set us on a slippery slope to selling vital organs such as hearts. But that argument would apply equally to the case of the unpaid kidney donation, and nobody is afraid that that will result in the donation of hearts. It is entirely feasible to have laws and professional practices that allow the giving or selling only of non-vital organs. ...

It must be stressed that we are not arguing for the positive conclusion that organ sales must always be acceptable, let alone that there should be an unfettered market. Our claim is only that none of the familiar arguments against organ selling works, and this allows for the possibility that better arguments may yet be found.

Nevertheless, we claim that the burden of proof remains against the defenders of prohibition, and that until good arguments appear, the presumption must be that the trade should be regulated rather than banned altogether. Furthermore, even when there are good objections at particular times or in particular places, that should be regarded as a reason for trying to remove the objections, rather than as an excuse for permanent prohibition.

The weakness of the familiar arguments suggests that they are attempts to justify the deep feelings of repugnance which are the real driving force of prohibition, and feelings of repugnance among the rich and healthy, no matter how strongly felt, cannot justify removing the only hope of the destitute and dying. This is why we conclude that the issue should be considered again, and with scrupulous impartiality.