

Black markets, transplant kidneys and interpersonal coercion

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One of the most common arguments against legalising markets in human kidneys is that this would result in the widespread misuse that is present in the black market becoming more prevalent. In particular, it is argued that if such markets were to be legalised, this would lead to an increase in the number of people being coerced into selling their kidneys. Moreover, such coercion would occur even if markets in kidneys were regulated, for those subject to such coercion would not be able to avail themselves of the legal protections that regulation would afford them. Despite the initial plausibility of this argument, there are three reasons to reject it. Firstly, the advantages of legalising markets in human kidneys would probably outweigh its possible disadvantages. Secondly, if it is believed that no such coercion can ever be tolerated, markets in only those human kidneys that fail to do away with coercion should be condemned. Finally, if coercion is genuinely opposed, then legalising kidney markets should be supported rather than opposed, for more people would be coerced (ie, into not selling) were such markets to be prohibited.

vendor would lack adequate access to legal representation and so the protections that the proponents of kidney markets believe would be ensured by regulatory control would be illusory.

If it is true that legalising markets in human kidneys would in practice increase the number of people who suffer from the abuses inherent in the black market, then this would be a powerful objection to legalising them—even if in theory legalising this market is required owing to consideration for autonomy or concern for human well-being. Objection to legalisation has gained support because of the documented abuses of the black market in human kidneys and also because the typical vendor is desperately poor and hence lacks easy access to legal representation. Yet, despite the widespread acceptance of this objection to legalisation, I believe it is seriously flawed—and that if we are concerned about reducing the abuses of the black market for human kidneys, we should favour the legalisation of kidney markets, not their continued prohibition.

REGULATORY CONTROL AND INTERPERSONAL COERCION

The abuses that occur in the black market for human kidneys are both widespread and well documented. Vendors regularly receive less for their kidneys than they agree to sell them for. They fail to receive the postoperative care that they were promised, and are often deceived about the medical risks that they run in selling a kidney. We have also found well-documented cases of people being coerced into selling their kidneys by their family members. The end-use purchasers of black market kidneys have received diseased organs, or kidneys that were not suitable, and have suffered as a result of their bodies rejecting them.

Pro-market argument from regulatory control

The proponents of legalisation argue that such abuses are a result of the illegal status of markets in human kidneys. Hippen,⁹ for example, argues that “the absence of any appeal to an enforceable rule of law that binds individuals to contracts means that defrauding vendors [in the black market] is routine”. Similarly, de Castro¹⁰ holds that “Being underground, the [black] market is not subjected to institutional regulation that could ensure proper pretransplant and post-transplant care for the donors ...”. The defrauding of kidney vendors would thus be greatly reduced, if not eliminated, if markets in human kidneys were to be legalised, and the contracts

It is well known that a thriving international black market in human kidneys exists and also that the vendors in such a market suffer from a variety of abuses, ranging from fraud to outright coercion.¹ Yet at the same time that the horrors of the black market in human kidneys are becoming widely recognised, there is growing support for markets in kidneys to be legalised.^{2–6} Believing that trade in human kidneys cannot be eliminated, some people support its legalisation on the grounds that if it is legalised the abuses that now occur in the black market can be mitigated through regulatory control.⁷ Others adopt a more principled approach, arguing that legalising markets in human kidneys is required to respect the moral values of personal autonomy and human well-being.⁸ The proponents of legalisation hold that once such markets are legal, the ability of their participants to seek legal redress against fraud and coercion would suffice to protect them from abuse.

Yet, many who oppose such legalisation claim that it is naive to believe that regulated markets in human kidneys would mitigate the abuses of the black market. Rather than mitigating the abuses of the black market, such people claim, legalising markets in human kidneys will increase them. This is because the typical kidney

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entered into within them legally enforceable.¹¹ This would mean that people who received a defective kidney would have legal redress against those from whom they purchased it. Legalising a market in human kidneys would thus seem to protect those who would participate in it as vendors and as end-use purchasers.

Responding to the pro-market argument from regulatory control

Despite the elegance and simplicity of this pro-market argument, many who oppose legalising a market in human kidneys find it unpersuasive, for they believe that it fails to represent how a kidney market would operate in practice. As Scheper-Hughes¹² writes

Armchair bioethicists can ignore the real world and its messy social, economic, cultural, and psychological realities. They only need conjure up a hypothetical world where conditions can be controlled or manipulated so as to favour the logic of a market approach to increase the “supply” of human organs for transplantation.

Such critics reason that the proponents of the pro-market argument assume that those who participate in a legal kidney market would have access to legal recourse if they were defrauded or coerced into selling their kidneys. They claim, however, that in reality this will probably not happen. The people who sell their kidneys will typically be the desperate poor, “nobodies”,¹³ a “discredited collection of anonymous suppliers of spare parts”,¹⁴ who are “socially invisible”,¹⁵ and “naive”,¹⁶ and whose voices have been “silenced”.¹⁷ Although not every kidney vendor is disenfranchised in this way, there is a subset of vendors who clearly do suffer such a fate: those who are so under the control of their family members that they could be coerced by them into selling their kidney against their will.¹

People who are coerced into selling their kidneys are those who are unable to protect their own interests through legal means. Given this, legalising a market in human kidneys would worsen the situation for such people, through making greater numbers of them vulnerable to being coerced into selling their kidneys. In a legal market for kidneys, these people’s family members would have easier access to kidney brokers, and this would encourage them to coerce those in their power into selling. The anti-market response to the pro-market argument about the benefits of regulation is as follows:

- There are disenfranchised people who are subject to coercion by others.
- These people would not be able to pursue legal means to protect their interests.
- Legalising a market in human kidneys would encourage the dominators of such disenfranchised people to coerce them into selling their kidneys.
- Hence (from premises 1–3), even if a legal market for human kidneys were to be regulated, the numbers of people who would be coerced into selling their kidneys would increase.
- Therefore (from premise 4), if we are concerned about reducing the number of people coerced into selling their kidneys, we should oppose the legalisation of markets in human kidneys.

ASSESSING THE ANTI-MARKET ARGUMENT FROM INTERPERSONAL COERCION

An initial pro-market response

The first response to this anti-market argument is to note that it may be levelled against markets in any goods, on the

grounds that disenfranchised people may be coerced into selling them.¹⁸ A proponent of the anti-market argument, however, has a ready reply: “Being coerced to sell some possessions such as old shoes, or some books, or some corn from a cornfield is not always, if ever, as seriously harmful ... as being coerced into selling one of one’s own bodily organs”.¹⁹ Thus, as being coerced into selling a kidney would usually (if not always) adversely affect sellers more seriously than if they were coerced into selling other goods, we are justified in treating markets in kidneys differently from markets for other goods (such as shoes or books or corn). In offering this reply the anti-marketeer accepts that possibly, for some people, being coerced into selling “old shoes, or some books, or some corn from a cornfield” would be worse than their being coerced into selling their kidneys. Perhaps, for example, the old book is the Torah that their father kept with him through the holocaust, or the old shoes are those that their ancestor Van Gogh painted. Yet, even though this is so, the anti-marketeers can bolster their arguments by noting that the numbers of people being coerced into selling such items (ie, items whose owners consider them to be more valuable than their kidneys) would be small, whereas the number of people who would be coerced into selling their kidneys would be large if markets for them were legalised. The anti-marketeer thus has two replies to this initial response:

- that coercing a person into selling a kidney is usually worse than coercing him or her into selling some other good and
- that the prevalence of coercion in a kidney market would be much greater than that which may occur in other markets.

Given these differences between markets, it seems that the argument from interpersonal coercion can be levelled against markets in kidneys without committing its proponents to also advocating the prohibition of markets in other goods.

Assessing this consequentialist defence of the argument from interpersonal coercion

The replies that anti-marketeers can offer to defend their argument are explicitly consequentialist in character. The first is based on noting that coercing people into selling a kidney would usually be worse than coercing them into selling some other good, and that this justifies treating kidney markets differently from other markets. The second is based on holding that markets in certain goods are acceptable even if they permit people to be coerced into selling things that are extremely valuable to them (eg, their heirlooms), provided that such coercion would rarely occur, and so its ill effects would be outweighed by the advantages of allowing markets in the goods in question. These anti-market replies can thus be met in two ways. One could show that the numbers of disenfranchised people who would be coerced into selling their kidneys in a legal market would be low, and so the harm that they would suffer were such a market to be instituted would be akin to that suffered by the (few) people who are coerced into selling their heirlooms. (Response A) Thus, as markets in heirloom goods are morally legitimate, so are markets in kidneys. Alternatively, we may show that even if considerable number of kidney vendors were coerced into selling, the harm that they would be subject to would be outweighed by the benefits that a kidney market would confer on others. (Response B)

Response A seems to be readily available for the proponent of current markets in human kidneys. In the most extensive study of the Indian black market in kidneys that has been carried out to date, Goyal *et al*¹ found that of the 305 kidney sellers they interviewed only 2 had been coerced into selling

their kidneys. This seems to show that the number of people who may be subjected to interpersonal coercion to sell a kidney is in acceptable limits. The anti-marketeters, however, have three responses to this.

Firstly, they may contest the claim that having about 0.66% of kidney vendors being coerced into selling represents an acceptable level of coercion.

Secondly, they may note that the number of people who would be coerced into selling their kidneys still seems to be far higher than the number of those who are likely to be coerced into selling (eg) their heirlooms. Thus, they may claim, the analogy between allowing markets for such possessions (which seems to be morally acceptable) and markets for kidneys is weakened—and so is the pro-market response.

Finally, the anti-marketeter could note that the number of people who reported to Goyal *et al.*,¹ that they were coerced into selling their kidneys, is probably less than the number of those who were actually coerced, for the truly disenfranchised would be likely to conceal this information for fear of displeasing their coercers. Thus, the anti-marketeter may conclude, the analogy offered in response to the anti-market argument from interpersonal coercion (ie, between selling kidneys and selling heirlooms) is probably weaker than it seems.

Response B is stronger. If we take the anti-market consequentialist replies seriously, then we will accept that even if some people are coerced into selling their kidneys a legal market in these organs would be morally acceptable if its benefits outweigh this cost. And it seems undeniable that this would be so. People who sell their kidneys without being coerced into doing so would benefit in that they would secure something that they valued more than their kidneys (ie, cash). The end-users of these kidneys would also benefit, by exchanging their money for (to them) a more valuable kidney. Thus, given that the number of people who would sell their kidneys without being coerced into doing so would (from the data supplied by Goyal *et al.*) probably be much greater than those who would be coerced into doing so, the benefits of a market would greatly outweigh its costs. The consequentialist replies that may be offered by the anti-marketeter should thus be rejected.

Assessing the deontological defence of the argument from interpersonal coercion

Although the consequentialist objections that the anti-marketeter may offer against markets in human kidneys can be met, we may still object to such markets on the deontological grounds that coercion is morally wrong. Therefore, if such markets are likely to enable coercion to occur, then this shows that they should remain illegal. Two initial points need to be made about this deontological version of the anti-market argument from interpersonal coercion. Firstly, the proponents of this argument are not attempting merely to show that certain cases (ie, those that occur as a result of coercion) of kidney sales are morally wrong. (This could be accepted by all parties to the debate.) Rather, they are attempting to support the much stronger claim that the possibility of such coercion would justify the prohibition of all such sales on moral grounds. Secondly, this argument is not a blanket argument against all markets in human kidneys. Instead, it is only an argument against those markets that are not structured to preclude people being coerced by others into selling their kidneys. This deontological argument can thus be met by ensuring that legal markets in human kidneys are structured so that those who participate in them as vendors do so willingly. To achieve this, two conditions should be met. Firstly, the pool of potential vendors should be restricted to people who can

show that they are not disenfranchised. It could, for example, be required that for people to sell a kidney they must have a certain level of education, have a certain income and have access to legal counsel.²⁰ Secondly, it can also be required that a potential kidney seller be demonstrably eager to sell, rather than merely fail to be reluctant to sell, on the grounds that such an attitude would be harder to falsify. To ensure that the potential vendors meet these conditions, their enfranchisement should be assessed by independent third parties who would issue licenses to sell their kidneys to people they judged to be free from coercion.^{21–22} The participation of such licensing parties would be required to allay fears that corrupt officials would be misclassifying disenfranchised people.²³

Yet, any such system of licensing kidney vendors can be criticised from both the pro-market and the anti-market positions. Anti-marketeters would note that no such system would be flawless, and that some disenfranchised people would still be coerced into selling their kidneys. By contrast, pro-marketeters would note that such licensing would result in fewer people who were willing to sell their kidneys being allowed to do so and fewer people who needed a kidney being able to secure one. Taken together, these observations provide the basis for a further response to the earlier deontological argument. In prohibiting people who, without coercion, were willing to sell their kidneys from doing so, the licensing bodies outlined would themselves be engaging in coercion. They would be coercing people into not selling by threatening them with punishment if they sold their kidneys without the requisite license. One who is morally concerned about coercion, then, should consider not only that some disenfranchised people would be coerced into selling their kidneys, but also that prohibiting markets in human kidneys, or restricting who is allowed to participate in them as vendors, is also coercive.²⁴ People who are concerned about coercion should thus assess the number of people who are likely to be coerced when current markets in human kidneys are prohibited (or regulated) against the number of those people who are likely to be coerced when such markets are legalised (or unregulated). Given the available evidence, such an assessment is likely to favour the legalisation, rather than the prohibition, of current markets in human kidneys. As we noted above, very few people are likely to be coerced into selling their kidneys. The evidence from Iran, however, shows that there are large number of people who are willing to sell their kidneys: More than 8400 kidneys were bought from living people who were unrelated to their organs' recipients between 1988 and 2000.²⁵ Thus, if a market in human kidneys is legalised, few people would be coerced into selling; however, if the market is prohibited, a greater number of people would be coerced into not selling. Hence, if we are concerned about the moral badness of coercion, then we should favour legalising markets in human kidneys, rather than prohibiting them.

CONCLUSION

Three reasons for rejecting the widely accepted anti-market argument from interpersonal coercion are as follows:

- The advantages of legalising markets in human kidneys would probably outweigh their disadvantages.
- If we believe coercion to be a moral wrong, we should not condemn all markets in human kidneys, but only those that fail to eliminate coercion.
- If we are morally concerned about coercion, then we should support, rather than oppose, legalisation of kidney markets—even if such markets do not eliminate coercion.

This is because more people would be coerced (ie, into not selling) if such markets were to be prohibited. Of course,

rejecting this anti-market argument does not show that markets in human kidneys should be legalised. But it does show that one of the main objections to them should not be accepted.

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