

Against Selling Bodily Parts

The transplantation of a human kidney is no longer a rare or highly uncertain process. Over 5000 patients received transplanted kidneys last year, and their prospects for lasting success are bright. Because improved immunosuppressant drugs like cyclosporin have greatly increased the survival rate for transplant patients, the primary barrier to successful transplantation for thousands of patients with end-stage renal failure is now the lack of an adequate supply of transplantable kidneys. Patients often wait years after being listed as prospective transplant recipients, and those years are filled with the discomfort and constraint of dependence on dialysis — each year of which is as costly as the \$40,000 transplant operation. Because of the sharp recent increase in our capacity to transfer living tissues of various kinds successfully from donors to recipients, the large shortage of transplantable materials is growing larger. Controversial economic, political, and moral issues swirl around our efforts to respond to this new situation.

How can we best meet the vital needs of patients who require transplant surgery, while respecting the various related interests and concerns which come into play? We are faced here with choices which, in the words of Richard Titmuss, “lead us, if we are to understand these transactions in the context of any society, to the fundamentals of social and economic life.” The question of how to close the gap between the demand for and the supply of transplantable organs is no less than the question of what sort of society we wish to advocate, endorse, and nurture.

The Role of Government

What should the government do, promote, permit, or prohibit in respect to organ transplantation? The range of possible responses is great. Proposals have been made to presume consent by prospective donors in the absence of clear evidence to the contrary, to establish commercial markets in organs, and to increase the efficiency of present approaches through devices ranging from tax incentives to public education. I am not aware of any proposal yet that organs should be made available regardless of the wishes of the person whose organs are at issue — but at this point it would not surprise me.

Any position on the role of government here must rely on a broader conception of the proper role of government generally. It is not the responsibility of government to be the solution of first resort to the problems of contemporary society; rather, the private sector is our best hope for meeting a broad range of needs. The government has a responsibility to step in only where it must, to safeguard the public interest. Further, the government should exer-

cise great caution in enacting prohibitions on behavior. Only where it can sustain a persuasive justification may it properly constrain the behavior of citizens; it has no business prohibiting actions merely because they are offensive to the sensibilities of a portion of the citizenry, or because they could conceivably lead to more serious abuses in the future. Nor may it require actions simply because they would be in the public interest. Requiring actions (such as the payment of taxes or participation in national defense in wartime) or prohibiting actions (such as violation of the civil liberties of citizens) requires strong justification indeed.

For this reason, the appropriate role for the government in respect to the shortage of organs is catalytic rather than coercive. To require the donation of cadaver organs would be to ride roughshod over the rights of individuals to exercise discretion over the disposition of their bodily parts. Even to presume consent in the absence of dissent would be to place the burden where it does not belong. Those who prefer not to donate organs, for reasons of religion, superstition, or squeamishness, or for no reason at all, would be cast into a defensive position in which they might feel hard pressed to protect themselves and their families against intrusions of a most intimate sort.

Yet the problem remains and grows, so something must be done. An ideal solution would lie in a massive shift in national sentiment about transplantation — a shift that would greatly increase participation in voluntary donation plans and would also greatly diminish the barriers, psychological and economic, to participation by the medical profession in efficient collection and distribution of organs.

The new American Council on Transplantation may become an effective instrument for rationalizing our methods of collecting and distributing organs and of increasing public participation in donation plans — but that will require it to have significant financial and institutional backing, a firm and energetic resolve to meet its objectives, and a fair bit of good luck. Its prospects of success have been greatly enhanced by the passage of HR5580, which, without being coercive or intrusive, fosters a major increase in our structural capacity to achieve an adequate solution based on a voluntary and altruistic response to the plight of potential transplant recipients.

This bill amends the Public Health Service Act to authorize financial assistance for organ procurement organizations; to establish a United States Transplantation Network; to establish a Task Force on Organ Transplantation to “conduct comprehensive examinations of the medical, legal, ethical, economic, and social issues

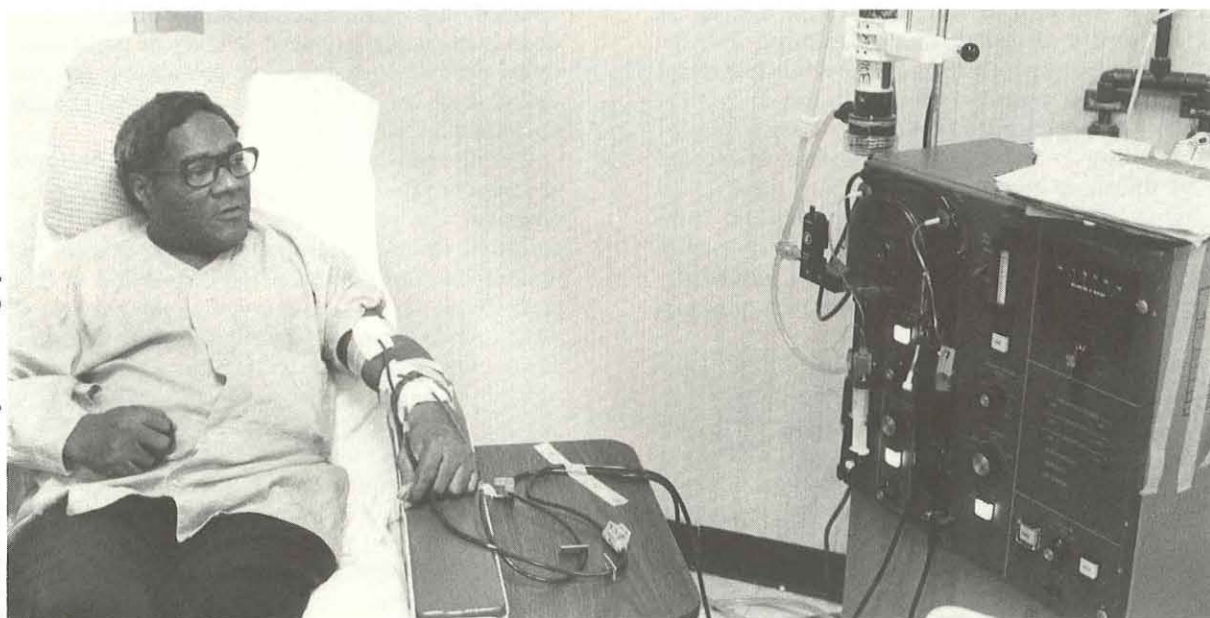
presented by human organ procurement and transplantation"; and to prohibit a commercial market in transplantable organs. This last provision is my present concern.

The approach represented by HR5580 must be given every reasonable chance of success, for the alternatives are grim indeed. One of the worst would be a governmental takeover of the whole domain, responding to national shortages with national criteria, supported by mandatory and intrusive processes of collection. The disadvantages of such a scheme, I trust, need no elaboration here. However, a comparable peril exists on the other side. For another alternative is to allow a commercial market, linking supply and demand through the mechanisms of free enterprise. And the disadvantages of *that* scheme do require some elaboration.

would be naive not to realize that we are at the beginning of the problems associated with our newly developed capacities of medical and surgical intervention.

Jacobs defends his scheme by appeal to humanitarianism, public service, and the American way. He points out that his plan will deliver kidneys to people who need them, and cash to people who need it, quite possibly to their mutual benefit. And with the traditionally admirable flexibility of the free-market system, the scheme can function long before the catalytic efforts of the government or the American Council on Transplantation can take effect. If, as he claims, all related transactions are to proceed by the voluntary actions of fully informed and uncoerced adults, we must pause before concluding that there is a legitimate public interest in prohibiting such exchanges.

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Kidneys for Sale

This is no idle speculation. H. Barry Jacobs of Virginia has established a business for the commercial brokering of kidneys. He has proposed to commission the sale of kidneys from persons in the third world, for whatever price is needed to induce them to sell, and then to broker the kidneys to affluent Americans. The brokerage fees will make the enterprise, in Jacobs's own words, "a very lucrative business."

This plan raises many questions that go beyond the immediate need to increase the supply of kidneys. The demand for transplantation will continue to increase, as will the variety of transplantable tissues. Today, we focus mainly on kidneys, corneas, and livers, knowing that lungs and hearts are also transplantable. But skin, bone, and muscle are transplantable, too, and recent successes in the reattachments of digits and limbs foreshadow the transplantation of such parts in response to major trauma. It

Many assumptions in the Jacobs scheme are open to challenge. The risks to donors are greater than he has admitted. The scheme makes a mockery of informed consent, as is evident to anyone familiar with federal regulations protecting human research subjects — regulations which reflect a sensitive awareness that desperate circumstances can be implicitly coercive and that the provision of excessive inducements to the oppressed can constitute a violation of their autonomy. And there are problems of quality control that might be insuperable. But we miss the most fundamentally important issues if we focus on such weaknesses in the proposal. At stake are important features of the distribution of vital resources in the challenging years ahead.

There are various standards for judging the greatness of a society — by the peaks of its achievements in the arts and culture, or in technology, by the average material standard of living of its people, by the scope of its ter-

ritorial authority, and so on. I have always thought that one appropriate standard for making such judgments is that of how a society treats those whom it treats least well. The analogue at the level of the family is compelling, at least. No matter how we admired the talented, affluent, accomplished family next door, our judgment of them would plummet if we discovered that they had one family member whom they abused, whose interests they ignored, whose needs left them unmoved, and whom they exploited to their own maximum advantage. That discovery would teach us much about their character and integrity — about their sense of justice within a social structure. By the analogous criterion, American society still falls short of its loftiest ideals.

Another criterion for judging the greatness of a society is the way it treats its most seriously disadvantaged. (This criterion is related to, but not the same as, the previous

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one.) People beset by grinding poverty, malnutrition, and ignorance, like those beset by life-threatening illness, are clearly in highly disadvantaged circumstances. Surely one aspect of the Jacobs scheme is that it is profiteering on the desperation of these two groups. But what better societal response to their plight is there to endorse?

A free-market model is based on the values of competition, individual initiative, and the elasticity of supply and demand in response to market forces. But medical need is no respecter of success in the world of commerce. The poor are more likely, not less likely, to be seriously ill, and their ability to obtain medical care is seriously compromised by their poverty.

To distribute vital resources according to ability to pay is to set aside all concern for medical need as the primary determinant of access. It is to set aside considerations of compassion and cooperation, and abandon efforts to fashion a society in which mutual supportiveness is our response to desperation. It is to sanction the expansion of unfettered commercialism into dimensions of life which could provide the opportunity for a greater sense of community and of national purpose.

The argument for a commercial market in kidneys might have greater force had we put ourselves to the test, and failed. But we are just now acknowledging a new national need and fashioning a constructive response to that need. It is far too soon to judge that response a failure.

The only adequate barrier to the commercialization of life in the proposed manner is a new legislative prohibition. I support that prohibition, and I do so as one reluctant to endorse any unnecessary restriction on individual lib-

erty. Such a prohibition, however, is necessary to test our capacity as a nation to meet the present shortages, and to find ways to deal with future shortages, with due regard for the dictates of liberty and social justice. We are well advised to temper our passionate and worthy defense of liberty with consideration of the social context without which our liberty would be a tragically empty achievement.

An additional reason for supporting the prohibition derives from the symbolic significance of the proposed market in organs. At a time when we urgently need to nurture good relations with the third world, our international credibility would be dealt a severe blow by our tolerance of a plan according to which the poor in underdeveloped countries were exploited as a source of spare parts for rich Americans.

In the third world, it is unlikely that strong restrictive action will effectively prevent the plundering of poor people's parts for profit. Their public health concerns still center on problems of sanitation, nutrition, and infectious disease. If there are to be effective controls, they must be at our end. But it is no surprise, nor inappropriate, that the world's most highly developed nation should bear the burdens of exercising responsibility over medical science's most advanced capacities. If we want the world to be inspired by our example as a humane and just society, we must be prepared to provide that example.

I am not concerned merely with the prospects for international exploitation, and the damage that threatens for our image abroad. I pressed Barry Jacobs in debate to explain why he proposed to seek organs elsewhere, rather than from among America's downtrodden — the street

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people in New York, the unemployed migratory farm laborer, the inner city destitute, the most impoverished of our Native Americans on reservations. He replied, changing his stance, that he will go abroad for kidneys only if these American sources are inadequate to meet the demand. Thus would he have us turn on our own poor to seek relief for our well-to-do.

I am concerned, of course, with what such a scheme would do to those whose destitution and desperation might move them to sell bodily parts in the hope of gaining a foothold for the climb out of poverty. But I am concerned even more about what such behavior would do to the rest of us, and what it would reveal about our compassion, our commitment to equality, our capacity to make

voluntary efforts in the public interest, and our willingness to face common problems with collective resolve.

That the poor are exploited is unarguable. That their poverty seems intractable is a continuing tragedy of our unprecedentedly affluent society. I hope that history will be able to judge us as a society that never abandoned its struggle to eliminate that poverty, that strove always to enhance its respect for individuals and for their capacity for mutual aid, and that faced the problems of an awesome new technology with humanity and efficiency both,

rather than as merely another commercial opportunity. I believe there is a legitimate public interest in striving to bring this about.

— Samuel Gorovitz

This article is based on testimony presented to the Subcommittee on Investigations and Oversight, Committee on Science and Technology, United States House of Representatives, November 9, 1983. HR5580 was passed by the House on June 21, 1984.

Gays and the Civil Rights Act

When gays themselves speak of "gay rights," they generally refer to the sort of protections found in the 1964 Civil Rights Act rather than to a host of other possible legal and constitutional protections which they do not now possess (for example, the reform of sodomy and solicitation laws and the drive for domestic partner legislation). For gays, gay rights are viewed primarily as protections against discrimination in the private sphere in regard to housing, public accommodations, and especially employment — protections which the Civil Rights Act currently affords racial, ethnic, gender, and religious classes.

Gays have not been particularly successful in acquiring even those limited rights. Only 40 or 50 municipalities have some form of civil rights protections for gays. Wisconsin is the only state to have such protections. In March of 1984 the California legislature passed a gay employment bill only to have it vetoed. The federal gay rights bill has but 74 cosponsors in the House and 8 in the Senate. Gays are now at about the same place blacks were in 1945.

The arguments in favor of gay civil rights cluster into three main groups. The first is a recognition that the general arguments for civil rights legislation indeed apply to gays, sometimes with special force. Second, the status of gays as an invisible minority has the practical consequence that in the absence of these protections, gays are effectively denied access to civic and political rights. Third, gays appear to be relevantly similar to classes already protected by the Civil Rights Act, so that considerations of fairness call for extending its protections to gays.

General Arguments for Civil Rights

It is unfortunate that the original general motives for civil rights legislation have been forgotten in discussions of gay issues. And yet the original reasons continue to provide good and powerful engines in justifying civil rights

restrictions on the private sector and apply at least as well to gays as anyone. There are four such general justifications, some interrelated.

First, civil rights legislation promotes human dignity. Vague as this reason may initially sound, it is the reason the Supreme Court found most compelling as a ground for state action when it unanimously upheld the constitutionality of the Civil Rights Act. No one can maintain a solid sense of self if he is, in major ways affecting him, subject to whimsical and arbitrary actions of others. Jobs, housing, and entertainment are major modes through which people identify themselves to themselves and to others. That these major vehicles of character, personality, and identity can be taken away from a person without regard to any characteristic that is relevant to his possessing them is an outrage against personal integrity deserving remedies from the state. To fire an employee, for instance, on the basis of some trait that has no bearing on his ability to do his job — such as his sexual preferences — is one way to degrade someone and make him feel worthless. Given widespread discrimination (actual or merely perceived) against gays, it is not surprising that gays manifest many of the same self-destructive, self-deluding, self-oppressing patterns of behavior as are shared by other historically oppressed minorities.

Second, there is a general expectation in a non-socialist society like our own that each person is primarily responsible for meeting his own basic needs; employment is the chief means of doing so. Civil rights legislation helps people discharge their obligation to be self-sufficient, without placing any comparable burden on those who are restricted by the legislation (employers, retailers, etc.).

Third, civil rights legislation tends to increase the overall output of goods and services in society, thus contributing to general prosperity. By eliminating extraneous factors in employment decisions, it tends to promote the best fit between a worker's capacities, talents, and skills and the bona fide occupational qualifications of his prospective work. Many gays take dead-end jobs, which do