Kidney Sales and the Burden of Proof

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ABSTRACT

Janet Radcliffe Richards' *The Ethics of Transplants* outlines a novel framework for moral inquiry in practical contexts and applies it to the topic of paid living kidney donation. In doing so, Radcliffe Richards makes two key claims: that opponents of organ markets bear the burden of proof, and that this burden has not yet been satisfied. This paper raises four related objections to Radcliffe Richards' methodological framework, focusing largely on how Radcliffe Richards uses this framework in her discussion of kidney sales. We conclude that Radcliffe Richards' method of inquiry hinders our ability to answer the very question that it ought to help us resolve: What is there best reason to do, all things considered?

INTRODUCTION

Janet Radcliffe Richards is one of the most prolific contributors to the organ market debate, and one of the most incisive critics of the current prohibition of live donor kidney sales. Over a series of publications spanning 20 years of engagement with the topic, Radcliffe Richards has consistently argued that any discussion of paid living kidney donation should begin by recognising that allowing kidneys to be sold could plausibly increase the supply of transplantable kidneys, thereby providing life-saving transplants to those who otherwise might never have received one. Based on this *prima facie* argument, Radcliffe Richards argues that there is a presumption in

favour of allowing organs to be bought and sold—and, conversely, that the burden of proving otherwise falls on opponents of organ markets. According to Radcliffe Richards, none of the objections to organ markets that have been offered to date have met this burden (Radcliffe Richards et al. 1998; Radcliffe Richards 1992; Radcliffe Richards 1996; Radcliffe Richards 2003a; Radcliffe Richards 2005; Radcliffe Richards 2008; Radcliffe Richards 2012).

This article explains and critically evaluates Radcliffe Richards' methodological approach to the topic of paid living kidney donation. We focus in particular on how Radcliffe Richards outlines and applies this approach in *The Ethics of Transplants: Why Careless Thought Costs Lives*, which is both Radcliffe Richards' most detailed and most recent substantial contribution to the debate. We first challenge the idea that a *prima facie* argument in favour of a proposal can establish who (if anyone) bears the burden of proof. We then argue that although Radcliffe Richards' method of inquiry is intended to shape only the form and not the conclusion(s) of ethical analysis, it effectively stacks the odds in favour of her starting presumption. We further argue that applying Radcliffe Richards' methodology to the topic of paid kidney donation may therefore hinder identification of the course of action we have best reason to pursue. We conclude that future ethical analysis of organ markets should abandon the idea that either party to the debate bears the burden of proof, at least in the sense suggested by Radcliffe Richards.

Although this article focuses primarily on Radcliffe Richards' discussion of live donor organ markets, our arguments have broader significance. Notably, Radcliffe Richards' analysis of paid kidney donation is not only intended to contribute to the organ market debate, but also to illustrate a novel strategy for resolving moral problems in practical contexts (Radcliffe Richards 2012, 12). Indeed, Radcliffe Richards has elsewhere outlined how this methodological approach should be applied to other topics in practical ethics, including debates regarding the moral permissibility of markets in gametes and surrogacy services (Radcliffe Richards 2008). The concerns we raise in this paper suggest that Radcliffe Richards' method of inquiry is ill suited to resolving the kinds of moral issues that emerge in practical contexts, not just the specific question of whether we should allow the sale of organs. Our arguments may also have further implications for practical ethics more generally. As we have described elsewhere (Koplin and Selgelid 2015; Koplin and Selgelid 2016), claims about the burden of proof have been made in relation to a wide range of topics in applied ethics. Although not all of our objections to Radcliffe Richards' method of inquiry

apply to all burden of proof arguments, our analysis nonetheless provides reason to be wary of some of the common ways that burden of proof arguments are deployed.

RADCLIFFE RICHARDS' METHOD OF INQUIRY

The Ethics of Transplants begins by noting that one of the most common ways of framing disputes in practical ethics— i.e., as a pro/con debate with two distinct sides—leaves much to be desired. According to Radcliffe Richards, discussions that are structured in this way typically amount to little more than "confused noise":

> *Incompatible arguments get heaped up on each side as though they reinforced each other, replies to opponents mix up objections to the conclusion with objections to particular arguments in defence of the conclusion, and both sides slither between arguments about the problem itself and speculation about the other side's motives. The issues get lost in the psychology of warfare. (2012, 13)*

The Ethics of Transplants purports to develop a more systematic approach to resolving disputes in practical ethics. Radcliffe Richards intends for this method of inquiry to provide the mechanism necessary to carefully assess the arguments on either side of a debate, identify the roots of any disagreement, and ultimately help us determine what course of action ought to be pursued.

Radcliffe Richards' method of inquiry begins by positing a *prima facie* case in favour of one policy. This *prima facie* case is used to ground a starting presumption (that this policy should be adopted) for the inquiry as a whole. The starting presumption is defeasible: it is not intended to settle the outcome of the debate, but rather to establish who must bear the burden of proof (or, more precisely, the burden of proving that their position is ultimately correct). In relation to organ markets, Radcliffe Richards points out that the current shortage of transplantable kidneys costs lives, and argues that because establishing a market in kidneys could plausibly help alleviate this shortage (and thereby save the lives of renal failure patients), there is a strong *prima facie* case for doing so. On this basis, Radcliffe Richards argues that opponents of paid kidney donation bear the burden of proving that the prohibition of kidney sales is justified, even though people suffer and die as a result of the current shortage (Radcliffe Richards 2012, 16). According to Radcliffe Richards, the inquiry should therefore proceed by considering each potential objection to organ markets

in light of the starting presumption in favour of them. Radcliffe Richards suggests the following template:

> There is a presumption against any obstruction to organ procurement.
> Prohibition of payment for organs cuts off a supply of kidneys for transplant.
> But...
> ~~~~~~~~~~~~~~~
> So prohibition should remain. (Radcliffe Richards 2012, 49)

Or more succinctly:

> There is a presumption in favour of allowing payment for organs.
> But...
> ~~~~~~~~~~~~~~~
> So prohibition should remain. (Radcliffe Richards 2012, 70)

Radcliffe Richards distinguishes between two different kinds of objections that can be used in an attempt to meet the burden of proof. "In principle" arguments attempt to show that we should not implement a particular proposal because doing so would "directly contravene some existing, generally accepted principle" (Radcliffe Richards 2012, 94). The claim that kidney sellers are effectively coerced by poverty (and therefore do not give valid consent to the surgery) falls under this category. "In practice" arguments rely on empirical claims. They seek to establish that organ markets would, in practice, have harmful effects overall.[1] Claims that kidney sellers would be harmed by the transaction are central to the most widely discussed examples of "in practice" arguments against organ markets.

According to Radcliffe Richards' method of inquiry, "in principle" and "in practice" arguments have very different requirements for argumentative success. She holds that "in principle" arguments against kidney sales can succeed only if they show that (allowing) the practice would directly contravene a legitimate, noncontroversial moral principle more powerful than the principle that we should save lives. "In practice" arguments against kidney sales, according to Radcliffe Richards, are

1. Richards (2012, 134–146) later describes these two kinds of arguments in terms of *constraining principles* that rule out certain policy options altogether, and *policy considerations* that help us choose between the remaining options.

able to satisfy the burden of proof only if the following three conditions are met: (1) claims that establishing organ markets would have negative consequences must be supported by positive evidence; (2) it must be shown that such harms would outweigh the benefits of organ markets; and (3) prohibition must be regarded as a last resort, to be enacted only if attempts to sufficiently reduce these harms have failed. Radcliffe Richards further argues that even if the harms of kidney selling can be shown to outweigh the benefits in a particular context, prohibition should always be regarded as provisional. We should continue to recognise that there is a presumption in favour of organ markets, and should therefore make ongoing efforts to find ways of minimising the harms of kidney selling (Radcliffe Richards 2012, 94–101).

The key elements of Radcliffe Richards' method of enquiry are as follows. A *prima facie* case is made in favour of a particular policy, placing the burden of proof on those who believe that this policy should be rejected. Objections to the starting presumption are then considered one by one. Unless the objection under consideration is able to meet specific requirements (with the exact criteria depending on whether the objection holds that the proposed policy would be wrong in principle or harmful in practice) this objection is rejected. The remaining objections are then examined in turn, with the burden of proof remaining on those arguing against the starting presumption (unless or until an objection is shown to be adequate). In applying this framework to the organ market debate, Radcliffe Richards concludes that none of the objections to organ markets that have been offered to date satisfy the burden of proof. The case for organ markets therefore succeeds, according to Radcliffe Richards, pending the development of any new objections that are able to meet the burden of proof.

This paper raises four objections to Radcliffe Richards' method of inquiry. We first argue that Radcliffe Richards' methodology leads to contradictory conclusions regarding who bears the burden of proof, and is therefore incoherent. Second, we argue that even if Radcliffe Richards' method of inquiry could be coherently applied, we cannot conclude that we ought to enact a particular proposal simply because opponents of this proposal have failed to satisfy the burden of proof (i.e. failed to conclusively show that the proposal should be rejected). Third, we point out that Radcliffe Richards' method of inquiry requires a higher standard of evidence from those criticizing the starting presumption than those defending it, and argue that this can unfairly bias the outcome of the inquiry. Fourth, we argue that because Radcliffe Richards' method of inquiry considers each individual objection in isolation from the

others, it can fail to recognise, and therefore fail to address, the cumulative force of distinct objections. We conclude that Radcliffe Richards' method of inquiry hinders our ability to answer the very question that it ought to help us resolve: What is there best reason to do, all things considered?

1. *REDUCTIO AD ABSURDUM*: RADCLIFFE RICHARDS' METHODOLOGY LEADS TO CONTRADICTORY CONCLUSIONS

As outlined above, Radcliffe Richards' method of inquiry begins by outlining a *prima facie* case in favour of a particular policy, which is used to establish the starting presumption that this policy ought to be adopted. A *prima facie* case for a proposal can be made by showing that there is at least one consideration which, on the face of it, weighs in favour of implementing this proposal. Under Radcliffe Richards' method of inquiry, positing a *prima facie* argument in favour of some proposal is sufficient to establish a policy presumption that this proposal should be adopted (i.e. a presumption that we ought to act to implement this proposal, pending a successful argument being made to the contrary).

In this section, we argue that *prima facie* arguments cannot establish who (if anyone) bears the burden of proof. In policy debates it is almost always possible to posit a *prima facie* case in favour of a range of different proposals. Accordingly, Radcliffe Richards' style of argument can be used to reach contradictory conclusions regarding what the starting presumption should be, and who must therefore bear the burden of proving that their opponents' proposal(s) should be rejected. Paradoxically, under Radcliffe Richards' method of inquiry participants on both sides of many debates—including debates over the moral permissibility of live donor organ markets—can legitimately claim that their argumentative opponents bear the burden of proof.

This contradiction can arise in two related ways. First, proposals which would promote one desirable goal would often also hinder a different desirable goal. It is therefore often possible to posit a *prima facie* case both for and against the same proposal. Second, it is often possible to achieve the same goal in a variety of ways. Accordingly, it will often be possible to posit *prima facie* arguments in favour of a range of proposals aimed at achieving the same goal.

PRIMA FACIE ARGUMENTS APPEALING TO DIFFERENT GOALS CAN OFTEN BE MADE BOTH FOR AND AGAINST THE SAME PROPOSAL

In practical ethics, *prima facie* arguments appealing to different goals can be (and indeed, often are) advanced both for and against the same proposal. To name just a few examples, opposing claims about the burden of proof, based on appeal to different goals, have been made both for and against practicing capital punishment, genetically modifying crops, allowing human bioenhancement, and implementing policies aimed at reducing international poverty (Koplin and Selgelid 2015; Koplin and Selgelid 2016). The *prima facie* arguments offered in defence of these opposing claims may have nothing at all wrong with them, at least in the sense that they cannot be directly rebutted (qua, merely, *prima facie* arguments). Disagreements are instead often based, at least in part, on whether one moral duty overrides another and/or how much weight discussants believe should be attached to achieving different morally important goals in cases where these goals conflict. In such contexts a *prima facie* argument in favour of one proposal (based on one particular goal) cannot by itself create a presumption in favour of adopting it. We cannot simultaneously presume that we both should and should not adopt a particular proposal when *prima facie* arguments appealing to different goals lead to different conclusions. It is therefore arbitrary to lay the burden of proof on either side of the debate merely on the basis of a particular *prima facie* case (based on a particular goal) for a particular conclusion.

This general problem with burden of proof arguments is directly relevant to Radcliffe Richards' analysis of paid kidney donation. Radcliffe Richards begins from the position that because live donor kidney markets could plausibly alleviate the current kidney shortage, there is a presumption in favour of lifting the current prohibition on organs sales. While the possibility that we could save lives through establishing a market in organs can certainly ground a legitimate *prima facie* case in favour of organ markets, this does not show that there is a *presumption* in favour of establishing such markets, nor—conversely—that opponents of organ markets must bear the burden of proof. The problem is that opponents of organ markets are also able to posit a *prima facie* case for their position—one grounded in goals other than increasing the organ supply. For example, it could be argued that if we allow the sale of organs, people living in poverty might come to face social or legal pressures to sell their kidneys (Rippon 2014), which is *prima facie* undesirable. Alternatively, one could begin from the claim that it is *prima facie* wrong to offer people living in poverty

economic opportunities that they would not accept under just background conditions, as doing so risks normalising—and thereby reinforcing—these background injustices (see e.g. Malmqvist 2013a; Snyder 2013). In fact, a *prima facie* case against organ markets can be developed from most common objections to kidney sales, including, potentially, that kidney sellers are likely to be left worse off as a result of the transaction, that markets would breach Kantian moral constraints on treating others as mere means, that markets in organs wrongfully commodify the body, or that the practice of kidney selling might undermine social solidarity.[2]

Given that it is possible to establish a *prima facie* case both for and against organ markets, proponents and opponents of organ markets alike could adapt Radcliffe Richards' style of argument to establish a presumption in favour of their position and place the burden of proof on their opponents. Radcliffe Richards' method of inquiry would therefore require us to presume that we both should and should not open a market in organs, and to hold that both sides of the debate bear the burden of proof. But this is obviously absurd.

PRIMA FACIE ARGUMENTS BASED ON THE SAME APPEALED-TO GOAL CAN OFTEN BE MADE BOTH FOR AND AGAINST THE SAME PROPOSAL

Radcliffe Richards grounds her *prima facie* case for organ markets (and therefore her starting presumption in favour of such markets) in the claim that increasing the organ supply is a morally important goal. We argued above that because prohibiting organ markets could promote other important goals, Radcliffe Richards' method of inquiry leads to contradictory conclusions regarding who bears the burden of proof. In this section we make the related point that Radcliffe Richards' method of inquiry can be used to make contradictory claims about the burden of proof even if the initially-appealed to goal is held constant. Where Radcliffe Richards argues that the moral importance of increasing the organ supply establishes a presumption in favour of organ markets, others could adapt Radcliffe Richards' style of argument to establish a *prima facie* case—and thus starting presumption—in favour of a different proposal aimed at the same goal, placing the burden of proof on those who favour organ markets.

The supply of transplantable organs could be increased in any number of ways,

2. The point being that all of these objections, implicitly if not explicitly, ultimately appeal to one goal or other.

many of which are entirely compatible with existing models of altruistic donation. Martin and White (2015) have recently surveyed a number of potential areas for improvement: reducing the discard rate of deceased donor organs by optimising allocation systems; increasing the use of organs from donors following circulatory death; removing financial *disincentives* to participate in living kidney donation (e.g. by compensating donors for financial expenses related to donation); expanding paired kidney donation programs; and intervening in the modifiable causes of end-stage renal disease (Martin and White 2015). Even if these measures are unable to fully resolve the kidney shortage, more radical proposals might. Following a suggestion from John Harris (1975), we could institute a "survival lottery": a state policy of forcibly redistributing the organs of some individuals to save the lives of numerous others. If forced organ redistribution seems too extreme, we could pursue gentler alternatives. We could, for example, institute what Samuel Kerstein (2013, n. 192; 2014) has dubbed an "organ draft": a system where citizens are randomly selected to donate a kidney to an anonymous stranger, but only after they are screened for physical and psychological suitability. More speculatively, technological developments may eventually provide entirely novel ways to meet the current kidney shortage. For example, advances in xenotransplantation and stem cell science may eventually provide ways of generating transplantable organs that eliminate the need for human donors altogether.

In short, there are many potentially promising means of improving the supply of transplantable organs—and *prima facie* cases (based on appeal to the same goal that is appealed to by Radcliffe Richards) could thus be made in favour of any of them. Opponents of organ markets in organs could therefore use Radcliffe Richards' same style of argument to conclude that there should be a presumption (based on a *prima facie* case) in favour of different proposals aimed at increasing the organ supply, thereby placing the burden of proof on those who (like Radcliffe Richards) defend proposals different from theirs.

The same problem is raised by Radcliffe Richards' claim that there is not only a presumption against *prohibiting* paid donation, but also a presumption against *restricting* the sale of organs (meaning that a minimally-regulated market in organs should, pending further argument, be presumed the best model of paid donation). Many proponents of organ markets have suggested that the trade should be regulated in various ways—for example, by limiting the market to a single self-governing geopolitical area, or by distributing organs according to need rather than ability to pay. Radcliffe Richards (2012, 146), however, argues that those who defend highly

regulated markets characteristically fail to recognise that "given the direction of the burden of proof, the whole [discussion] should work from the position of having to justify obstructions." Radcliffe Richards (2003b; 2012) further claims that those who argue in favour of restricting the scope of the market have failed to meet the burden of proof necessary to justify these obstructions. Yet it is far from clear why the burden of proof should be thought to fall on proponents of highly regulated markets rather than proponents of minimally regulated ones. To begin with, it is not obvious that an open market would fulfil the initially appealed-to goal (i.e. to provide organ transplants to those who need them) more effectively than a highly regulated system. To the contrary, insofar as some patients might be unable to afford to buy a kidney, an open market seems less likely to meet the needs of renal failure patients than a monopsonistic market (e.g. a system in which a state agency is the sole purchaser of organs, and continues to distribute them according to existing criteria).[3] At the same time, a minimally-regulated open market seems more likely to replicate the documented harms of existing black markets than a heavily regulated monopsonistic market. A *prima facie* argument could be made for any number of different systems of paid kidney donation, again leading to conflicting conclusions regarding who bears the burden of proof.

The upshot is that Radcliffe Richards' method of inquiry leads to a contradiction even if the initially appealed-to goal is held constant. Radcliffe Richards appeals to the *prima facie* desirability of increasing the organ supply to defend a minimally-regulated market in organs. However, this style of argument cannot be legitimate, for it could be used to defend multiple conflicting proposals aimed at achieving this goal—in which case proponents of each proposal could claim that the burden of proof falls on those who would prefer a different approach.

To put the point in general terms, when there are multiple means of achieving a particular goal, it is not possible to establish who (if anyone) bears the burden of proof on the basis of a *prima facie* argument in favour of one specific proposal. Rather than beginning ethical inquiry with a presumption in favour of one particular strategy for achieving one particular goal, *we should instead ask how we can best achieve our original goal, taking other legitimate goals into account*. As this broader question has no *a priori* answer, it makes little sense to claim at the outset of the inquiry that one proposal is

3. This concern would be especially salient if, as one of us has argued elsewhere, the practice of kidney selling would likely undermine the practice of unpaid kidney donation (Koplin 2015)

presumptively correct, nor that those who would prefer an alternative approach must bear the burden of proof (and thus provide stronger arguments).

OTHER VERSIONS OF RADCLIFFE RICHARDS' STARTING PRESUMPTION

We have challenged the idea that the goal of increasing the organ supply entails a presumption in favour of paying kidney donors. However, it is worth noting that, midway through her discussion of kidney selling, Radcliffe Richards offers an additional reason for beginning with a presumption in favour of paid donation: because kidney sellers stand to gain financially from participating in the market (Radcliffe Richards 2012, pp.48-58). While the alternative means of increasing the organ supply discussed above may help alleviate the current organ shortage, they would not help realise these potential benefits to kidney sellers. Could this stronger argument for Radcliffe Richards' starting presumption—which combines the claims that it is *prima facie* desirable to increase the organ supply and that it is *prima facie* desirable to allow individuals to participate in mutually advantageous transactions—establish a presumption in favour of organ markets?

This second, more detailed, rendering of the starting presumption remains problematic. As we note below, Radcliffe Richards' assumption that sellers would benefit (all things considered) from the opportunity to sell a kidney is controversial; kidney sellers may face risks to their physical, psychosocial and long-term financial wellbeing that diminish or outweigh the benefits, particularly in the kind of minimally-regulated market Radcliffe Richards advocates. But even if we grant that sellers would typically benefit from the transaction, this merely points towards an additional *consideration* in favour of increasing the organ supply by means of organ markets. There may also be a range of considerations that weigh against paid living organ donation, as well as a range of considerations that weigh in favour of alternative solutions to the organ shortage; more than one proposal may have multiple reasons in favour of adopting it. A policy presumption in favour of increasing the organ supply *by means of establishing an organ market* therefore remains problematic even if it is grounded in both the idea that it is *prima facie* desirable to increase the organ supply and the idea that it is *prima facie* desirable to create opportunities for individuals to engage in mutually advantageous transactions.

2. FAILURE TO SATISFY THE BURDEN OF PROOF DOES NOT CONFIRM THE STARTING PRESUMPTION

As described above, Radcliffe Richards holds those who reject the starting presumption responsible for producing and substantiating objections, as well as showing that these objections are sufficiently compelling to satisfy the burden of proof. In relation to kidney selling, Radcliffe Richards claims that:

> *[T]he* burden of proof *[original emphasis] lies on anyone who wants to block or impede some particular means of getting organs. They need to show that* even though people will suffer and die *[original emphasis] as a result of that obstruction, it is nevertheless justified. (2012, 16)*

Radcliffe Richards further argues that those who believe that establishing organ markets would have harmful consequences are responsible for demonstrating that such harms would in fact occur:

> *[A]nyone who wants to produce an argument of this kind needs to make the case* positively *[original emphasis]—not just presume it stands until the other side has produced a conclusive refutation of it. (2012, 97)*

Regarding "in practice" arguments, Radcliffe Richards claims that opponents of organ markets must:

> *.... assess the loss of benefit on the other side, and engage in moral debate about the relative merits of the two. This is an enormous undertaking in large-scale contexts, and anyone producing an argument of this form needs to demonstrate at least having taken the matter seriously. (Radcliffe Richards 2012, 98)*

In this way, Radcliffe Richards' method of inquiry requires those criticising the starting presumption to do more argumentative work than those defending it.[4] Advocates of organ markets are not required to show that their position is justified, all things considered. Instead, opponents of organ markets bear the burden of proving

4. This is one of the reasons why it is problematic, as shown in the previous section, that both sides of a debate can claim that their opponents bear the burden of proof.

that the prohibition of kidney sales is justified, all things considered. If they fail to do so, then the starting presumption in favour of organ markets wins by default.

Yet if the aim of an inquiry is to determine what course of action we ought to take all things considered, as it presumably should be, it is unclear why the responsibility for generating conclusive arguments should fall exclusively on opponents of the starting presumption. The failure of those who reject a proposal to successfully make a case against it does not imply that there is no such case to be made. Even if opponents of organ markets have failed to make a conclusive case against organ markets, there is no guarantee that those opposed to markets in organs have thought of and/or voiced every relevant objection. Nor can we be sure that opponents of organ markets will successfully demonstrate that their arguments can satisfy the burden of proof, even if their arguments (collectively) are in fact able to do so; many may raise one or more discrete concerns without attempting this larger task. Indeed, much of the philosophical literature on the possible problems with a legal trade in organs explicitly brackets off the question of whether markets are desirable, all things considered (see e.g. Björkman 2006; Hughes 2006; Kerstein 2009; Kass 1992; Malmqvist 2013b; Malmqvist 2014; Phillips 2011; Radin 1996; Rivera-Lopez 2006; Sandel 2012; Satz 2010). We therefore cannot infer that there is no plausible case against markets in organs simply because (in Radcliffe Richards' view) opponents of organ markets have failed to produce one.

This is not to suggest that policymakers should abstain from implementing organ markets just in case someone comes up with a successful objection at a later point. Our claim, instead, is that neither proponents nor opponents of organ markets should bear the sole burden/responsibility of proving their conclusion. If the aim of inquiry is to determine whether a particular policy ought to be implemented, the best possible case in favor of the policy should be weighed against the best possible case against it. Under some circumstances, placing the burden of proof exclusively on one side of the debate (i.e., on opponents of organ markets) or the other (i.e., on proponents of organ markets) may prevent this from happening.

3. EXCESSIVELY HIGH STANDARDS OF EVIDENCE

In addition to placing the burden of proof on opponents of organ markets, Radcliffe Richards stipulates that any empirical objections to kidney selling must be supported by a very high standard of evidence. Radcliffe Richards argues that oppo-

nents of organ markets must provide positive evidence for any empirical claims about the harms of transplant commercialism:

> *[W]hen there is... a clear burden of proof, there needs to be positive evidence, not the mere possibility, that the predicted harms will occur and be great enough to outweigh the benefits. (2012, 105)*

This requirement for positive evidence plays a key role in Radcliffe Richards' rejection of the claim that kidney sellers would experience significant harm. The literature on the experiences of kidney vendors in existing markets indicates that kidney sellers often experience a range of significant physical, mental, social and financial harms (Koplin 2014). One plausible explanation points towards the inherent differences between the practices of altruistic and paid donation: that kidney donors and kidney sellers are drawn from different populations, act on different motivations, and participate in practices with a vastly different social meaning. On this view, organ vendors face greater risks than kidney donors, and may continue to do so under a regulated system of paid kidney donation.

Radcliffe Richards, however, argues that any evidence that is drawn from existing black markets in organs fails to meet the standard of evidence necessary to overturn the presumption in favour of paid donation. Since most of the extant literature is drawn from contexts where the sale of organs occurs on the black market, it cannot (Radcliffe Richards claims) tell us what would happen if organ selling "were not illegal, and were subject to the kinds of standard that we automatically apply in other areas of law-governed life" (Radcliffe Richards 2012, 53–54). On Radcliffe Richards' view, we currently lack sufficient evidence to show that organ selling would necessarily be harmful in practice. Radcliffe Richards further argues that *any* research drawn from existing markets, no matter how carefully assessed, cannot meet the standard of evidence necessary to satisfy the burden of proof. To satisfy the burden of proof, according to Radcliffe Richards, we must first overturn the current prohibition of kidney sales, then track kidney sellers' long-term outcomes, and, if necessary, make attempts to regulate the market in order to minimise any harms that kidney sellers might experience. Radcliffe Richards argues that until such research has been conducted, we should reject any objections to organ markets based on potential harms of kidney selling, and continue to presume that kidney buyers and kidney sellers alike

could benefit from a properly conducted trade in organs (Radcliffe Richards 2012, 53–58).

Radcliffe Richards applies this same principle to *any* empirical claims about the possible harms of organ markets: that people living in poverty might be coerced to sell their kidneys, or face harmful pressures to do so; that paying living kidney donors might erode deceased donation; that markets would reinforce structural injustice or erode social solidarity; or that establishing even well-regulated market in the West might contribute to the growth of poorly regulated markets in the developing world. In discussing such objections, Radcliffe Richards makes the general point that any concerns about the consequences of organ markets need to be supported by "real evidence" drawn from experiments with legal, regulated markets (Radcliffe Richards 2012, 97–98). By setting these standards of evidence, Radcliffe Richards' method of inquiry makes it impossible for opponents of organ markets to make a successful case against such markets without first overturning the prohibition on kidney sales, and thereby allowing the very thing (and potentially inflicting the very harms) they wish to prevent!

Under Radcliffe Richards' method of inquiry, those who defend the starting presumption are not required to meet nearly as stringent standards of evidence as those who seek to challenge it. If proponents of organ markets wish to respond to "in practice" objections to organ markets, they need not show that the predicted consequences are unlikely to occur or even engage with the relevant evidence; it is sufficient to show that opponents of organ markets have failed to provide near-conclusive positive evidence for their claims. Those defending the starting presumption are therefore required to do less argumentative work than those who seek to challenge it.

Notably, in arguing that organ markets would increase the supply of transplantable organs (and are therefore presumptively desirable), Radcliffe Richards herself relies on an empirical claim about the effects of establishing a market in organs. The idea that a market would have a net positive effect on the organ supply is not uncontroversial, particularly in light of concerns that financial incentives would displace or erode unpaid donation (Koplin 2015; Sandel 2012). Yet in arguing that the *prima facie* desirability of increasing the organ supply creates a presumption in favour of organ markets, Radcliffe Richards does not offer (and does not appear to think she is required to provide) any evidence for the empirical claim that a market would in fact achieve this goal. Here, too, there is a significant discrepancy between the standards of evidence that proponents and opponents of organ markets are expected to meet.

It is unclear why such a high standard of evidence should be required for empirical claims about the harms of organ markets, particularly given that equally demanding standards of evidence are not required for empirical claims about the benefits of organ markets. While a persuasive rationale for applying strict standards of evidence has been developed for some contexts—most notably, legal decision-making—this rationale does not seem to be applicable to practical ethics generally, or the organ market debate specifically. In law, the requirement that prosecutors of criminal cases meet an especially high standard of evidence, by proving their case beyond a reasonable doubt, has less to do with discovering the truth of the matter than with avoiding a certain kind of error. A legal presumption of innocence does not help determine whether a defendant truly *is* innocent, but rather prioritises the avoidance of false attributions of guilt over the avoidance of false attributions of innocence (Hahn and Oaksford 2007; Dare and Kingsbury 2008; Lippke 2010; Walton 2014).

While the importance of the burden of proof (and the requirement that arguments meet a specific standard of evidence in order to satisfy this burden) may be clear in the context of criminal law, it is not so obvious in the context of applied ethics. In criminal law, the requirement for near-conclusive evidence helps achieve the goal of the inquiry: to uphold a presumption of innocence *unless we are certain* that the defendant is guilty. The same rationale does not seem to apply in practical ethics, a domain where the goal of the inquiry is to determine what course of action one has best reason to take. On the face of it, the most appropriate response to inconclusive evidence would be to acknowledge that the moral force of an "in practice" objection to organ markets depends, in part, on how persuasive the available evidence is. All else being equal, stronger evidence makes for a stronger argument—but unless the relevant empirical claim is wholly implausible, even potential harms can have some weight. Even a small risk that taking a certain action would end in disaster provides an important reason against doing so. If there is reason to believe that establishing a market in organs may plausibly have negative consequences, any uncertainty should presumably weaken, but not completely undercut, the strength of the argument.

There is one way that the rationale behind a strong standard of evidence in criminal law might be thought to be applicable to the organ market debate. In criminal law, a strong standard of evidence is required because it is considered worse to make one kind of error than another—i.e., that it would be worse to punish an innocent person than to let a guilty person go free. By analogy, one might think that it is worse to unnecessarily deny renal failure patients kidney transplants (thus resulting

in death) than to (e.g.) inflict even serious harms (though less serious than death) on kidney sellers. However, the correct allocation of burden of proof evidence standards is less straightforward in the context of public policy than criminal law. As we argue in the following section, when there are several relevant moral considerations, even arguments that are less than decisive can lend some degree of support to the cumulative case for or against a conclusion. In such contexts, it is not clear how (or if) we should define standards of evidence for individual arguments.

4. FAILURE TO CONSIDER CUMULATIVE ARGUMENTS

Radcliffe Richards' method of inquiry begins by building a *prima facie* case in favour of one proposal, then examining potential objections one by one. Each objection is considered in isolation from the others. An objection either succeeds in satisfying the burden of proof, or else is rejected outright. In this section, we argue that structuring moral inquiry in this way can fail to recognise (and therefore address) the *cumulative weight* of distinct objections. Objections that are not sufficiently powerful to overturn the starting presumption on their own may nonetheless have *some* moral force. It is at least possible that a combination of such arguments may be more powerful than the *prima facie* case in favour of the starting presumption, all things considered.

This is frequently true of banal examples of practical reasoning. In practical contexts, reaching a decision will often require us to consider the cumulative force of the various considerations at play. Consider, for example, the way that one might weigh various considerations when purchasing a new car. Radcliffe Richards' method of inquiry could be applied in the following way:

> There is a presumption in favour of the safest car.
> The less safe alternative would be more affordable.
> But the lower price does not outweigh the decrease in safety.
> So the presumption in favour of the safest car remains.
>
> There is a presumption in favour of the safest car.
> The less safe alternative would be more reliable.
> But this does not outweigh the decrease in safety.
> So the presumption in favour of the safest car remains.

The problem is that considering each relevant factor in isolation from the others does not tell us which option would be best, all things considered. One might reasonably prefer the safest car over one that is more affordable *or* one that is more reliable, but nonetheless prefer an alternative car that is both cheaper *and* more reliable. In the same way, policies that achieve one worthwhile goal while creating a host of other problems will not always be desirable overall. Radcliffe Richards' method of inquiry, however, is structured in a way that systematically fails to recognise the important possibility that the moral costs of a particular proposal might cumulatively outweigh the benefits, even if no single objection proves decisive.

It is worth noting that this is a general criticism of Radcliffe Richards' methodology as a whole, and that it does not necessarily apply to her analysis of organ markets in particular. If (as Radcliffe Richards claims) the existing objections to organ markets are so obviously flawed that they "could not have begun to persuade anyone who was really trying to work out the rights and wrongs of the issue from scratch" (Radcliffe Richards 2012, 109), there is no cumulative case against organ markets that needs to be considered. Yet even if Radcliffe Richards is correct (which we doubt) that none of the existing objections to organ markets have *any* moral force, it remains possible that some of the familiar objections to organ markets can be refined, and that new ones might be introduced. While we do not defend this claim here, we do not think that it is obviously implausible that the individual and social harms of organ markets could cumulatively outweigh the benefits, especially if they are weighed against alternative strategies for promoting organ donation. However, under Radcliffe Richards' method of inquiry, a cumulative series of arguments against organ markets—no matter how carefully made—may stand little chance of success. If each objection to organ markets is considered in isolation from the others, even a compelling cumulative argument may fail to overturn the starting presumption in favour of markets.[5]

CONCLUSION

In *The Ethics of Transplants*, as well as numerous earlier publications, Radcliffe Richards argues that the concept of the burden of proof should play a central role in the organ market debate specifically, and in practical ethics generally. Radcliffe

5. For an example of the kind of cumulative argumentation we here have in mind, see Selgelid (2008).

Richards claims that proponents of organ markets do not need to prove that such markets would be desirable, all things considered. The burden of proof instead falls on opponents of organ markets, who must show that the prohibition of kidney selling is justified despite the fact that our current policies are failing to provide enough kidneys to meet demand.

We have argued that Radcliffe Richards' method of inquiry is ill-suited to resolving the kinds of questions typical of practical ethics, including the question of whether (and/or under what conditions) we should allow the sale of transplantable organs. We agree that there is a legitimate *prima facie* argument that can be offered in favour of organ markets, and we agree that the possibility of paying kidney donors is therefore worthy of consideration. However, while we agree that this issue gives rise to important empirical and philosophical questions, we do not think that Radcliffe Richards' method of inquiry can help us resolve them. We have argued that Radcliffe Richards' methodological approach is incoherent/inconsistent and/or biases the outcome of the inquiry from the outset. We therefore need a different kind of analysis.

In our view, disputes over who should bear the burden of proof will often be unproductive. Rather than considering who should bear the burden of proving what, it is more important to recognise that policymakers have the responsibility—or the burden—of pursuing courses of action supported by the best reasons, all things considered. In order to meet this responsibility, policymakers (and, arguably, those engaged in practical deliberation more generally) ought to weigh the moral costs and benefits of the various proposals that are on offer, taking into account both the possible consequences of implementing these proposals and the likelihood that these consequences would eventuate. Radcliffe Richards, then, is correct that if policymakers are to maintain the prohibition of kidney sales, they ought to be able to show that this is an acceptable course of action, all things considered. However, this is equally true of proposals to establish a regulated market in organs, or to run pilot studies of the same. Whatever decision policymakers reach, they ought to be able to show that their decision is justified, all things considered.

Admittedly, rejecting the claim that there is a presumption in favour of organ markets does not settle the debate. It does, however, level the playing field. The idea that either side of the debate bears the burden of proof should therefore be abandoned, and the ethics of paid living kidney donation more carefully reconsidered.

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