

# Not a Defence of Organ Markets

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## ABSTRACT

Selgelid and Koplin's article 'Kidney Sales and the Burden of Proof' (K&S 2019) presents a series of detailed and persuasive arguments, intended to demolish my own arguments against the prohibition of organ selling. And perhaps they might succeed, if the case described by the authors were the one I actually make. However, notwithstanding the extensive quotations and the detailed explanations of the way I supposedly argue, this account of my position *comprehensively* mistakes both the conclusions I reach and the arguments I give for them.



I know that there are around many misconceptions about my views on this subject, but I have always hoped they could not survive a reading of what I had actually written. I have just—after a gap of many years—looked again at the two most recent of the texts Koplin and Selgelid refer to, and it goes without saying that I can see various things I could now do better; but I do still find these misinterpretations hard to understand. And since anyone with nothing to go on but this article would reasonably conclude that the original texts were not worth reading, I am grateful to the editors for the opportunity to try to set the record straight.

I presume not many readers would be interested in a detailed comparative commentary on the texts, showing where this account gets my intentions wrong. I shall try instead to explain how what I do mean—and what I think I say—diverges from what is said here, and then go on to a brief outline of what my arguments and conclusions really are. I hope this may also give some sense of why, for all the opposition I have encountered since I was first drawn into this debate, I persist in thinking that the work I have been doing is important not only for this topic but for analysis in practical ethics more generally.

## 1. MARKETS

The first, crucial, misunderstanding, which underpins and vitiates everything that is said in the article, appears in the abstract as well as throughout the text. I emphatically do *not* argue for “markets” in organs, let alone for minimally restricted markets (K&S 2019, p.44). I certainly do not suggest that payment of living donors is an inherently desirable means of acquiring organs, let alone that it is better than other means. In fact, I do not argue for any “policy” whatever. What I do is argue *against* the total prohibition of payment for transplant organs that was put in place pretty well instantaneously when the practice came to light, and has remained, for most people involved in policy making, a fixed principle ever since. That is a totally different matter.

There is more to say about this, and I shall clarify further later, but the idea that opposition to a principle of total prohibition amounts to an advocacy of markets, or any other positive policy, is a straightforward mistake—made, I presume, by the many people who seem to think I am an advocate of markets. To be against the total prohibition of anything—abortion, recreational drugs, homosexual practices or whatever—is not in itself to commit yourself to anything at all about what should happen in the absence of total prohibition. There are indefinitely many possibilities. And in fact I make this explicit (JRR 2012, p.57):

*To argue that prohibition is unjustified is to leave wide open the question of what arrangements for regulation there should be if payment were not totally prohibited.*

And later (JRR 2012, p.103)

*The arguments...do not reach any positive conclusion about what policies and arrangements there should be about payment. The starting point of the enquiry is the absolutely minimal claim that there is a presumption against total prohibition, and the conclusion is the equally minimal one that this presumption still stands. This conclusion merely opens up rather than settles the question of what kinds of restrictions and regulations there should be—including, possibly, in some places and at some times, a total ban.*

Opposition to total prohibition is compatible with recommending unregulated

markets, or state monopoly of buying, or sales so stringently controlled that hardly anyone could meet the required conditions, or even, for that matter, allowing transactions only on alternate Tuesdays.

In fact I have no fixed views about policy at all, and for what it is worth I find the idea of the sale of organs from living vendors as horrible as does everyone else. But what I do think is that there have been from the outset deep intellectual, *and therefore moral*, confusions at the root of this issue, and that these have corrupted the debate ever since. My concern is with these confusions. You can identify mistakes without making any claims at all about what should happen if the mistakes were removed, just as a mathematician might expose (crucial) miscalculations in the plans for building a bridge without making any claims about how bridges should be built. I am engaged not in policy making—for which I am totally unqualified—but in what Locke, if he had been writing in this context, might have called sweeping away the rubbish that lies in the way of policy discussions (Locke 2001, p.13). That is far from sufficient for resolving debates about policy, but it is an absolutely necessary contribution to them if they are to be morally serious.

## 2. BURDENS OF PROOF

This mistake seems to be the root of the second, which is a global misconception of what is going on in the burden of proof argument (JRR 2012, pp. 14-17). I am not sure about the details of where this goes wrong, because I am not entirely sure what the authors think I think. But the idea seems to be that I am engaged in two—way contest between a policy of prohibition and a policy of markets, and that I illegitimately think I can settle the case in favour of markets by arbitrarily claiming that the prohibition side bears the burden of proof, which its proponents cannot meet.

Whether or not I am right in thinking this is what they think I think, it is certainly not what I say. My question is simply whether a global policy of total prohibition, almost universally put in place as soon as the issue came to light, is justified. And the burden of proof argument is essentially that this policy is on the face of it seriously at odds with values and principles normally professed by *most advocates of prohibition themselves*. It is straightforwardly in conflict with the normal liberal principle that competent people should be allowed to judge their own best interests, and make mutually beneficial exchanges that harm no one else. It is also in striking tension with our general presumption that it is an intrinsically good thing to get organs to save

lives, and that it is an intrinsically bad thing to reduce the choices available to people who are already badly off, into which category come most potential vendors.<sup>1</sup>

It was striking that when the organ selling issue first arose, these drawbacks of prohibition were not even mentioned. Nobody seemed to consider the matter of sending a would-be organ vendor back to the daughter whose life he could now not afford to save, or the would-be purchaser who would now go back to death or, if lucky, dialysis. Nobody commented on the dissonance of prohibition with our normal principles of liberty and autonomy. But to anyone who holds these values, there is a presumption—a *prima facie* case—against prohibition. This does not mean that prohibition is unjustified, but it does mean that—by the standards of anyone who holds these values, which as far as I know is everyone in the debate—it needs justification.

As I say in the book, this is “*purely* a methodological device for getting the argument into order” (JRR 2012, p.46). All it does is make clear the problem that needs to be addressed: a tension between the immediate impulse to ban organ sales and other values held by people involved in transplant debates, but which was apparently not noticed in the original rush to prohibition. It is certainly not proposed as a means for “resolving” (K&S 2019, p.37) debates about practical ethics in general (I only wish there were such a means), but just for making the structure of this particular problem clear. It does not “stack the odds” (K&S 2019, p.37) against anyone, because it amounts simply to a challenge to people who hold sets of beliefs that seem to be in tension to show that the two can be reconciled, or to give up one of them.

So the burden of proof challenge is essentially this. *If* you accept the general principle that people should be allowed to decide their own best interests, and that it is intrinsically good to save lives and increase the options for the badly off, *and* you want a general principle that curtails all these in the area of organ selling, you need a justification. And unless you are willing to give up the familiar background principles, which no one seems willing to do, the default is, *by your own standards*, that total prohibition is unjustified.

1. K&S write as though the starting point of the argument is only the second of these three: the inherent desirability of getting organs for transplant. This is because, although they mention a series of my articles in this area, the discussion in their article is entirely rooted in the book, and the book as a whole specifically deals with questions about the justifiability of obstacles placed in the way of various kinds of organ procurement. In all the earlier articles—with which K&S seem to be familiar—I mention all three of these issues; and in the earliest most of the stress is on the reduction of options of the would-be vendors. If I had anticipated that the discussion in the book would be treated as a general discussion about prohibition, rather than just as about its limiting organ procurement, I might have done it differently. However, it makes no difference to the substance of the argument.

From then on, the rest of the debate is about whether the proposed justifications work.

### 3. THE CRITICISMS

The detailed criticisms in the numbered sections of the article form its main substance.

I have nothing to say about the criticisms in the first section and its three subsections (K&S 2019, pp.41-46), since they are all directed at arguments I do not use, to conclusions I do not reach.

Criticism 2 (K&S 2019, pp.47-48) about starting presumptions, I don't follow. My only starting presumptions are the ones mentioned in the previous section. The only one mentioned in the book is the presumption in favour of getting life—saving organs (JRR 2012, p.45).

Criticisms 3 and 4, about excessively high standards of evidence (K&S 2019, pp.48-52) and failure to allow for the cumulative effect of arguments (K&S 2019, pp.52-53), will be addressed in the final section below.

It is however, worth mentioning a couple of points in the second section of criticism 1, (K&S 2019, p.42ff) about appealing to different goals, because these make misleading or false claims about what I say.

First, in asserting that the supply of transplantable organs can be increased in any number of ways, and listing several (K&S 2019, p.43ff), the text seems to imply that in my supposed enthusiasm for markets I somehow overlook these much nicer possibilities for organ procurement.

But I don't overlook them; in fact I specifically mention them (JRR 2012, pp.91-94). It is quite common for people arguing in defence of prohibition to say "there are better ways of getting organs!" as if this provided a justification, and I do discuss this claim. It is true that I don't go into the details of what these better ways might be, but this is not because I have any doubt that they exist. It is because, once again, I am discussing not the general question of what the best policies for organ procurement might be, but the specific claim that the possibility of their existence provides a justification for prohibition. From this point of view the details of better ways are irrelevant because, I argue, the line of argument does not work anyway. If these ways of getting organs could produce enough of them, there would be no point in prohibition because it would have nothing to do: nobody would want to buy, and nobody

would be able to sell. And conversely, if they did not produce enough, prohibition would still be preventing potential buyers and sellers from doing something that might benefit both.<sup>2</sup> The implication that I have overlooked these things again comes from the idea that the overall topic is how best to get organs, and that I am advocating markets in organs.

Then, very important, is the claim that I defend minimally regulated markets (K&S 2019, p.44). I do no such thing. There is here a reference to p146 of the book, and (looking at it again) I can see how a quick glance, from the standpoint of someone who already presumed that I was engaged in a defence of markets, might suggest that I was objecting to regulations as such. But this interpretation is possible only if the surrounding context is ignored. I do criticize certain proposals that have been put forward for organ markets, and I do claim that the particular restrictions some of them propose are not justified. But the context makes it clear that the criticism is not of restrictions as such; it is that these particular restrictions have not been justified. Criticizing the justifications of particular forms of restricted markets is very different from criticizing restrictions as such.

The section in which this appears is the final section of the chapter “Methodological Morals”, which is crucial for understanding the way the line of argument works as a whole. But apart from this totally mistaken, or at least seriously misleading, claim about what I say about restrictions, the article shows no indication at all of awareness that this chapter even exists. It is perhaps not surprising that it also shows no recognition of what my arguments and conclusions actually are.

I do say at the beginning of this chapter that anyone whose overriding concern is to get on with the practicalities of the problems can (temporarily) omit it and move on to the next. Perhaps I should have said explicitly that this exemption did not apply to anyone who was specifically setting out to discuss the methodology.

#### 4. OVERVIEW

I have never had any interest in promoting organ sales. My interest in this subject has from the outset been the extraordinary state of public debate, and the potential for harm that lies in all the mistakes of reasoning that are habitually made. My purpose

2. A similar sounding, but quite different, argument is that allowing organ sales might in practice reduce procurement by these methods (JRR 2012, p.94ff). These tend to be conflated. The difference is discussed in the book.

in the various iterations of this subject has been not to keep repeating the same point, but to use the persisting interest in it to try to clarify various aspects of methodology of argument in practical ethics. This is a difficult and slow process—or at least I find it so—and it is still ongoing. In the book I made some advances on earlier attempts, especially in the chapter just mentioned. Here I will try to pull together various elements of the book more tightly than I managed there. I shall also explain what my practical conclusions really are—nothing to do with the establishment of markets in organs—and outline how the arguments to those conclusions are supposed to work. In doing so I shall reply to criticisms 3 and 4 in the article.

To do this I will make use of two distinctions made in the book. K&S mention these, but they seem to regard them as the same (K&S 2019, p.39ff, including footnote), and do not discuss the significance of either of them. Perhaps I can make things clearer here.

The distinctions are between:

Arguments in defence of prohibition that appeal to principle, and ones that depend on practicalities (principle vs. practicality defences)

Policies reached as the conclusions of arguments, and principles introduced as constraints at the beginning (constraints vs. policy debates.)

These need explaining. Take the second first.

When we debate policies in practical contexts, there are usually constraints we take for granted from the outset: ranges of possibilities that we refuse even to consider. Debates about policies for organ procurement have always taken place against established principles that were in place long before transplantation was possible: no murder, no kidnapping, a requirement of valid consent (JRR 2012, pp.32-35). But there could in principle be a quite different debate, about whether we should change these background rules. You might argue that since the organs from one person could save the lives of many, surgeons should be allowed to go out and kidnap people when they needed spare parts, we should modify existing rights to allow for it; or, perhaps, that criminals should be deprived of these rights, as has been said to happen in China (JRR 2012, pp.23-25). At the moment nobody seems to suggest that we should change our current background rights, but we can recognize it as a possible subject of debate, *distinct* from current policy debates that take place against the background of those

rights. And if we did change the background rights, subsequent policy debates would be different. This means that the question of what the background framework should be is logically prior to questions of policy within a framework. The two kinds of question are distinct.

What I am arguing is that the organ selling debate must be recognized as falling into two parts in the same way. First, there is the question of whether there should be a *principle* of prohibition, constraining all subsequent debates about organ procurement in practice. If there is a constraining principle, that settles prohibition as a practical conclusion. But if it is decided that there should be no such overriding, constraining principle, that leaves detailed questions of policy wide open. The question of whether prohibition should be established in particular circumstances would remain open, to be determined by whatever other moral and practical considerations did frame the debate. It might still be decided at particular times and in particular places that there should be a policy of prohibition, but not because it was entailed by a general principle. Both these debates are about prohibition, but they are quite different, and it is essential to distinguish them.<sup>3</sup>

Now the prohibition of organ selling happened as soon as the practice came to light, initially without argument or discussion, as if it should obviously be a constraint on future debates about organ procurement in the way the prohibition of murder and kidnapping are. And so it has remained ever since. The policies of the World Health Organization, and the Declaration of Istanbul (JRR 2012, p.83) are striking illustrations of this. Nearly all practical debates about organ procurement policies still take place against the background of prohibition as an established constraint. So the fundamental question about prohibition is not about details of practical policies, but about whether it is legitimate as a fixed starting position for all detailed debates about procurement policy.

This is where the burden of proof argument comes. Most people who immediately agreed on the principle of prohibition also normally accept our values of autonomy, life—saving and expanding options; but prohibition is in tension with all three, and so calls for justification. And indeed, the point is implicitly conceded by the fact that since the problem was raised in this form, there has been a never—ending stream of proposed justifications. The next stage of the debate is to assess these.

3. In the book (141) I argue that it is a mistake to consider the second kind of question as being about prohibition at all. That is a detail, but important.



And here is the relevance of distinction 1, above, between attempted justifications depending on principle and ones appealing to practice. They are usually not distinguished in the debate, but the difference is important, as will appear.

The first justifications offered for total prohibition were usually ones that appealed to existing principles—ones that are normally, already, accepted as constraints on what can be done. For instance, many took the form of claims that organ vendors could not satisfy the requirement for valid consent. If that had been true, it would have followed that organ selling could be ruled out directly, on the grounds that it could not comply with existing rules for valid consent, in spite of the *prima facie* case against prohibition. Prohibition would be directly entailed by the consent requirement. Many other proposed justifications have worked in similar ways, as appeals to existing standards.

There is obviously no space, here, to go into the details. But in sum, my claim about arguments of this kind (pp 58-94) is that they all fail on grounds of ordinary rationality. The conclusions do not follow from the premises, or the premises are in conflict with what their proponents would accept in other circumstances, or there is no coherent principle at all (105).

Now, to go back to K&S, these are presumably the arguments that their criticism 4 complains that I take separately, without considering their cumulative effect. And indeed I do, but this is because arguments of this kind *must* be discussed separately, simply because they are *arguments*: claims that the principle of prohibition follows directly from some already accepted principle. Each of these arguments is offered individually as a justification for prohibition, and if the argument fails to support the conclusion, it is simply useless. It is not like weak evidence, or small considerations in favour, which may indeed be used cumulatively. Arguments of this kind cannot be used in that way, because if they fail they have no weight at all. The idea that failed arguments have some value if taken together is what Antony Flew called the “ten leaky buckets fallacy” (Flew 1966, pp.62-63). If a bucket won’t hold water, you are not helped by having ten of them.

This is one reason why it is important to recognize the distinction between the arguments for prohibition depending on principle and the ones depending on practicalities. The second kind of argument, claiming that prohibition is best all things considered, does indeed depend on cumulative evidence about how different policies will turn out. And here, I presume, is where K&S would advance their claim that I demand unreasonably high standards of evidence: the ones I describe on pp94-101.

But here again is a point where it is essential to bear in mind the distinction just described between the two possible kinds of debate: about prohibition as a starting constraint, and about prohibition as a particular policy in the absence of such a constraint.

Suppose that there were no general principle against payment and you were considering particular policies for regulating payment for organs, say in a particular country at a particular time. There might be dozens of proposals on the table, including one of outright prohibition. In such a case of course cumulative evidence in favour of different possibilities would be relevant, and the same standards of evidence and argument would apply to them all. This is also a context in which it would be entirely appropriate to consider harms that *might* happen, and how likely they were to happen: the kinds of consideration listed on K&S 2019, p.42ff. These are the sorts of practical issue raised throughout the literature of opposition to prohibition—the kinds of issue I think I am being accused of disregarding—and of course they would all be important to consider in that situation.

But we are not in that situation, and these practical problems are not under current discussion. The question here is that of whether prohibition should be in place as a *matter of constraining principle*, as it is now, ruling out policies involving payment before detailed procurement policy discussions even begin. It is in this context that I claim that if evidence of this cumulative kind is used, an extremely high standard of proof should certainly should be required. A line of argument based on claims about a preponderance of harms over good would need to show that a constraining principle of no payment would do better than any possible arrangement that did allow for payment. Even if that were possible even in principle (which I doubt) it would certainly need overwhelmingly strong evidence to overcome the presumptions against prohibition.

So that is my answer to the challenge, in section 3, that I demand unreasonably high standards of evidence. If I had been defending a particular policy, such as markets, against others, in a situation with no background constraint of prohibition, those evidence requirements would indeed be far too high. But I am discussing the logically prior question of whether there should be a prohibition constraint at all, and that would certainly require exceedingly high standards of evidence. I find it incred-

ible that anyone recognizing the nature of the challenge could regard us as having anything like adequate evidence yet.<sup>4</sup>

Even if someone wants to dispute that, however, another thing is certain, which is that we certainly could have had no such evidence when prohibition was first introduced. If any of the arguments of *principle* had worked, deriving prohibition from existing principles such as the need for consent, that might have justified the immediacy of the prohibition response. We might have seen directly that there was a conflict between allowing organ selling and already entrenched principles. But these other attempts at justification of prohibition as a principle, depending on empirical evidence, could not possibly have provided a justification at the time. This means that the shift from arguments of principle to all—things—considered arguments amounts to an implicit admission that there was no justification when prohibition was originally, instantaneously, adopted.

And this leads to my second practical conclusion, which I will introduce here, as in the book, with a favourite quotation from Mill, anticipating modern moral psychology by 150 years:

*So long as opinion is strongly rooted in the feelings, it gains rather than loses in stability by having a preponderating weight of argument against it. For if it were accepted as a result of argument, the refutation of the argument might shake the solidity of the conviction; but when it rests solely on feeling, the worse it fares in argumentative contest, the more persuaded adherents are that their feeling must have some deeper ground, which the arguments do not reach; and while the feeling remains, it is always throwing up fresh intrenchments of argument to repair any breach made in the old (see JRR 2012, p.108).*

Everything about the organ selling debate exemplifies this. A strong feeling against organ selling leads to a determination to keep prohibition by one means or another, and when one argument fails another is immediately offered. The determi-

4. I see now that on pp 99-100 I make a concession to the possibility that arguments of a cumulative kind might just work. I think that was wrong. This is an occupational hazard of active work in the disentangling of arguments: I was still struggling with the details of the distinction between arguments within a particular framework and arguments about the framework when I had to hand the text over to the publisher. If I had worked on it a bit longer, and had time to go through the earlier chapter again, I would have seen that those arguments could not justify a principle of prohibition, and would be relevant to questions only of policy making that did not take place against the background of such a principle.

nation to find some way to justify prohibition has continued unabated since the issue first arose.

That being the case, there is the interesting question of what exactly the motivating feeling might be, and I speculate about it in the book. I suspect that it is something in the broad area of disgust, which has been endlessly rationalized in terms of the interests of the interests of the very people—the sick and the badly off—whose interests it potentially overrides. But whatever it is, it is objectively clear that it has systematically corrupted the arguments so far, and unless it is recognized for what it is, it will go on corrupting reasoning about policies – even if the current principled objections to payment for organs are theoretically withdrawn.

## 5. CONCLUSION

Of course K&S are right to say that we should be trying to find the best policies all things considered. But my contention is that the deep opposition to allowing paid donation systematically obstructs any serious attempt to do this, in two ways.

First, the general prohibition of payment for organ donation rules out of consideration, from the start, indefinitely many possible policies that might be best all things considered. Since prohibition as a principle is unjustified, as long as it remains it positively obstructs any genuine effort to find out what really would be best. It should be abandoned, and we should reopen the whole question from the point of view that should have been taken from the start: recognizing that prohibition prevents competent adults from doing what seems to them to be in their best interests, and concentrating instead on trying to work out how best to prevent the harms that obviously might arise as people try to take advantage of new possibilities open to them, while allowing as far as possible for the good.

Second, even if this were done, the evidence of the arguments so far, showing a determined resistance to allowing payment, means that the problem would still persist in a covert way. Questions about the all—things—considered merits of policies are immensely complicated and full of factual uncertainties, and hardly ever capable of definitive answers. In arguments of this kind people with strong intuitions about some subject will of course pick out elements of evidence that support what they already believe, and still fail to see what they might otherwise recognize as better by their own considered standards. There is probably no way of preventing this com-

pletely, but at least a full awareness of the problem would give us the best possible chance.

The organ selling context is of course not the only one in which issues like this arise, and where deep preconceptions hide flaws in arguments that would never be made in neutral contexts. It happens in other parts of the organ procurement debate, as well as indefinitely many other kinds of context. It is essential to look out for such mistakes. As I say on the cover of the book, if you die from mistakes in moral reasoning, you are as dead as if you die from mistakes in medicine.

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