

Slate

DIALOGUES

Organ Peddling

By Richard A. Epstein and Atul Gawande

Updated Thursday, July 2, 1998, at 3:30 AM ET

From: Richard A. Epstein

To: Atul Gawande

Posted Thursday, June 4, 1998, at 3:30 AM ET



Current U.S. policy allows the gift but not the sale of organs.

In *Mortal Peril*, and more recently in the *Wall Street Journal*, I took up a cause shared by a few brave souls to reverse that policy and to allow the sale of organs, live or cadaveric, in a legal market. The motivation for that position is simple enough: We have shortages of usable organs today, and people die as a consequence. The hope (and it is not a certainty) is that a price inducement can increase the supply of organs and counteract the shortage, as it does in other markets. Better that we have 200 people alive with one kidney each than 100 people alive with two kidneys. Better that cadaveric organs be used than be buried with the decedent. Markets could make either, or both, these things happen. Atul, you rightly note in your *Slate* article "[Organ Meat](#)" that the proposal is not part of some vast (right-wing?) conspiracy to incapacitate the poor and unwitting. My thanks for your fair-minded treatment of the issue. But you have doubts, which turn on two themes--confusion and exploitation. You treat these as reasons for keeping the ban. You're right to signal the difficulties. You're wrong to treat them as trumps. Let's take them in order.

The issue of confusion arises whenever patients seek advice about medical treatments. The array of choices, the probabilities of success with each, and the downsides of failed treatment all offer an ideal laboratory for decision theory. And we know, as you say, that patients often make a mess of it. But we don't ban their choices because they are sometimes erroneous. Rather, we try to supply more information--and more sources of information--to counter the risks. A legal doctrine of informed consent is a tiny part of the picture. The larger element is a set of support services ("Look it up on the Web" is the first response when people learn of serious illness within their families) that helps overcome the difficulties. If it is possible to do this kind of research with standard illnesses, it should be possible to do it with organ transplants. It is difficult to generate information about illegal transactions; it is far easier to generate good information about legal transactions. And if the difficulties with live donor transactions are too formidable, then the cadaveric market could still operate.

The basic mistake in your worldview is to treat difficulties as insuperable barriers when they are only formidable challenges to rational behavior. Exploitation fares no better as a reason for closing down markets. The cases of proposed organ transplants are all odd. A 55- or 63-year-old donor is not the prime candidate for this business. Nor is the weak, poor, and infirm individual who does not have healthy organs to give. The targeted population for live donations will have to be people of sober and frugal habits with some short-term need of their own: perhaps funds for an operation on their own child. The targeted population for cadaveric transfers could be just about anyone, for just about any reason. The exploitation fear is not credible in the second market; and it can be countered in the first. Once transactions are legal, markets cease to be thin. As the number of choices increases, information becomes more available, and the likelihood of real exploitation is effectively curtailed. Brokers and other middlemen can add stability to the market. And there is now unimpeded access to the Web. It is always a mistake to assume that legal markets will be just a magnification of illegal ones. Their entire internal structure changes as well, and for the better.

The time has come to put aside ethical squeamishness. There are ways to counteract these practical difficulties. But we have to try in order to have any chance of success.

From: Atul Gawande
To: Richard A. Epstein
Posted Wednesday, June 10, 1998, at 3:30 AM ET

As you might expect from a surgical resident like me, squeamishness--ethical or otherwise--has nothing to do with my opposition to your proposal for a legal market for the sale of organs. Far from it being a "brave" cause hindered only by a couple of "practical difficulties," I think it is fundamentally flawed. Indeed, it lays bare serious inadequacies in a no-holds-barred libertarian worldview.

Your e-mail briefly mentions the issue of selling organs from cadavers. That raises many altogether different problems (like who owns them and who decides and how you get this kind of market to actually function in the real world) that I won't take up here. The idea of living people selling off some of their organs has enough troubles for one conversation.

You start your rebuttal by saying we should permit people to sell their organs because it could save lives. But we should be clear that, even if lives would be saved, such sales would be horrifying--and should be kept illegal--if irrational thinking or exploitation are likely driving sellers' decisions. If people signing a sales contract for their kidney are making a big, dumb mistake or being unjustly taken advantage of, then it would not be "better that we have 200 people alive with one kidney each than 100 people alive with two kidneys." My argument is that, given how unlikely it is that hawking one's organs will be in one's self-interest, mistakes and exploitation will likely rule the day. Given how serious and irrevocable the decision is, organ-selling should remain banned.

What person could possibly have reason to accept the substantial health risks and disfigurement of selling their organs? You dismiss the two people in my article who took out ads offering to sell a kidney. One wanted to buy a boat. The other needed an unaffordable operation. They were "odd" examples, you said, for they were oldish (although a transplant surgeon would not necessarily think so) and perhaps infirm. Instead you suggest a good example is a young family man who desperately needs funds for an operation on his child. But he's a reason for enacting universal health insurance, not for dropping the ban on organ-selling. Your chosen example is a classic case of exploiting a desperate situation, like charging a man dying of thirst \$1,000 for a glass of water. If our wealthy society has many people in such a state of deprivation that it would be rational for them to sell their organs, society is what needs to be fixed.

As dubious as I am, however, let's suppose that we could somehow screen exploitation out. There would still be some people left trying to sell their organs. Perhaps a few have lives that would be so enriched by the payment they get that the risks are worthwhile. But many, like a lot of gamblers, will be enticed to do it by a weakness for money or a mistaken estimate of the risks involved. Indeed, given what we know about the rationality of people, it is a safe bet that organ markets would be dominated by folks with faulty reasons for selling their organs.

Professor Epstein, you approach this issue and others in your book with a presumption that people nearly always act rationally, and then you conclude that people should be allowed to engage in virtually any transaction. But everything that I've seen in my modest experience watching how patients actually make vital decisions about their lives--like whether to undergo a risky surgery or not--indicates that decision-making is usually far from rational. That's just the way people are.

You avoid grappling with my argument by saying the problem is merely "confusion," which can be fixed with your prescription for more information, but it's not. Our reasoning process has fundamental flaws. For three decades, neuropsychology research has shown that our decisions are heavily influenced by irrelevant factors--such as the order in which options are laid out, the way they are framed, and who presents them. The brain is particularly dreadful at weighing probabilities and risks. We do not carry around statistical programs in our heads. Instead, we deal with probabilities using mental shortcuts that often fail us. Anecdotes are more powerful than data. Immediate gains and losses loom larger than distant ones, regardless of size. In my essay, I cite still other examples.

The upshot is that, no matter what is done, humans will reliably and frequently make irrational choices. That is no less the case when weighing the losses of having an eye or kidney removed against the gain of a bunch of cash. Where a decision is this open to exploitation and irrational thinking, has consequences this serious and irrevocable, and is so unlikely to be in a person's self-interest, we ban it.

It is no different than prohibiting, as we do, people from donating three-quarters of their blood at one sitting or entering into a heavyweight boxing match when they are unfit.

I wonder if you recognize these concerns to some extent. You write in your book that you agree with laws preventing living people from donating their heart or enslaving themselves. Why? After all, it's conceivable that people may rationally wish to do such things. A parent, for example, may rationally wish to give up his or her heart and life to a child. Nonetheless, I stick with the ban because of the large likelihood that exploitation or a nonrational factor is driving a decision of such terrible consequences. Why do you?

From: Richard A. Epstein

To: Atul Gawande

Posted Tuesday, June 16, 1998, at 3:30 AM ET

Many thanks, Atul, for your last letter, which forces the debate forward in a constructive fashion. But once again I think you move too quickly to the themes of irrationality and exploitation and spend too little time working through the particulars of this situation.

First, I am not impressed with the global attack that claims to find serious inadequacies in a libertarian worldview. The point just cuts too deeply. The broad arguments that you make on cognitive dissonance, the inability to make probability calculations, and the tyranny of anecdotes would shut down every employment and financial market in the entire world. And what it misses is how organized markets cope with these problems. One solution is to have only skilled individuals play in certain games, which is why I do not trade futures for a living. That approach won't help with organ donations, which are inevitably a personal decision. But another approach--using informed intermediaries as agents--could eliminate a lot of confusion and ignorance on these matters. And those people cannot operate in an environment in which the basic transactions are branded as illegal. So the current law does a good deal to block the conditions under which sensible voluntary transactions take place. Remove the ban and the entire structure of the market changes.

More concretely, Atul, we'll put aside the question of cadaveric organs. There is a real question of who owns those organs after death, and it is just that question that has thwarted the emergence of a strong market in voluntary donations. A single family member who protests can veto the operation, and the more people who take an interest in the case the more difficult it is to secure unanimous consent. So here the difficulty you point to is as important for ordinary donations (which I would, of course, encourage) as it is for sale transactions.

So it is back to live donations, and here again we have to ask a similar question: Why is it that we should allow and encourage voluntary donations but not allow voluntary sale transactions? The truth of the matter is that I am often horrified by donations: They have the same physical properties as sales--individuals are cut up and mutilated in order to harvest their organs. In some cases there are cognitive barriers against the correct judgments, there is often an insufficient appreciation of the relevant risks, and in many cases there could be sustained forms of family pressures that go unrecorded within the legal system, and for which a cash payment (or purchase of an insurance policy) could afford some protection. The puzzle for you, Atul, is to explain why you allow gifts of organs, where the benefits flow in one direction, but want to ban the sale of organs, where the gains are divided between the two parties. Your answer is, I think, sophisticated, but incorrect. Start with the example of the \$1,000 glass of water. That is a classic case of sales under condition of necessity. But necessity here does not mean that you need water to live. That is true all the time. Rather, necessity means that there is only one supplier of water, and he holds out for a very high price. Even here we do not require that the water be given for free, but only that the price charged be related to its cost, not to its holdout potential. This is a very nice theoretical problem that underlies most of our concerns with common carriers, regulated industries, and natural monopolies. But it's irrelevant here. Here there is no single seller or single buyer. This market may have difficulties, but they are not the structural difficulty of having only one source of supply. I think that your argument is more relevant when you ask about the question of exploitation. Here you note correctly that we evaluate mutual gains from transactions by looking both to our background understandings of human practices and to the particulars of the individual case. In *Mortal Peril* I used

just that argument to explain why we should maintain the traditional prohibition against murder but think about the legalization of physician-assisted suicide and voluntary euthanasia. In the murder case, our background probabilities are so powerful that we would not believe the individual evidence of consent, especially when the decedent is not there to give an account of his or her actions. But in the terminal illness case, the background probabilities are no longer so heavily skewed in one direction, so we have to take into account the possibility that hastened death is the preferred alternative of the individual patient. At this point, we cannot rely on broad condemnations of exploitation. What we must do is ask whether there is too much abuse to the process. And in most instances, a set of sensible institutional arrangements should drive out the Kevorkians from the field, and leave these decentralized decisions to more responsible decision makers.

My position is that organ transfers are more like physician-assisted suicide and less like garden-variety murder. We can see the ultimate gain from having 200 people alive with one kidney each, even if we recoil at the thought of 100 people giving up a kidney in exchange. Cash is what lubricates those transactions and saves those lives, or so one could argue. Of course, I don't like this process; it is just that I like certain death even less. My concerns are more with the victims of disease than with the condition of the givers of organs. To put it most simply, suppose we could avoid this horrible situation by breeding animals with compatible kidneys. Then we could solve the shortage problem. Who would be made better off by this? First and foremost those people who suffer from kidney disease. But perhaps some potential organ donor would lament the loss of his market. We could take that into account and still come up with the obvious conclusion that from behind the veil of ignorance we are all better off having a secure animal supply than with experimenting with sales of human organs. But that hardly counts as an indictment against voluntary transactions in the world as it now exists. Once the animal supplies become certain we can be equally positive that voluntary donations will not be used either. But for the moment we have to take technology as given and human motivations as they exist. I would rather take my chances with increasing the supply than with increasing the death rates. Your concerns are valid ones and we have to be sure that some intermediate institutions are available for counseling and advice. But you leap too quickly from the identification of practical difficulties to the endorsement of the ban. We can find some middle position that permits the sales and avoids the most serious mistakes, not all the time, but most of the time. And with human institutions, we don't want the best to become the enemy of the good.

From: Atul Gawande

To: Richard A. Epstein

Posted Tuesday, June 23, 1998, at 3:30 AM ET

This debate is evolving quite nicely. Not only is it turning out to be good clean fun, but I think we've also come down to the nub of our differences: On the one hand, I think people (myself included) are crazy, so the last thing we should do is let them do something as self-defeating, dangerous, and irrevocable as selling their organs. On the other hand, you think people are sensible, and since some people are dying for want of organs, the last thing we should do is keep other folks from selling some to them.

You argue against me in two ways. Specifically, you ask, if people are such loons, how can I allow them even to donate organs? Since I accept living organ donations, I must permit organ sales because nothing makes them different except the involvement of cash. More broadly, you argue, if people make decisions as nutty as I say they do, then we could not let them make any decisions at all. It "would shut down every employment and financial market in the entire world."

On the first point, don't assume I am so enamored of living organ donations. I think we should worry about them, too. Studies have shown that people often decide to donate a living organ instantaneously, before the risks are understood. It's telling that a 1997 study found that the higher their education, the more ambivalent people were. Furthermore, as a study in the April 15 *Transplantation* shows, many donors report that they did not feel wholly free to say no. The problem appears to be that families, society, and even hospital staffs look down on people who say no as being selfish and cowardly. No matter what we do, poor decision-making and social pressure will play a role in living organ donation decisions.

I accept such donations, however, because the other thing studies show is that donors rarely regret their decision. A recent *People* magazine (another vital information source for me) tells the story of a man who gave his brother one kidney only to have his remaining kidney go into failure years later. The man is now on the transplant waiting list. Yet even he did not regret donating his kidney, for it has meant that he has had his brother all these years. The lack of regret is a sign that for most people donating an organ to save a sibling or a child is the right decision.

The fact that money is involved in organ-selling makes a world of difference. The organ donor bets his life for the sake of saving a relative. But an organ seller would be betting his life for the sake of money. And like a gambler who bets his house, the organ seller would generally be making a bad decision. This is, as you say, a difference in opinion about the "background probabilities." Both of us agree with laws that prevent people from choosing to donate their heart while alive. Why? Because we both believe that the background probabilities are that a healthy person who agrees to be killed is being irrational, coerced, or exploited. I do not think it is a huge step to think that someone who sells his organs is in a similar position.

As for your second argument, accepting the overwhelming evidence that people are often irrational decision-makers doesn't mean we have to shut down markets. We let people make all kinds of crazy consumer decisions. Witness the entire body piercing industry. (I've noticed the latest thing among Boston's hip is getting one's ears pierced with a post the size of a quarter. It makes their ear lobes look like straphanger handles in subway cars.) We allow people to make dumb choices for two reasons. First, because the alternative is tyranny. And second, because part of the purpose of human life is charting your own course. We draw the line, however, at decisions that are not only most likely irrational but also have terrible consequences. Like selling one's organs. This kind of limited paternalism is not tyranny. It is part of a good society.

From: Richard A. Epstein

To: Atul Gawande

Posted Wednesday, July 1, 1998, at 3:30 AM ET

Dear Atul,

I'm glad that you crystallized the points of difference between us so well in your last response. But I still think that you fail to make good on the ban on all organ sales. Here's why.

First, as a background presumption, I think that we have to start with the world as sensible rather than the world as nutty. We could not organize any form of political or market behavior if we thought that irrationality were so endemic to the system that there was simply no way in which any individual could step outside the system in order to stamp that irrationality out. The basic difficulty is that no one could escape the charge against his own preferred solution. The politician could point to the irrationality of markets, and the marketeer could point to the irrationality of politicians. Each side could veto the actions of the other, and no cooperative behavior could take place.

Second, once we recognize that the corner position of universal irrationality is untenable, we do not have to move to the other position and assume that all individuals are rational in their behaviors all the time. If they were, the problems of political economy would be far less interesting than they presently appear to be. We could choose politics or markets and rely on benevolent and informed individuals to come to the right conclusion on a wide range of social questions. The problem here would be in a sense too easy, because either solution would work so well that we would never worry about issues of incremental improvement.

Third, the first two points leave only one workable position. We start with a rebuttable presumption of rational behavior and then look for evidence that certain transactions lie outside that field. And we can surely find them, given the problems that individuals have with greed, with haste, with anxiety, with coercion pressures, and the like. Here there is no doubt that organ transplantation is an area that quite literally breeds these problems, especially when the ban is in place. Most people have never been in this market before, they come only in time of crisis or desperation, and they are often uninformed of the risks

and benefits of certain procedures. And, of course, they are cut off from learning from those who have gone before them.

Fourth, and most critical, from these near self-evident truths, the ban on organ transplants does not follow. It is an extreme solution that cuts out lesser remedies that could control the excesses while allowing the transactions that do offer real gain to go forward. To review the bidding, we allow donations because of the judgment that two people with one kidney each are better as an end state than one person with two kidneys. But in the donation situation, we should expect to see exactly what you mentioned: all sorts of subtle family pressures, precisely because there is no way to compensate the family losers with cash. We could therefore get better decisions by allowing purchase, knowing that the web of social connections will allow compensation that offsets some of the serious loss to the donor without extracting all the potential gain from the recipient. If you are uneasy about donations in the family context, the injection of other forms of compensation should be regarded as an opportunity for improvement and not as some dreaded alternative.

Fifth, even in stranger type situations with live organ donations, there are less intrusive remedies than the ban, and they should be tried. One could require individuals to receive counseling and literature before engaging in organ sales. (Or one could assume that these services would emerge voluntarily so long as it is no longer illegal to supply them.) We could have some waiting periods before the transactions could take place. Most important is that the dense experience of real markets gives people an opportunity to learn. They can make phone calls, watch talk shows, read testimonials to find out whether they want to undertake so critical a decision. Ironically, total bans work to increase the chances of total irrationality. They simply cut too deeply to be justified on any general social calculus.

Sixth, you point to the empirical evidence that notes the want of regret of individuals who at the time felt coerced into making familial donations. Are we so confident that the same outcomes would not take place in the sale transactions, knowing that another individual may live because of the risks that you have been prepared to take? I fully recognize that the role of empathy is likely to be weaker in these settings than in familial ones. But so too are the external pressures to contribute, and of course the cash is there to help fill up the void and to allow expenditures on other items. Once again, the ban prevents us from getting the information that would allow an intelligent assessment of the psychological consequences to organ suppliers. Indeed, I would feel much more respectful of the ban if it were implemented after programs of organ sales were allowed and failed (if they failed) than I am with bans that are done on the strength of a priori hunches that necessarily fail to take into account the adaptive responses that private individuals and third-party intermediates would take once the market were legal. Seventh, and last, I don't therefore understand, Atul, how you can be so confident that the consequences of selling organs would be so terrible when the practice has never been tried. I could understand it if we saw no potential gain from the outcome, which is why we think that lethal heart transplants make no sense, or why a market in eye transplants has never emerged, either. There are no voluntary donations, so we can be quite confident that there would be no sensible sales either. In the first case, it is a big loss (to say the least) to the donor and a smaller gain (given the risk of failure) to the recipient, so we should not expect to see this market emerge at all. And with eyes, we know that no transplant has ever worked, so if the benefit side is close to zero, why endure the very heavy costs? But we have no such priors with kidney transplants. So, even if we thought that some form of limited paternalism were appropriate, this would not be the case in which to apply the rule.

In the end, Atul, I think that your objection is largely aesthetic. And that's a good reason not to participate in the program. It is not a good reason to prevent others from so doing. The burden is on those who think that they can overcome the presumption of liberty. In the case of live kidney sales, I don't think that you have been able to carry that burden.

*This dialogue grows out of Gawande's article "[Organ Meat](#)," which appeared recently in **Slate**. Click to purchase [Mortal Peril](#) from **Amazon.com**.*

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