as a pretext to remove parts *without consent* (Ferguson et al., "Non-Heart-Beating Organ Donors"). Remarkably, Elizabeth Ward ends her appeal for presumed-consent legislation in a U.K. national newspaper (see note 37 above) with the following passage: "Sooner or later we all have to come to terms with the loss of someone close, but it is far easier when we know that death was inevitable, and that all that could be done to save his or her life had been done." Ward's concern and sentiments apparently apply exclusively to the *recipients* of organs, not to the unwitting "donors."

Organ Transplantation: The Human and Cultural Context, eds., Stuart J. Youngner, Renée Fox and Laurence J. O'Connell, University of Wisconsin Press, 1996.

6 Thomas H. Murray

Organ Vendors, Families, and the Gift of Life

Personal Statement

The realm of gifts was mysterious to me. I liked receiving them, and was quite happy to give them, to be sure. But some things about gifts were puzzling. What is so bad if you forget to acknowledge a gift? How can it be that sometimes we are obliged to make a gift? Why do I feel more constrained in how I treat a gift than in my treatment of something I obtain for myself? I may never have cleared these mysteries up had it not been for a bizarre case that inexorably drew me in. The case involved a man whose cells were used by a researcher to develop a patentable, and potentially lucrative, cell line. The man, John Moore, protested that a wrong had been done and, as people do these days, sued.

The Moore case prompted me to think about the relationship between medical researchers and the people who donate the tissues that make research possible. I concluded that the best way to understand the relationship was to think of it as involving a gift—a gift of the body. That conclusion turned out to be the beginning, not the end, of my process of understanding. To understand the ethical implications of such gifts, I plunged into the (relatively meager) philosophical and theological literature on gifts, and, more important, into the eye-opening anthropological and sociological literature. I found much there about the role of gifts in society in general, along with compelling insights into organ and tissue donation—the sometimes life-preserving gifts of the body.

No other research I have ever done has caused such a transformation in my personal life. Reflecting on the moral significance of gifts and their role in human relationships has provided new, and I firmly believe, more insightful ways of thinking about those relationships. It has helped me to understand better the limitations of the economic model of human affairs, an understanding reflected in my chapter in this volume. And it has sharpened my appreciation for the intimate and enduring relationships that give meaning and structure to our lives. I now know much better what gifts are about. But I'm still bad about writing thank-you notes.

If we were to have a widget shortage, economists would tell us how it could be resolved. What gets people to produce more widgets is an increase in the price of widgets. The ordinary workings of supply and demand in a market would increase the price and, hence, the supply.

We do have an organ shortage. Many people die for lack of an appropriate transplant. Economically minded scholars have a diagnosis and a prescription, but our public policies forbid markets in transplantable human organs. The effective price paid to a prospective organ supplier—typically the close relative of a young person who has died suddenly from a catastrophic accident—is zero. This is an insufficient incentive to supply organs, the economist argues. Surely, a price greater than zero would increase the supply, just as raising the price of widgets would lead to a greater supply of widgets. The solution? Permit financial incentives in organ recovery that would effectively raise the price paid to organ suppliers.[1]

In this chapter, I consider three proposals to introduce financial incentives into organ recovery: a "futures market" in which individuals contract to sell their organs after death, with a price of several thousand dollars per recovered organ paid to their estate; discounts on health insurance to people who sign over their organs to their insurers, which would be taken upon their death; and the oxymoronically named "rewarded gifting," under which families of organ providers would be given a modest amount toward funeral expenses.

The proposals to use financial inducements to spur more organ donations raise questions of two kinds. First, as a practical matter, would financial incentives increase the number of organs for transplantation? Second, are financial incentives in organ recovery a good idea? Or would permitting markets for organs so compromise important values that we would be justified in forgoing the lives that might be saved by organ transplants?

The first question is empirical. We do not know the answer, although

market enthusiasts are confident that people will respond to money here as they respond to it in most circumstances. Organs are like widgets and cars and turnips and daffodils. They belong in the market, and they are affected by the same incentives that affect other commodities in the market—or so the argument goes.

But proponents of financial incentives for organs make an important, and dubious, assumption here: Do people really think that organs are like cars and so on, such that they will respond to money for organs in the same manner as for those other objects? One way to approach this is to ask how many widgets would be supplied at a price of zero. The answer, I presume, is few, if any. Yet thousands of organs are supplied each year, not as many as might be made available or could be used, to be sure, but a significant proportion of the theoretically available supply. People, that is, are willing to donate organs, and in that way organs differ from widgets.

In addition to examining critically the empirical presuppositions of market approaches to organ recovery, we should look at where the logic of the market takes us. In my case (and in the spirit of Jonathan Swift), it led to a modest proposal inspired by the arguments of the market proponents.

A Modest Proposal

One problem with the proposals to obtain more transplantable organs by offering financial incentives is that, even if these proposals were successful, the organs might still come up short of the number that would be useful. Dazzled by the arguments offered in those other proposals, I was inspired to think up a new one that has the capacity to supply all the transplantable organs that might be needed, in pristine condition, when they are needed.

The idea is simplicity itself: Have a lottery! It could take either of two forms. In the first (modeled after Henry Hansmann's proposal, to be discussed later), instead of your paying for a ticket, we would pay you. Furthermore, the fewer people participating in the lottery, the more money you and the other players would receive. In that way, the financial incentive is directly tied to the supply, and medical needs for transplants would determine the demand. In the second (modeled after Lloyd R. Cohen's proposal, also to be discussed later), you can get your ticket free of charge, but you don't actually receive a payoff until your number comes up. To be completely accurate, you would not receive the money yourself; it would go to your estate. In both lotteries, the people whose names are picked would become multiple organ donors—every usable part of their bodies would be removed, painlessly and under ideal conditions for preserving the organs and tissues. The winner, of course, would never wake up.

The advantages of this proposal are legion. As long as enough players are in the lottery, we would obtain all the organs we need, with the added bonus that they would be in pristine condition. Many lives would be saved; in fact, for each lottery winner, we would be trading the loss of one life for the saving of several. All the testing, tissue matching, and such could be done well in advance so that matches are optimized and waiting is minimized. The participants would all be volunteers, so there could be no question about whether the source of organs had consented to having them removed and placed in other people; we would only be enforcing a contract. Nurses and doctors would not have to confront families with messy choices about whether to release the organs of their newly dead relatives; everything would be signed and sealed in advance, and the family would have nothing to say about it.

The reader might be wondering by now whether I am serious about this proposal, whether I think such an organ-taking lottery would be a good thing. To put any such doubt to rest, let me say that I think this would be a terrible idea. It is an idea, however, entirely in the spirit of other proposals to increase the organ supply with financial inducements. It follows the logic of the marketplace into its darkest corners, certainly, but I do not believe that it distorts that logic. This "modest proposal" builds upon three key commitments in market ideology: a firm belief in the power of money to motivate people, a strong tilt toward a morality in which the highest goal is to increase overall wealth, and a commitment to the ultimate importance of individual choice as both a fundamental moral warrant and the best way to achieve Pareto's optimal outcomes, that is, a distribution of goods and services in which it would be possible to make someone better off without making anyone else worse off. I offer this with tongue firmly in cheek, though not as a parody or humorous exaggeration, because I do not believe that it is much of an exaggeration. I offer it, rather, to suggest in a provocative way where the economic analysis of organ recovery goes wrong. It goes wrong, in the first place, because of the way in which it frames the problem.

Framing the Problem of an Organ Shortage from the Economic Point of View

Taking organs from one human body and placing them in another is anything but a simple and straightforward business transaction. The acts of recovering and transplanting human organs have profound

psychological, social, religious, and even mythological dimensions. I may ponder whether to get strawberries or raspberries at the grocers. The choice of what car to buy could have important financial and safety implications for me, as well as provoking questions of self-identity (a snappy, youthful Miata? a sleek and elegant Cadillac? or a safe and practical Taurus or Accord?). But none of these economic decisions seems to have much in common with the decision of whether to pass on my own or a deceased family member's organs and tissues to someone else, quite possibly an anonymous stranger.

Or do they? The three proposals I examine here all take the market as an appropriate framework for thinking about organ recovery. The intuitive appeal of a market solution is strong. Markets celebrate individual preference and choice. In ideal markets, people make their own decisions and live with the consequences of those decisions, so the theory goes. Consent and choice are powerful moral warrants, reasons for judging that a particular action, such as holding people accountable for the consequences of their choices, is morally justified. In theory, markets also effectively maximize wealth—the sum total of goods in a society. If a particular transaction would make both of us better off, then in a free market we are inclined and able to make it. People with organs to spare—their own or their dead relatives'—might well consider themselves better off if they trade those organs for cash, while on the other side, a person dying for lack of those same organs might well consider himself much better off with less money but with a healthy heart or liver or lung or pancreas. Making the trade—cash for flesh—would be, in the economist's lingo, a Pareto-optimizing move.

Their close allegiances with some popular moral ideas, coupled with their ideological resonances and enormous flexibility, have made economic analyses of social issues pervasive and important, but they are not necessarily insightful or useful guides to understanding and action. Economic analysis is not merely a set of neutral analytic tools but rather a prism through which to view the world. Whether that prism allows us to see more clearly or obscures our vision of organ recovery is an open question. I will try to illuminate the matter with a close and careful reading of the three proposals, especially the first two, by Cohen and Hansmann, which are clearer, bolder, and more radical than the third, by Thomas G. Peters.

My concern is that framing the problem of an organ shortage in economic terms distorts our vision. It picks out a few features and disguises or obscures other, vital ones. In the culture of the contemporary United States, where the market plays such a dominant role, thinking of any shortage in economic terms—including a shortage of transplantable organs—seems intuitively plausible. The presumptions are largely hidden behind a facade of what appears to be neutral, technical analyses—a facade that can best be penetrated by closely examining the analyses themselves to reveal what lies behind. It is important to see first whether organ recovery and the human beliefs and practices important to it are described adequately. Then we will be better prepared to ask whether the economists' solutions are morally defensible.

The first issue, then, is whether an economic analysis provides us with a full and faithful description of the problem. Does it capture the features that strike us as important? Does it distort our understanding of the situation? Does it leave anything of importance out? When the proposal moves from description to prescription, do the inadequacies of the description infect the prescription? In what ways? The best, indeed the only, way to answer these questions is in the context of the specific proposals. I believe that framing organ recovery in market terms misses much that is humanly important. If the description/diagnosis is badly flawed, then we can have no confidence in the proffered cure.

Three Proposals to Increase Organ Recovery by Financial Incentives

Lloyd R. Cohen, a lawyer and economist, proposes a futures market in transplantable organs.[2] Henry Hansmann, a professor of law, proposes that people willing to have their organs taken be given a reduction in their health insurance premiums.[3] Thomas G. Peters, a transplant and general surgeon, proposes that families of deceased persons whose organs are taken be given a "death benefit."[4] What the three proposals have in common is the conviction that financial inducements are appropriate and likely to be effective means of increasing the supply of transplantable organs. Before examining their assumptions, consider the bare bones of their proposals.

Cohen is not bashful in proclaiming the virtues of a market: "A cash market in transplantable organs would prevent much needless death and suffering."[5] He suggests a futures market in which individuals would contract to make their organs available after death—in his words, make a "prospective contingent sale"—with various sums to be paid to their estate for each organ and tissue successfully recovered. Hospitals would become "bailees" of the newly dead body, "required to take as much care with it as with his wallet and watch."[6] Hospitals that fail in their legal duties would be sued for negligence. The family's role? "Should some doctors still feel inclined to ask the relatives of the deceased for permission, and acquiesce in a negative response, they will receive a sharp blow to their wallet when they are successfully sued by another relative who is the named beneficiary under the organ sales contract; such requests for permission will quickly become extinct."[7]

Cohen's "ballpark estimates" for the value of major organs is five thousand dollars apiece; for other tissues, such as corneas, skin, and bone marrow, lesser amounts should suffice. He considers briefly other barriers to organ recovery but concludes unsurprisingly that the "problem . . . is not at bottom psychological and religious: it is economic."[8] His solution is to give people unambiguous property rights in their own bodies and to establish a cash market in futures rights for human organs.

Hansmann appears to share Cohen's faith in markets, although he structures his plan quite differently. Hansmann proposes that health insurers purchase the right to claim organs and tissues from the newly dead by offering in exchange a small reduction on insurance premiums. When people fill out their insurance forms, they could check off a box that promises them a slightly lower annual premium in return for surrendering ownership of their organs after death to whatever organization holds the rights to them. Hansmann estimates the amount of the reduction at roughly ten dollars per year.[9] He would permit a secondary market in organ rights, so that insurers could sell them to some sort of broker. A national registry of those who have sold their rights would be established and, presumably, before a physician could disconnect a brain-dead individual from respirators, IVs, and the like, he or she would have to get clearance from the manager of the registry. If a broker owned the rights to the decedent's organs, then organ-preserving measures would have to be continued until the organs could be removed from the body.

Hansmann is more modest about the virtues of a market in transplantable organs than Cohen is. Assessing the likely success of such a market, he writes: "It is at least possible, however (though by no means certain), that overall donation rates would be significantly higher under such an approach than they are, or could easily be brought to be, under the current regime."[10] He admits that it "would be foolish to suggest that the market offers a magic solution," but he asserts that "the present blanket prohibition on any form of payment seems extreme." He concludes that "there is a good case for reforming federal and state law to permit judicious experimentation with suitably regulated markets both to procure and to distribute human organs."[11]

Peters, a physician, has a much simpler plan. Rather than instituting a market or reorganizing the current system of organ-procurement organizations, Peters would have organ-procurement organizations offer each potential donor family one thousand dollars, described as a death benefit, and contingent upon successful recovery of at least some organs. He claims that his plan, far from commercializing transplantable organs, could actually discourage markets in organs, by increasing the supply of inexpensive ones. Like Hansmann, he would like to see his idea put to the test: "Unless proven otherwise by soundly designed pilot programs, I submit that a death benefit payment would save lives that are now lost, lives that should be more important to us all than adherence to concepts and rules that we have promulgated ourselves."[12]

A Note on the Misuse of Language

Confusion in language reflects and encourages conceptual confusion. Each proponent of paying for organs refers to the sources of those organs as donors.[13] Whether they do this out of habit, for that is how we now refer to the humans whose organs we recover for transplantation, out of misplaced delicacy in not wanting to use such terms as *vendor* or *supplier*, or because they do not grasp the distinction between a gift and a sale does not matter. (These authors at least avoid using that execrable oxymoron *rewarded gifting*, a euphemism employed by others in defending plans such as Peters's.)

A donor is "one that gives, donates, or presents," and a donation is "the action of making a gratuitous gift or free contribution esp. to a charity, humanitarian cause, or public institution," according to representative definitions of the terms.[14] To promise someone payment for a donation makes it something other than a donation; it makes it a sale. Gifts and sales are two very different means of transferring goods, with drastically different implications for the relationship between the parties involved. At this juncture, I want only to point out this misuse of language, which stems mostly I suspect from an underlying confusion about the social and moral significance of gift relationships as opposed to commercial relationships. I will discuss the significance of the distinction in terms below.

The same ideological worldviews that give rise to the confusion between donations and sales lead to other problems for proponents of paying for organs. In particular, proponents encounter difficulties in explaining what motivates people to give organs and tissues. Thus, in addition to their shallow understanding of motivation in organ donation, market proponents may have fundamentally misdiagnosed the underlying problem of the shortage.

Accounting for Donor Motivation

The discussions of donor motivation touch on three major questions. First, what motivates people to allow their own or their relatives' organs

to be taken? Second, why don't more people provide organs under the current system? Third, why do people oppose financial incentives for providing organs?

What motivates approval for organ recovery? Cohen, in his long article, actually has very little to say about why anyone would consent to provide organs under the current system. Look at his general description of why people do what they do:

> I would rather not serve on committees, grade exams, or clean public toilets. While extensive discussion with a psychiatrist might reveal the psychological or ontological root of my aversions and even eliminate them, that is hardly the most efficient way of overcoming them. I perform the first two noxious activities despite my antipathy because I am compensated for doing so, and if sufficiently compensated I would even overcome my deep-rooted neurotic aversion to human excrement and perform the third task as well. . . . [In a poll, prospective donors] were unwilling to donate because they were being asked to assume costs without being offered a sufficient compensating benefit.[15]

According to Cohen, consenting to donate my own or my relative's organs is a "noxious activity" just like serving on committees, grading exams, or cleaning public toilets. And just as with those other noxious activities, the way to motivate people to provide organs is to supply sufficient quantities of the Great Motivator—money. Pay enough, and people will overcome their "neurotic aversions." Cohen has difficulty explaining why anyone would provide organs under the current system of donation. In the absence of money, what could move people to do such a difficult thing as donate organs? Given his assumptions, Cohen can have little useful to say. His basic strategy is to downplay the successes of a gift-based system and to bewail the failure to provide more organs.

Hansmann likewise has very little to say about what motivates people to donate organs. He sees costs, largely psychological ones, to individuals, but mentions no benefits to the donors. Money, again, is seen as the most important motivator. He refers scornfully to descriptions of the current system as voluntary, saying, "It might be more accurate simply to call it 'uncompensated.'"[16]

Hansmann does make a peculiar inference from the phenomenon of living-related kidney donations. He equates the risk of donating a kidney to driving a modest distance to work. Observing that people do accept such risks, for the right price, he concludes that the phenomenon "suggests that such transactions are efficient in the economic sense—that is, that the organ is worth more to the recipient than it is to the donor—and thus that there will commonly be a price that will make both donor and recipient better off even in the absence of altruism."[17] There may well be a price at which sellers will be willing to participate in the unconscionable "organ lottery" I described earlier, or to play Russian roulette for the entertainment of a perverse audience. Our capacity to find a price does not guarantee that both parties are "better off," nor does it prove that the community is served by permitting a market of that sort. Hansmann's argument is tautological given his premises, but it proves nothing once one questions those premises.

Peters has had direct experience with the current organ procurement system. He chides the reader for presuming that people are or should be altruistic when deciding whether to donate a relative's organs. He offers a cautionary tale about a prospective source of organs whose older brother responded to the request by saying, "I hated that s.o.b.! Go ahead and cut him . . . take his organs! Where do I sign?"[18] He allows that some decisions may be motivated by something vaguely describable as altruism, but reminds us that the motivation behind actual decisions may be more complex. Though he lacks the ideological fervor of Cohen and Hansmann, Peters agrees with them that money motivates, though in his case the decision is made by and the money is directed to the relatives rather than the would-be source.

Why do some refuse to donate? Cohen acknowledges three sorts of barriers to organ donation. Some people fear that physicians will hurry death along if they know the patient's organs will be used in transplantation. About what he dubs "religious and aesthetic concerns," Cohen notes correctly that theological barriers to organ donation are inconsequential for most Americans because their religions support the practice. He does not make clear what he means by "aesthetic" objections.[19] Finally, he cites as a barrier people's unwillingness to think about their own death.[20] To no one's astonishment, he diagnoses the failure as "fundamentally economic." The people involved in donating "all lacked sufficient incentive to carry out their assigned tasks in shifting these vital organs from those who no longer required them to those who had a vital need for them."[21] Given his conception of human motivation, Cohen could not have concluded otherwise. Weighing against the decision to donate organs—a "noxious activity"—are aversions, at least some of them neurotic or otherwise irrational. With enough money, the balance will shift. The aversions may be quite strong, and it could take substantial sums to overcome them.

Hansmann sees it differently. He offers a similar account of human motivation and the role of financial inducements, but he is offering people only an estimated reduction of ten dollars a year on their health insurance premiums; not surprisingly, he does not find that resistance to parting with organs is powerful. He argues that most people are not opposed in principle to donating their organs: "presumably they fail to donate only because of inertia, mild doubts about their preferences, a slight distaste for considering the subject, or the inconvenience involved in completing or carrying a donor card."[22] Choosing whether to donate an organ, in Hansmann's portrayal, seems about as significant as choosing whether to carry out the garbage or go to a movie. Inertia, mild doubts, slight distastes, inconvenience: this list does not appear to exhaust the factors influencing decisions whether to donate your own or your relative's organs. Instead, the list trivializes such decisions.

Peters suspects that the decisions of potential donors' families are affected by superstition, anger against "the establishment," and beliefs that the "disadvantaged in society are again being exploited." His proposed death benefit might tip the balance in some cases, he argues.[23] He is particularly concerned with "populations now giving the fewest organs, needing them the most, and being underserved by the present donation system."[24] Judging from the references he cites, these unspecified populations are African Americans, who are less likely to donate organs and more likely to need them, especially kidneys, than other ethnic groups in the United States. Because African Americans presumably are among the same people he describes as disgruntled and disadvantaged, it seems fair to infer that he has special hopes for inducing them to supply organs in exchange for the thousand-dollar death benefit he proposes.

Why do people oppose financial incentives for organ suppliers? Cohen offers the most original explanation for opposition to a market in organs. He cites the policies of three physicians' associations that threaten to expel members who participate in organ commerce. His explanation? "To the extent that [current transplant surgeons] have an adequate supply of organs to keep them well employed, restricting supply not only provides them with a necessary input at a lower price, but also, by indirectly limiting the potential supply of transplant services, gives them a measure of monopoly power."[25] Cohen professes he had to overcome a "naive faith in the beneficence of physicians" in order to suspect the monopolistic "knavish motives" behind their opposition to organ sales. One does not have to believe that surgeons are saints to find Cohen's account implausible on this point. I have yet to meet a transplant surgeon who did not complain loudly and at length about the shortage of organs and the crying need to do something about it. Transplant surgeons suspicious of organ markets seem to have the same roots for their opposition as most people who oppose these markets: concerns about the inappropriateness of commerce in vital human organs, concerns about justice, a feel for the awesome nature of such gifts, and some uneasiness about shutting families out of the process.

Having disposed of surgeons who dislike organ markets, Cohen takes on the rest of us. He accuses us of holding "widely shared beliefs and values hostile to trafficking in human body parts" that rest on "misleading and outdated ethical metaphors and analogies."[26] He describes four kinds of transactions for which a market might be considered morally objectionable: sales that degrade the seller, such as selling oneself into slavery; sales in which only the wealthy can purchase what we believe should be available equally to all; sales of what a person does not own, with children as a possible example (though Cohen appears to be sympathetic to the idea of a market in children); and sales of what cannot be sold without being transformed into something inferior, such as transforming friendship into paid companionship.[27] He judges all these possible objections to organ sales as either wrongheaded or irrelevant.

Hansmann is less interested in general opposition to the sort of market he proposes than in whether it would work in practice. He grants the possibility that true donations might dry up if people saw a market for their organs, and that fewer organs might actually be supplied. Despite citing evidence that payment may depress blood donations, his faith in the market triumphs, although cautiously. He worries also that some people whose organs might have become available under the current system would not check the appropriate box and hence be unavailable in his market, or that people would be afraid that doctors and hospitals, now having a financial incentive to acquire organs, would be "less than zealous in sustaining life."[28] Hansmann also acknowledges the opposition to commodifying organs but complains that he cannot "find a clear statement of precisely what is meant by commodification or why it is undesirable."[29]

Peters worries that our emphasis on altruism and our opposition to financial incentives may mean "imposing our own values on persons who may not appreciate those values at all. We may be coercing some families to accept concepts foreign to them at a time of great personal loss."[30] In response to the complaint that paying for organs would benefit the rich disproportionately, he once again emphasizes what he perceives to be the advantage to minority patients in need of organs. He cites evidence that transplanted kidneys survive best in patients of the same race, and that certain categories of patients, such as "immunologically sensitized black women," have great difficulty finding compatible donor organs. He argues that "black cadaveric donors, who might match with such recipients, are being lost with the current organ donation process."[31]

The three pleas for financial incentives give very flimsy and unconvincing accounts of why people donate organs and why they object to markets for them. Cohen and Hansmann give the standard economist's

account of humans as individualistic, more-or-less rational pursuers of their own satisfaction. (Unlike more modest economists, who regard their theories as reasonable accounts of how markets operate in the world, Cohen and Hansmann appear to take the more radical stance of wanting to turn the entire world into a market.) This understanding of human nature must attempt to explain away nonmarket transactions. Hansmann does this most clearly.

Hansmann tries to explain why people object to selling children. He argues that such sales incur "substantial external costs or benefits that cannot be internalized without excessive transaction costs."[32] This market defect, he claims, prompts societies to make parents "internalize a set of norms that induce them to provide care for their children whether or not they feel that what they get in return yields them adequate compensation."[33] Ethics, in this case the moral obligations of parents to their children, constitutes nothing more than a second-best response to market failure.

Hansmann continues this theme, asserting that another "reason for using norms of right and obligation rather than market exchange to govern a set of transactions is that the cost of employing market mechanisms would be high relative to the value of the transactions involved."[34] What sort of transactions does he have in mind? Those within families and among friends and co-workers. We use ethics rather than cash in these relationships because "establishing prices for all such transactions would be unduly complex and time-consuming."[35] In other words, the reason I didn't charge my children every time I fed and burped them or, when they grew older, helped them with their homework, hugged and kissed them, or comforted them when they cried was either that the transaction costs were too high or that the "value of the transactions" was too low to justify the costs of establishing a market.

I feel that I have just paid a brief visit to Wonderland. I do not doubt for a moment that a creative scholar can give an account in economic terms of the entirety of human affairs. The concepts economists use are sufficiently powerful and flexible that they can wrap themselves around just about anything. But we must be careful not to confuse the ability to tell a Kiplingesque "just-so story"—how the camel got its hump; why we don't let parents sell their babies—with an authentic, persuasive, and insightful explanation.

The economic story of my relationship with my child has got it absolutely backward. The value of the transactions between my children and myself is not only high but incommensurable with the market transactions I conduct outside the family. Further, in a very important sense, the point of participating in market transactions is to provide the material necessities that permit humanly valuable relationships to survive and flourish.

Hansmann offers his economic theory of morality: "It is advantageous to assign as many transactions as possible to the category of market transactions since this 'economizes' on morality. Where the 'invisible hand' of the market works well in advancing social welfare, there is no reason to expend the substantial social effort necessary to develop and inculcate a (possibly very elaborate and perhaps rather rigid) set of norms to guide transactions."[36] Make no mistake about it: this is a bizarre account of morality, however internally consistent it may be with the economic view of the world. Perhaps its greatest intellectual flaw is that it presumes exactly what must be shown. It presumes that the economist's model of human nature is not merely plausible or useful in understanding certain phenomena but also fundamentally and exclusively correct. It presumes that the only valid measure of human flourishing is the maximization of wealth measurable by the economist's own instruments. And it presumes that the only source of value is money.

An Alternative Perspective on Markets, Justice, and Organs

In their most recent book on organ transplantation, Renée C. Fox and Judith P. Swazey place the current enthusiasm for market approaches in context.[37] The 1980s witnessed the first explicitly commercial endeavor in the United States to buy and sell organs. The International Kidney Exchange, Inc., established by Dr. H. Barry Jacobs, planned to import kidneys from poor countries and sell them to Americans.[38] Jacobs's plan quickly evoked resounding condemnation both from professional groups and from the U.S. Congress. Nonetheless, by the end of the 1980s and into the early 1990s, the idea of market incentives for organ procurement had reemerged. Fox and Swazey argue that "it is more than coincidental that a market approach to organ donation gained momentum during the 1980s, a decade when a certain view of the market has not only become more prominent and 'attractive' in the economic sector of American society" but has become more prominent in other spheres as well.[39]

The market analysis of organ recovery is seductive because it seems like such a realistic and sensible approach, especially in light of our recent political history. It evokes many of our culture's values and assumptions: autonomy, liberty, and private property; a belief in the power of money as a motivator; and a view of markets as fair and efficient institutions for producing and distributing goods. Market advocates

like Cohen and Hansmann take the moral and practical superiority of markets for granted, and they assume that all other schemes for producing and distributing goods are second-best, if that (recall Hansmann's ideas about morality as a regulator of human behavior).

Money may well be the dominant good in American culture at this time, and markets may be widely used to distribute goods,[40] but there are many goods that money should not be able to buy, and for which the market is not the appropriate system of distribution. To name only a few, we should not be able to purchase a desired legal verdict, a Pulitzer Prize, or a child. These and many other goods have a meaning and value that places them outside the market. What we need is an alternative interpretation of goods and the principles by which goods are distributed among people; an interpretation that captures more faithfully the complexity of our most deeply held ideas about the meanings of those goods and about distributive justice. One promising interpretation is found in the work of Michael Walzer.

Walzer's theory of justice as complex equality is particularly helpful in understanding what is troublesome when all things are measured by one standard of value and when one good, such as money, dominates the distribution of virtually all other goods.[41] Complex equality is a response to tyrannies of the sort described by Blaise Pascal in this pensée cited by Walzer:

> The nature of tyranny is to desire power over the whole world and outside its own sphere.
>
> There are different companies—the strong, the handsome, the intelligent, the devout—and each man reigns in his own, not elsewhere. But sometimes they meet, and the strong and the handsome fight for mastery—foolishly, for their mastery is of different kinds. They misunderstand one another, and make the mistake of each aiming at universal dominion. Nothing can win this, not even strength, for it is powerless in the kingdom of the wise.[42]

Injustice in the form of tyranny consists in the domination of one social good over others. At different times in human history and in different places, the dominant good has varied, from sacred office to wealth and status by birth to political power. In the contemporary United States, the dominant good is money.

Also crucial to Walzer's theory is an account of social goods, ranging from membership in a community to security, love, office, and material things. Each of these sets of goods has a socially constructed and shared meaning, and each carries with it notions about how it should be distributed within its particular sphere. Recall Pascal: physical strength does not determine who is most wise and, therefore, whom we should respect as our teacher; the wisest may not be the best athlete, and so has no claim to prevail in the sphere of athletic competition solely by virtue of his or her wisdom. Each sphere is autonomous, and the goods within each sphere ought to be distributed according to the meaning of justice within that particular sphere.

Tyranny reigns when one sort of good is too readily converted into another—when money, for example, buys office. A market approach to organ recovery is not, strictly speaking, tyrannical in Walzer's or Pascal's sense. Tyranny would rule if the distribution as well as the recovery of organs were determined by money. (Market proponents seem to be sympathetic to a market approach to distributing organs, but they steer clear of emphasizing it, perhaps because they recognize that most people would regard it as a moral outrage.) The danger in an organ-procurement market is more subtle.

Financial incentives for organ recovery try to convert one sort of good—the organs and tissues that constitute the human body—into another sphere. Our culture has a long history of treating the human body as something distinct from commercial property. Though we make exceptions for certain replenishable products such as hair and plasma, we frown upon schemes to buy and sell organs or body parts. Imagine the public response to a wealthy bidder who offers fifty thousand dollars apiece for freshly severed human arms: we would, I think, block any such transactions immediately. We made a similar response to the entrepreneur who obtained a license to import transplantable human organs, passing no less than a federal law banning interstate transport of human organs for profit.

The dead human body likewise has been an object of great moral concern and social meaning.[43] Different cultures have had different ideas about what counts as respectful treatment of the dead, but few if any regard the newly dead human body as an object of moral indifference.[44] The Anglo-American legal tradition treats the body as "quasi property," a category that confers many of the responsibilities of possession with none of the privileges, certainly not the right to profit by sale. The leading book on tort law has this to say about cases dealing with the disposition of dead bodies:

> In most of these cases the courts have talked of a somewhat dubious "property right" to the body, usually in the next of kin, which did not exist while the decedent was living, cannot be conveyed, can be used only for the one purpose of burial, and not only has no pecuniary value but is a source of liability for funeral expenses. It seems reasonably obvious that such "property" is something evolved out of thin air to meet the occasion, and that in reality the personal feelings of the survivors are being protected, under a fiction likely to deceive no one but a lawyer.[45]

I have some sympathy for the judges who ruled on such cases. They faced a difficult task. They had to adjudicate disputes over where bodies should be interred, whether burial or cremation would be done, the alleged stealing of bodies, and other such matters. And they had to rule with the legal tools at hand, tools better adapted for regulating commercial relationships. Yet their judgments suggest the understanding that the newly dead human body possesses a greater moral significance than mere commercial property.[46] So they were forced to come up with a legal category that captured, however imperfectly, the meaning and moral importance of the newly dead body.

I also want to reflect for a moment on the tort scholar's theory about the real source of the judges' concern: protecting "the personal feelings of the survivors." I think he is on the right track, as long as we take the relationship of the survivors to the newly dead person as something weighty and worthy of both our moral respect and sympathetic public policies. In this light, financial incentives for organ recovery can be seen as an attempt to transform the relationship that a family has to the remains of its newly deceased relative. The relationship is transmuted from one of intimate social and moral connectedness to something more like the relationship the owners of old cars have with their vehicles, which are now being stripped of still-useful parts in a salvage yard: impersonal, with the hope that a little utility and a little money can be extracted from the now lifeless hulk.

It is important to stress again the profound difference in meaning and moral significance between, on the one hand, such commercial acts and what they connote about the relationships between the custodians of the body and, on the other, acts of donation, in which families choose to make gifts from the body of their newly deceased relative.[47] Such gifts convey something beyond and other that what we think the now-dead person would have wanted, although respect for that person's memory and wishes is what one would expect from those who loved that person. These gifts may convey a sense that our loss intensifies our sympathy for other families who are imminently facing similar losses for want of a healthy heart or liver or kidney. They may offer some consolation in our grief, or a sense that our relative in some way lives on in another. They may permit us to affirm our belief that our relative's characteristic generosity (if he or she was generous) continues to enrich others' lives even after his or her death. I can imagine more meanings of the gift here. The point is that financial incentives intrude violently on these manifestations of the gift and on the meaning of the relationship between the family and the newly dead person.

Financial incentives for organs pose dangers of two kinds. First, they threaten to transform some deeply held conceptions about the moral significance of the body of a newly dead person. Those conceptions are relevant to whether we regard the body as a form of property that belongs in the sphere of the marketplace, to our sense about the meaning of death within a family, and to the relationship of surviving family members to the newly dead individual. A very practical reason also provokes worry about allowing money to intrude into such matters: to the extent that financial incentives misrepresent the moral meaning of the newly dead body, they may diminish people's willingness to part with organs—their own or those of their family members. Paying families for organs may inspire a reaction against the entire enterprise of transplantation, as well as increase the grief of surviving family members.[48]

The narrowly economic view of people and their morality is deformed, shrunken, and defective. It fails to understand why people value human relationships, how relationships based on and succored by gifts are significant, and what genuine human flourishing consists in. The economic view cannot grasp why people would donate their own or their relative's organs, or why people object to markets for organs. The solutions it offers are based on these defective explanations and are as likely to diminish the number of transplantable organs as to increase them. Even if they were to result in a modest increase, the social cost in values damaged and meanings distorted might be greater than the good of a few more organs obtained. But we do not yet need to strike this balance, because the prescription of a market solution appears to rest on a fundamental misdiagnosis.

Why Doesn't the Current System Provide More Organs?

The heart of the market proponents' proposals is that the organ-shortage problem will be cured by giving individuals and perhaps their families a financial inducement to provide organs. This diagnosis presumes that reluctant prospective donors and the families of newly dead persons are the principal obstacles to procuring more organs. But a more significant barrier prevents the recovery of more organs: health professionals.

Cohen himself admits that "the primary roadblock to organ retrieval was and remains the reluctance of medical professionals to, on the one hand, harvest the organs without consulting the next of kin, or on the

other hand, to approach the next of kin with such a request."[49] If Cohen is correct on this point, then the remainder of his analysis is suspect. He proposes a cure—the market—for a problem he diagnoses as a lack of incentives for people to authorize the taking of organs. But he fails utterly to present a convincing case for why anyone would authorize organ donation in the current system, despite the fact that a majority of families who are asked say yes. To put it another way, he wants to provide incentives to people who may well not need them, knowing that other people—medical professionals—are the principal barrier to obtaining more organs.

Some evidence indicates that adding financial incentives would increase, possibly substantially, resistance among the professionals involved in identifying candidates for organ retrieval and talking with their families. Jill Altshuler and Michael Evanisko conducted a survey with health professionals likely to be involved in these tasks. They found very high support for organ donation among all the groups they surveyed, and a high degree of comfort in approaching families of prospective donors among most of the groups, ranging from 99 percent among organ-procurement coordinators to 80 percent for neurosurgeons and social workers and 59 percent for critical-care nurses. Still, every group expressed considerable uneasiness at the prospect of having to mention financial incentives. Only 20 percent of neurosurgeons said they were comfortable approaching families with this message, and even fewer nurses said they were comfortable.[50] Surely a portion of health professionals' reluctance to approach families about financial incentives is due to their recognition that money cheapens the event by attempting to transform a solemn social and biological occasion into a quasi business transaction.

If health professionals represent the primary barrier to increased organ donation, and if providing financial incentives may make these professionals more reluctant to approach families in distress, then a plan such as the one Peters proposes might well lead to a substantial drop, not an increase, in available organs. Whether the hostility of health professionals to financial incentives would be as devastating to the plans offered by Cohen and Hansmann is less clear. Cohen has no patience with them. Recall his claim: If a couple of disgruntled relatives deprived of a payoff were to file lawsuits against physicians who heeded other family members' objections, that would quickly dissuade other physicians from paying any attention to family wishes. Nonetheless, health professionals' reluctance to raise the issue of money for organs suggests that perhaps something that escapes the understanding of market proponents is at work.

A Preference for Gifts over Markets in Human Organs

It has not been easy for opponents of market schemes for human organs to articulate their case. In part, I believe, the difficulty may be caused by an undue willingness to accept how market proponents describe the circumstances of organ recovery, as if their descriptions were unquestionably accurate and thoroughly neutral, containing no value-filled presumptions. If we accept their descriptions and their characterizations of the terms of dispute—saving lives with more organs versus sentimental, probably neurotic, aversions to surrendering our own or our relatives' organs—discussion is over before it begins. But we have good reasons for not accepting the way market proponents want to frame the debate. Thus far I have tried to show how their descriptions are anything but neutral, unobjectionable, and accurate, notably, how they fail miserably to understand why people give organs without the prospect of financial reward. I now want to make a case briefly for framing the situation differently—as belonging in the realm of gifts and crucial human relationships.

The world of markets and contracts regulates a great many human interactions. But a prominent sphere of gifts also exists, intimately tied to establishing and maintaining important human relationships. The sphere of gifts differs from the sphere of markets in many ways. In markets, the contract specifies your obligations; once the contract is satisfied, your obligations and whatever relationship existed during the life of the contract may be terminated. In gift relationships, your obligations are never fully satisfied; each gift you receive creates certain obligations—to be a grateful recipient, to use the gift gratefully, and to reciprocate with another gift at an appropriate time. Although services, tangible items, or even money might be transferred in either markets or gifts, in the market the relationship exists in the service of the transaction; in gifts, the transaction is in the service of the relationship. Perhaps the simplest way to put it is to say that markets are principally about goods and money; gifts are about human relationships.

When a family member dies, we could take the market perspective on the body of the newly dead person and speak of salvaging the economic value from what will rapidly become useless rotting flesh. But this is not the only reasonable view. We could choose to take family relationships seriously at this time. If we did, we might find the survivors forced suddenly and drastically to redefine their relationship with the newly dead person. When we ask the family members if they will agree to donate the organs of their newly dead son or daughter, sister or brother, they might see this decision as one of the crucial, telling, and final acts with which they will accomplish that redefinition.

We can attach great importance to the family's struggle without becoming Pollyannaish about families. They may love the person who has just died, but they may feel a surge of other emotions as well: loss; anger at the person for leaving them or for doing something so risky that it caused his or her death; remorse for not having loved the person better; guilt for not having warned the person to avoid whatever caused his or her death. The fact that family members in all likelihood have a complex mix of emotions, not all laudable as Peters observed, does not lead inexorably to the conclusion that we should adopt a policy of appealing first to their mercenary instincts.

Why not assume that the family of a newly dead person has as powerful a moral claim to that person's body, based on their long-standing relationship with that person and on their need to work through their own acute grief and ambivalence, as an anonymous stranger who desires one of his or her organs? Whether or not the family owns the legal title to those organs, in light of the moral and emotional centrality of family relations, seems a trivial point. It is a point that gives Hansmann, who has the courage to deal with it openly, great trouble. He asks, What should be done when the family prevents organs from being taken despite the person's having received the ten-dollar discount on his or her health insurance? He sees three options: ignore the family, make them pay the market value of the harvested organs, or make them pay only a "refund, with interest, of the insurance premium reductions."[51] Hansmann believes that only the first two options respect the contract, but he realizes there "might be considerable pressure to accept the third." He recognizes that family relationships may have force here, but does not recognize why they might be important and legitimate considerations.

Human beings pursue relationships with other human beings because relationships have value and because a network of relationships is conducive to human flourishing. Gifts help establish and regulate those relationships. Despite ludicrous attempts to reduce such relationships and the norms governing them to economic principles, the market view fails to comprehend the significance—and the ethics—of gifts, just as it fails to comprehend what is important in social solidarity, community, family relationships, friendship, and love.

In his recent study of "acts of compassion," sociologist Robert Wuthnow explores how and why Americans show care for others.[52] In a culture that proclaims self-interest to be the only motive, caring for others is deviant behavior, unless it can be explained as just another form of self-interested action. Wuthnow demonstrates the shallowness of such a view. We now live, he observes, "in open networks of intimate associations and casual acquaintances," deriving most of our fulfillment from our closest relationships.[53] But our lives also intersect with many other people in "diffuse webs of association that tie us together. The caring we may show toward persons other than our intimate friends and family demonstrates our commitment to these larger networks."[54] Acts of compassion show "a commitment to those who may not be able to reciprocate, an acknowledgment of our essential identities as human beings, and a devotion to the value of caring itself."[55]

Wuthnow describes very well the function the compassionate life plays in modern society. It counters "our fears of the impersonality of modern life and the corruption and exploitation that can occur in a bureaucratized society" and "provides a way of expressing our concerns about materialism and its corrosive effects on human life. . . . It reminds us of our humanity and therefore of the deeper qualities that are essential to our common human existence."[56] Compassion reaffirms that "not all of life depends on efficient, large-scale organization and a productive economy. [Compassion helps to] create a space in which to think about our dependence on one another, the needs that can never be fulfilled by bureaucracies and material goods, and the joys that come from attending to those needs. Above all, compassion gives us hope—both that the good society we envision is possible and that the very act of helping each other gives us strength and a common destiny."[57]

Wuthnow's study helps answer the question of why people donate organs, the question that so befuddles market proponents. I have already described a family's decision to donate the organs of their just-deceased relative as a crucial event in the transformation of that family's relationship with the now-dead family member. Wuthnow helps us to understand why so many families see donation—an act of compassion—as an appropriate choice.

Proposals to use the market to procure transplantable organs have a certain superficial appeal to our preference for individual choice. But they miss virtually everything that is important in the setting in which such decisions are made: families struggling to come to terms with the death of someone who, for better or worse, has helped determine what gives meaning and form to their lives and their enduring relationships.

Families can and should be asked to donate the organs of their newly dead relatives. Indeed, I believe a strong case can be made that families have a moral obligation in some cases to do so.[58] But I do not think we aid families in such straits by inventing futures contracts or offering them a thousand dollars for organs. We are more likely to outrage them. Nor do I believe that we are likely to increase the supply of organs with enticements of discounts now or cash later. The economic analysis of organ recovery fails to comprehend the circumstances under which

transplantable organs are recovered, the significance of the death to the surviving family of the newly dead, and the distorting impact of financial incentives on those crucial opportunities to begin to come to terms with the family's loss. A prescription based on a colossally faulty diagnosis could aggravate the problem.

Notes

1. See the chapters in this volume by Renée Fox, on the social meaning of organ transplantation, and Ruth Richardson, on the analogy of obtaining cadavers for dissection. Also see the chapter by Margaret Lock, who describes the Japanese aversion to commodifying organs.

2. Lloyd R. Cohen, "Increasing the Supply of Transplant Organs: The Virtues of a Futures Market," *George Washington Law Review* 58, no. 1 (1989): 1–51.

3. Henry Hansmann, "The Economics and Ethics of Markets for Human Organs," *Journal of Health Politics, Policy and Law* 14, no. 1 (1989): 57–85.

4. Thomas G. Peters, "Life or Death: The Issue of Payment in Cadaveric Organ Donation," *Journal of the American Medical Association* 265, no. 10 (1991): 1302–5.

5. Cohen, "Increasing the Supply," 24.

6. Ibid., 34.

7. Ibid.

8. Ibid., 50.

9. It seems ironic that Hansmann's plan would offer such a small amount of money, an amount we might well dub symbolic. The irony lies in the skepticism with which proponents of financial incentives regard what they call, disparagingly, merely symbolic concerns.

10. Hansmann, "Economics and Ethics of Markets," 69–70.

11. Ibid., 83–84.

12. Peters, "Life or Death," 1305.

13. See the chapters in this volume by Stuart Youngner, Renée Fox, and Ruth Richardson for discussions of the uses of language in organ transplantation.

14. *Webster's New International Dictionary of the English Language*, 3d ed., s.v. "donor" and "donation."

15. Cohen, "Increasing the Supply," 11.

16. Hansmann, "Economics and Ethics of Markets," 70.

17. Ibid., 72.

18. Peters, "Life or Death," 1303.

19. In many discussions of noneconomic factors, economists often dismiss such concerns as aesthetic, and rely on *aesthetic*'s unfortunate connotations of "weak, arbitrary, or something relegated to a mere matter of taste," a difference that is unsettleable, perhaps trivial.

20. Cohen, "Increasing the Supply," 9–11.

21. Ibid., 12–13.

22. Hansmann, "Economics and Ethics of Markets," 67.

23. Peters, "Life or Death," 1303.

24. Ibid.
25. Cohen, "Increasing the Supply," 24 n. 82.
26. Ibid., 25.
27. Ibid., 25–26.
28. Hansmann, "Economics and Ethics of Markets," 69.
29. Ibid., 74.
30. Peters, "Life or Death," 1303.
31. Ibid., 1304.
32. Hansmann, "Economics and Ethics of Markets," 75.
33. Ibid.
34. Ibid.
35. Ibid., 76.
36. Ibid.
37. Renée C. Fox and Judith P. Swazey, *Spare Parts: Organ Replacement in American Society* (New York: Oxford University Press, 1992).
38. Ibid., 65.
39. Ibid., 72.
40. See the chapter by Margaret Lock in this volume for a discussion of this issue in Japanese culture.
41. Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983).
42. Blaise Pascal, *The Pensées*, cited in Michael Walzer, *Spheres of Justice*, 18.
43. Thomas H. Murray, "On the Human Body as Property: The Meaning of Embodiment, Markets, and the Needs of Strangers," *Journal of Law Reform* 20, no. 4 (1987): 1055–88.
44. See Ruth Richardson's chapter in this volume for the remarkable parallels between historical policy debates (and debacles) over obtaining bodies for dissection and contemporary debates over obtaining organs for transplantation.
45. W. Prosser and W. Keeton, *The Law of Torts*, 5th ed. (St. Paul, Minn.: West Publishing, 1984), 63.
46. See the chapter by Renée Fox in this volume for a discussion of the moral significance of the newly dead human body.
47. See the chapter by Renée Fox in this volume for a discussion of gifts.
48. Renée C. Fox, "Regulated Commercialism of Vital Organ Donation: A Necessity? Con," *Transplantation Proceedings* 25, no. 1 (February 1993): 55–57.
49. Cohen, "Increasing the Supply," 14.
50. Jill S. Altshuler and Michael J. Evanisko, "Financial Incentives for Organ Donation: The Perspectives of Health Care Professionals," *Journal of the American Medical Association* 267, no. 15 (1992): 2037–38.
51. Hansmann, "Economics and Ethics of Markets," 65 n. 21.
52. Robert Wuthnow, *Acts of Compassion: Caring for Others and Helping Ourselves* (Princeton: Princeton University Press, 1991).
53. Ibid., 300–301.
54. Ibid., 301.
55. Ibid.

56. Ibid., 303–4.
57. Ibid., 304.
58. See Thomas H. Murray, "Are We Morally Obligated to Make Gifts of Our Bodies?" *Health Matrix: Journal of Law-Medicine* 1, no. 1 (1991): 19–29. This article attempts to distinguish the moral from the legal dimensions of organ donation, and it offers an argument that under certain circumstances we may have a moral duty to donate our own or our newly dead relative's organs and tissues, in the absence of any formal legal requirement to do so.