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A Free (Organ) Trade Agreement

Thousands of people die waiting for organs each year because the number of people requiring organs greatly exceeds the number of available organ donors. The root of this supply problem is right in the name: “donor.” Federal laws prevent monetary compensation for the supplier, leaving charity as the only legal incentive for organ donation. These laws, meant to protect the poor from “exploitation” by the organ-hungry rich, have resulted in long waiting lists, as people have proven unsurprisingly reluctant to go through the trouble and complications of surgery with no monetary benefit. By examining the situation faced by organ donors in the context of twentieth-century labor rights, I will show that trade in organs, even when those organs come from the poor, does not constitute “exploitation,” but in fact is a sensible arrangement which benefits both parties.

For labor rights to apply, organ donation must be treated as a job. Such a label might raise some objections – after all, no one could make a career out of organ donation – but the term still applies. A handicapped man could pay his strapping neighbor to build his shed, and it would still be viewed as a job, even though he could hardly be expected to keep putting up sheds in the man’s yard forever. A job only implies services rendered (the donation of the organ) for monetary compensation, not necessarily a long-term commitment.

Although organ donation is a new concept, exploitation of the poor is not; and thus a historical context exists in which we can examine the potential dangers of donor exploitation. The current debate can seem similar to the early twentieth century debate over “liberty of contract.” In its landmark decision *Lochner v. New York* (1904), the Supreme Court ruled that the state could not regulate labor contracts between workers and employers, prohibiting protective legislation that specified maximum hours, minimum pay and safe working conditions – in short, any law which prevented exploitative practices.ⁱ Although the decision was later overturned, rhetoric emphasizing the organ seller’s “right” to engage in a contract of his choosing still arouses sensible fears of exploitation.

But today, we still have textile mills, slaughterhouses and factories. We didn’t ban these industries because they could be used to exploit the poor – we regulated them. Similarly, it

seems absurd to outlaw the entire organ-donation industry. If a legal, international organ exchange were created, donors (or sellers, as they could then be called) could be paid fixed minimum sums, deemed by the international community to be adequate, and negotiate for higher pay. Such a system would be much less exploitative than the current black market, where they have to settle for whatever the illicit organ matchmaker they happen to meet is paying (usually only 5-10% of what is paid by the receiver).

However, paternalist defenders of the poor might argue that organ donation is intrinsically unsafe. According to an article in the Christian Science Monitor, “86% of organ sellers [reported] significant declines in their health in the three years after surgery.”ⁱⁱ If an occupation is intrinsically unsafe, shouldn't it be prohibited?

The answer to this question is unequivocally “no.” Our appliances continue to work because every day, coal miners descend deep below mountains and oil drillers venture out in floating rigs. Fishermen in Alaska brave the treacherous seas to bring back catches of king crab, and boxers inflict lasting brain damage on each other to satisfy the bloodlust of cheering crowds. Even the Occupational Safety and Health Act (OSHA), one of the labor movement's great triumphs, recognizes that jobs that are intrinsically unsafe sometimes need to be done. One of the criteria for violation of OSHA is that a recognized safety risk be “preventable;” thus, a company is only held to be in violation of OSHA if it submits its employees to *unnecessary risk*.ⁱⁱⁱ

And unnecessary risk is exactly what opponents of a free organ exchange are creating by forcing the hopeful sellers of the world to trade through the black market. Operations conducted through shady matchmakers in an unregulated environment are bound to be more risky than those in a transparent, legal system.

The idea that the trade in organs will disappear if stringent laws are passed preventing it is as absurd as the idea that prostitution will disappear. From one side comes a desperate desire to live – from the other, a desire to escape destitution. No law can keep a transaction with so much at stake from occurring. The only choice left to be made is whether these transactions should be driven into the shady underworld of the black market, where poor compensation and unsafe procedures are inevitable, or brought out into the light, where they can be regulated to the benefit of all concerned.

ⁱ “Lochner v. New York.” *OYEZ* Illinois Institute of Technology, n.d. Web. 29 Nov. 2010.

<http://www.oyez.org/cases/1901-1939/1904/1904_292>.

ⁱⁱ McLaughlin, Abraham. “What is a kidney worth?” *Christian Science Monitor*. 9 June 2004. Web. 29 Nov. 2010.

ⁱⁱⁱ “Using OSHA’s General Duty Clause.” *National Council for Occupational Safety and Health*. Web. 29 Nov. 2010. <<http://www.coshnetwork.org/node/353>>.