

Now, there is an indisputable cost for continuing the prohibition on organ markets.

Directions for the Disposition of My (and Your) Vital Organs

BY LLOYD R. COHEN

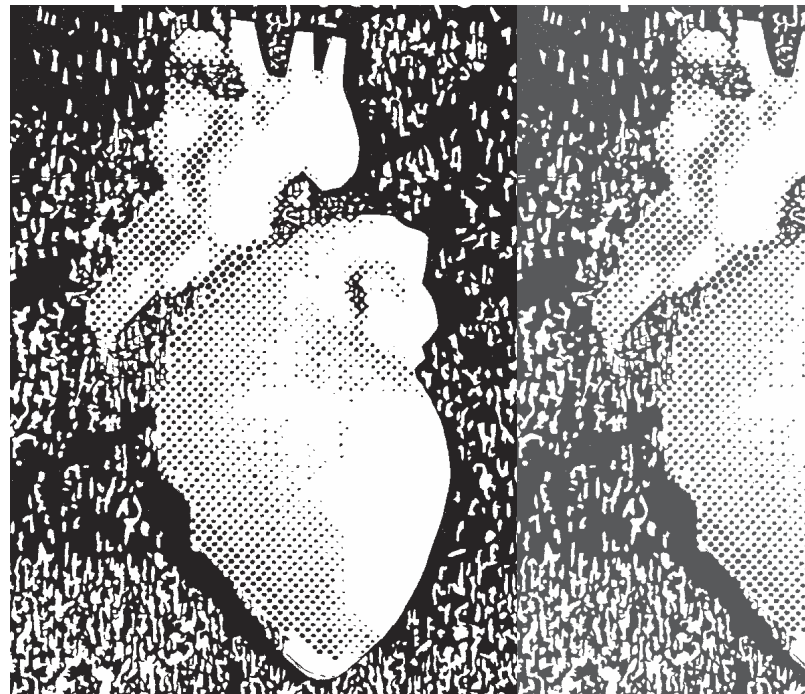
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AFTER SPENDING 16 YEARS URGING legal reform that would permit compensation for organ donation in order to increase the supply of transplant organs, I have decided to reverse course. I will now decrease the supply of organs by one donor—myself—and hopefully by many more. Why this radical change in direction? Because my efforts to change the law and increase the supply of organs have proved fruitless and there is little that I or anyone else can add to the argument for employing a market incentive to increase organ donation.

I entered this arena in 1989, proposing an options or futures market as the best way to alleviate the current shortage of transplantable organs and relieve human suffering. In such a market, healthy people would be offered the opportunity to give an “option” on their transplantable organs, which would be recovered at their death. If they die under appropriate conditions and their organs are recovered, a previously determined sum of money would be paid to their estate or designee. In earlier writings, I suggested the sum of \$5,000 for each major organ.

Over the years, I have written a book and perhaps a dozen

articles promoting that program. I have made my case before a variety of bodies including the plenary session of the World Transplant Congress and the joint meeting of the annual con-



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ference of U.S. Transplant Surgeons and Physicians. I have appeared on *60 Minutes*, the BBC, Australian television, and too many other television and radio shows to remember. I have even met individually with senior aides to perhaps half a dozen U.S. senators.

While I still believe that an options market is the best solution, like most of those who wish to marshal self-interest in the cause of increasing the supply of organs, I have been ecumenical in my efforts. I have added my name to the LifeSharers program founded by David Unids that would give priority in access to organs to those who agree to donate their own organs. I am also a supporter of the group AHCSIOS, organized by University of Pittsburgh neurobiologist Harold Kyriazi, that tries to promote a “rewarded gifting” proposal that would offer remuneration to next-of-kin in exchange for a right to harvest organs from a deceased loved one. Unfortunately, and with all due respect to the admirable efforts of LifeSharers, AHCSIOS, and other groups, I see little hope of relieving the ongoing shortage of transplantable organs unless some sort of market in organs is implemented. And I see no prospects of that happening in the near term.

THE DIRECTIONS

How can it be that the current prohibition on an organ market, under which so many people needlessly suffer and die each year, continues on without the slightest indication that it is withering and tottering under our assault? You will have to wait for just a bit for the answer to that question. First, let me unveil my newest proposal:

Directions For The Disposition Of My Vital Organs

Being of sound mind and body, I, Lloyd Robert Cohen, do hereby declare that in the event of my death, I refuse permission for any of my major organs (i.e., kidneys, heart, liver, lungs, or pancreas) to be harvested from my body unless and until

at least one of the two following conditions is satisfied:

1. that the harvested organ be designated for transplantation into my direct descendent, wife, mother, aunt, first cousin, or any of their descendents, or

2. that all costs attendant to the preservation of my body and the harvesting of my organs be paid by a third party, and

a. that the sum of at least \$864.27 be paid to my estate in exchange for each organ, or

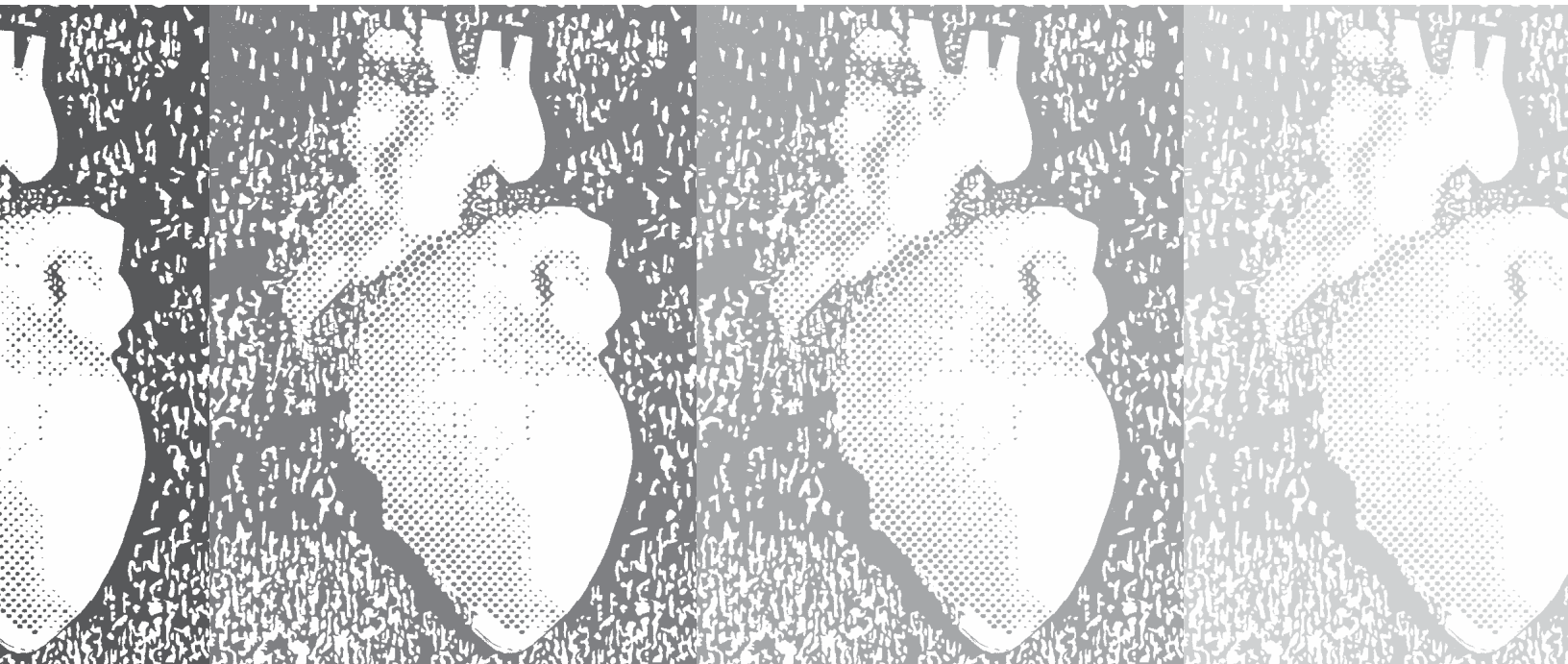
b. that the harvested organs be designated for transplantation into a member in good-standing of the LifeSharers list entitled to receive the organ.

Should any member of my family, in contravention to the wishes expressed in this document, permit transplantation of any of my major organs, the amount that he or she would otherwise inherit from my estate by devise or intestacy shall be reduced by \$50,000.

With that out of the way, we can take up the question of why such a declaration is necessary.

The principle reason that we manage to recover only about half the transplantable organs potentially available from cadavers is that those who are asked to donate receive nothing in return. A significantly larger organ supply would become available if donors were offered a substantial—though less than exorbitant—material reward. I am almost embarrassed to have earned some renown for championing a proposal based on such a trivially obvious proposition.

THE CRITICS But, if the benefits of an organs market are so clear, then why do we still live under a regime that condemns people to death and suffering while the organs that could restore them to health are instead fed to worms? The opponents of organ markets are inclined to wax poetic about the dig-



nity of human life and its degradation by the trafficking in human organs. As a typical example, consider the following statement by the late Benjamin Freedman, a respected medical ethicist, in his 1985 *Transplantation Proceedings* article “The Ethical Continuity of Transplantation”:

That which cannot be bought and sold is by definition priceless. By removing human life and health from the marketplace, we affirm this principle which underlies much contemporary thinking about ethics: the intrinsic, ineliminable, ineluctable value of human life and health. This affirmation is itself a process which can and should be constantly repeated without ever exhausting its point.

Those certainly are high-minded words. But high-minded words provide little relief to patients in need of a heart or lung. There would be an increased supply of those organs if society would allow the payment of donors for the right to recover their vital organs in the future, once the donors have shuffled off this mortal coil.

Elsewhere, I have offered arguments for organ markets and dissected criticisms of such markets. But my arguments have fallen on deaf ears. Those who oppose a market solution somehow maintain that the prohibition on compensation for organ donation is costless; that is, that compensation would not increase the supply. If they were to believe otherwise, then they would have to concede that to prohibit compensation in the name of the “ineluctable value of human life” is to condemn children to death by organ failure. Even those who recite platitudes of the sort I quote above recognize the absurdity of arguing that condemning children to death somehow vindicates and furthers human dignity. And so those who oppose compensation simply assert that not only is a market evil, but it would not succeed in increasing the supply of organs.

THE EFFICACY OF THE MARKET

For people with a basic knowledge of economics, hearing someone proclaim that compensation would not increase the supply of transplantable organs is akin to hearing someone proclaim the earth is flat. After all, cadaveric organs are valueless to their current owners, but are of enormous value to people in need of transplant. Permitting compensated transfer from the former to the latter would increase the number of exchanges.

This underscores the frustrating nature of the public policy debate over organ markets. For example, as I write these words, I am also preparing a talk for an Institute of Medicine panel in which I am asked to respond to questions like the following: “Would offering payment to families of deceased donors ‘crowd out’ charitable giving, so that the net impact on the organ supply could be negative?” So, though it is the economic equivalent of the argument that spilled water will flow downhill and not uphill, I will rehearse for you the reasons to believe that offering payment for organs will increase the quantity supplied.

EPISTEMIC ARGUMENTS Before presenting economic arguments, I will offer an epistemic one: The burden of persuasion

in this debate should rest not with me, but with my opponents. There are two themes to this argument: The first turns on the “loss function” and the second on “Bayesian priors.”

By a “loss function,” I mean the costs of error on each side. That is, there presumably is some cost to trying a market and discovering that it fails to increase supply. But there also is a cost to never trying a market that, if tried, would have increased the supply of transplantable organs and saved the lives of those suffering from end-stage organ failure. I think any reasonable person must believe that the latter cost is enormously greater than the former. It follows that prohibiting a market must turn on a likewise enormously greater probability that the market would fail. That is, it will not do for those who oppose markets to merely argue that a market might not be successful, or even that it probably would not work. Unless they can establish that there is some enormous cost to trying and failing, their argument must be that it is almost certain to fail. This is because the cost of not employing a market that would otherwise succeed in retrieving many vital organs is death and suffering.

The second epistemic point turns on the question of what sort of prior assumptions a reasonable person should bring to this question. I have found that often this debate begins with the unquestioned assumption that markets generally do not succeed in moving goods from those who value them little to those who value them much. It is in that spirit that I am asked to answer at a forthcoming Institute of Medicine panel, “What evidence is already available on the effects of financial incentives? What evidence would be needed and how would one collect it?”

This is a mild representation of the common, backwards assumption I am subjected to all too often in this debate, that in the absence of empirical evidence that financial incentives for organ donation will increase the supply, the presumption against a market cannot be rebutted. There is some cynicism in this formulation. The obvious, perhaps the only, way to resolve the empirical question is a market test. Let us try one of the various organ market proposals somewhere for a few years and see if it works. But, of course, we cannot try it because such a market is illegal. So then repeal the law. No! No! The opponents of markets respond that we must not repeal the prohibition until we have empirical support.

When I first heard the demand for empirical support and the claim that a market solution would not be successful, I was caught off-guard. In my first articles on this subject, I thought that the practical virtues of a market were so apparent as not to deserve extensive discussion. It did not occur to me that there would be a serious question raised about whether a market would increase organ retrieval. Given that market rewards are almost everywhere the most effective incentive for eliciting the provision of goods and services, a heavy burden of proof in the debate over the efficacy of a market rests with the other side. The opponents of organ markets should thus be the ones obligated to demonstrate that there is some peculiar reason why in this market, unlike virtually all others, permitting price to rise above zero will not increase the quantity supplied. And I cannot imagine

what sensible argument they might offer. There is, after all, nothing very economically peculiar in the proposition that if we offer people a fairly substantial amount of money for something that is of virtually no value to them (a cadaveric organ), more of them will surrender it than currently do so.

POWER OF MARKETS Notwithstanding that the burden of proof should not be mine but my opponents', I have offered in the past and will now repeat a few arguments on the efficacy of a market.

First, we may look to related markets. I hesitate to compare a market in cadaveric organs with a market in organs from living donors. Clearly the sacrifice on the part of the vendor is incomparably greater if the organ is to be taken when the vendor is alive. But, if there is a thriving market in organs from living donors in India, Turkey, and various other countries, then it certainly bodes well for a market in cadaveric organs in the United States.

Second, we may look to the relative value of the organ to the parties involved. The very reason that my opponents

donate, is there any doubt that if donors were charged a fee of a mere \$500 for each organ, most of the current supply would dry up? If on one side of the current zero price, supply is highly responsive to price, does it not stand to reason that, on the other side, supply would also be responsive?

Ultimately, I believe that virtually any of the proposed organ market regimes would be a resounding success because those who refuse to donate do not have a strong objection to having their organs harvested. Under the present regime, they are being asked to assume some real, albeit limited, psychic costs without being offered any compensating benefit. The simplest, most direct, most efficient, and least expensive way to induce them to make the sacrifice is to compensate them.

MARKETS AND HUMAN LIFE At times, the objection to financial incentives and their efficacy is cast in terms of the shallowness of a market. The point seems to be that—and here I quote myself—“The human body is a peculiar thing. At the moment of death it is transformed from the exalted state of the corporeal incarnation of the human spirit to the irre-

Why do we still live under a regime that condemns people to death and suffering while the organs that could restore them to health are instead fed to worms?

have such faith in altruism provides perhaps the greatest support for the efficacy of a market. They believe that altruism should work because transplant organs are of no value to the dead and of enormous value to the ill. But markets are most effective at transferring goods from low-valued uses to high-valued ones. I can think of nothing that fits this category better than a cadaveric organ.

Third, we can learn much from the limited American market in cadaveric organs. It is true that it is illegal to buy and sell organs, but it is legal—indeed, encouraged—to donate them. At the zero price currently paid to organ donors, we have a substantial but far less than satisfactory amount of organ donation. While the rate of donation has not been allowed to vary with price, it has varied in the manner that people are asked to donate. Many potential donors who would otherwise decline to donate can be badgered, bullied, embarrassed, cajoled, and perhaps even persuaded into donating if enough time and effort were expended in the effort. Thus, it is fair to infer that potential donors would respond to more substantial financial incentives as well.

Another use of the limited observation we have of the supply curve provided by the current zero-price market requires a thought experiment. Imagine that the price of organs is not raised above zero as I propose, but instead is lowered such that the donor must pay a fee to donate the organ. Despite our great respect for the generosity of those people who currently

versible status of a cadaver. It is understandably difficult for people to immediately recognize and accept such an awesome transformation.” Recognition and acceptance of this transformation is a profound experience and the shallow tool of financial compensation cannot speak to such concerns, say organ market critics.

The critics are right; a market is a shallow solution. But its efficacy does not rest on some profound understanding of the human spirit. While in some human endeavors depth is to be prized and shallowness disdained, not here. It is the very shallowness of economics that is its virtue! The critics make a simple error: they assert a truism and follow it with a non sequitur. The truism is that recognition and acceptance of death are profound and deep experiences; the non sequitur is that because feelings about the human body and its meanings have roots deep in human consciousness, we therefore cannot motivate people's behavior with regard to their bodies by something as base as financial reward.

In simultaneously having deep meanings and being subject to base economic force, transplant organs are not unique; indeed they are not even very special. Consider human waste. Human beings have a deep-rooted, not fully rational antipathy to excrement. Despite the deep root of this antipathy, you can—for a not-exorbitant sum of money—hire people to empty your septic tank. We would think it most odd if an ethicist were to suggest that, because the antipathy to excrement

has its root deep in human consciousness, we must terminate all paid drainage of septic tanks and instead rely on altruism to provide that service. So too with transplant organs; there is neither necessity nor virtue in delving deep into man's consciousness to find and change the root causes of uneasiness about organ donation. Offer compensation and people will sell and lives will be saved.

IDEOLOGUES Then there are those who accuse proponents of financial incentives of being ideologically driven. This reminds me of the saying that he who sees fault in his neighbor would do better to cast his glance upon himself.

Proponents of financial incentives design their proposals to be as ideologically uncontroversial as possible. Though I am a libertarian, my goal in formulating my options market proposal was to increase the supply of organs, not of liberty. Indeed, I sacrificed liberty to achieve political acceptability. How so? Some are concerned that the poor would be coerced to sacrifice too much, so my options market would not permit it—it is only directed at the dead, who are neither rich nor poor. Others are concerned that the rich would acquire organs ahead of the poor, so my market would allow a state agency to acquire the organs and allocate them by any conceivable means. I am concerned that mothers not be asked to traffic in their dead children's flesh, so my market does not entail it.

To the extent that ideology is evident in any of these market-oriented proposals, it is the ideology that supply is responsive to price. But such a belief is as grounded in observation and rational thought as the belief that the earth revolves around the sun. A critic who labels a proposal based on this belief as "ideologically driven" reveals more about

himself than the proposal he is criticizing.

Organ market critics, on the other hand, espouse an ideology that charity is a great virtue and that those who agree to donate their organs to help others have done a great and noble act. If donation is a virtue, they seem to argue, then a refusal to donate is a vice and any system within which people are rewarded (through financial or other incentives) for their refusal to make a gratuitous donation is doubly wicked. But this ideology is at its core false and repugnant. The same logic (donation is a virtue, refusal to donate a vice) can be applied to any exchange of goods or services. Is it wicked for my neighbor to hold a garage sale when she could easily and virtuously donate her unwanted possessions? Is it evil for an ethics professor to charge for his lessons when he could offer them for free? And is it doubly wicked that the law permits such transactions?

The belief that markets are an immoral alternative to virtuous donation is antithetical to the 230 years of political and philosophical thought on which this country is based. Yet, it is this ideology that is again and again apparent in the writings and statements of organ market critics. They are so driven by a loathing of markets that no market, however many compromises it incorporates to answer wealth-based or other ethical objections, can ever satisfy them. They simply cannot abide the notion that even with regard to cadaveric organs—which, after all, are a uniquely human gift of enormous value to the recipient and valueless to the decedent—altruism should prove inferior to self-interest as a motivation to donation. Driven by this fanatical ideology, they would sacrifice the lives of thousands of sick patients.

Readers of *Regulation* likely are easily convinced by my arguments and need little if any persuasion to believe the banal



proposition that if you offer to pay people a substantial amount of money for something on which they place little value (a cadaveric organ), they are more likely to supply it than if you do not. Unfortunately, in the policy debate over the ending of the legal prohibition, I need to persuade less rational—or perhaps more ideologically committed—people.

Perhaps I should have anticipated this resistance. The prospect of an effective organ market places my opponents in a terrible bind. A market that would recover the many vital organs that are now being buried and burned would be the salvation of thousands of innocent patients who now suffer and die. What great moral principle condemns such a beneficent market? As against the saving of innocent lives, poetic statements about the dignity of human life being degraded by commercialism would be revealed as the empty moral pieties of armchair philosophers incapable of a reasonable balancing of human needs. My critics would therefore prefer to believe that a market would not work and take the position that I must prove beyond all doubt that it will.

MAKING THE COSTS REAL

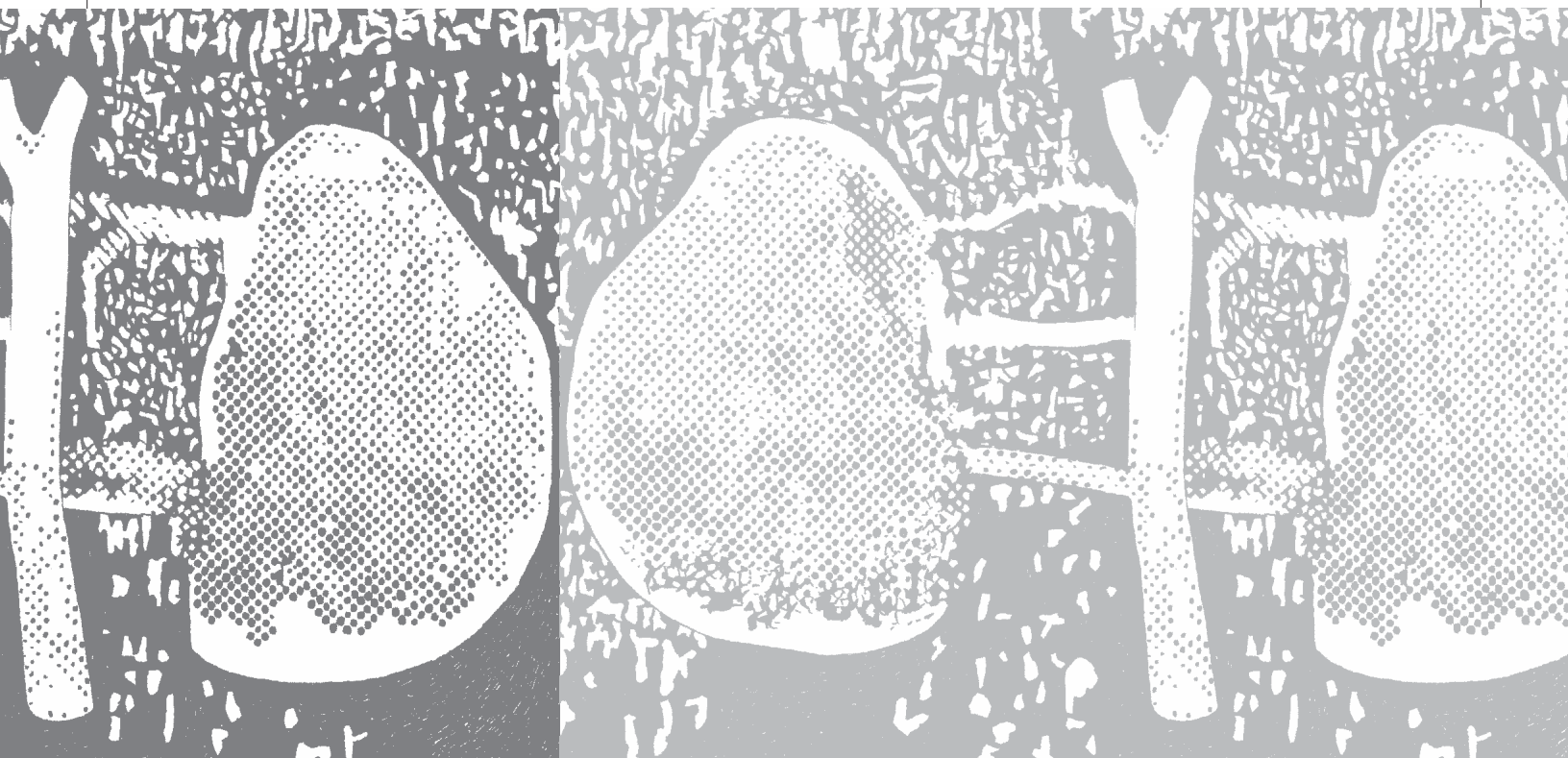
This brings me to my Directions for the Disposition of My Vital Organs. Some might be inclined to dismiss this proposal as the ravings of a strange and dark mind. But whether I am perverse or not does not affect the moral and political burden that I am about to place on you. Whether or not I have a good reason for withholding my organs is of no moment. I may withhold my organs for a good reason, a bad reason, or no reason at all. Indeed, it is because thousands of people go to their graves each year with organs that could return others to health—and do so for no reason that they, or you, or I consider very important—that I write this.

The Directions are my effort to focus attention on the cost of the current legal prohibition on financial incentives. Those who insist that it is good and just for the law to prohibit and criminalize the voluntary exchange of organs for money can no longer pretend that there is no cost to that prohibition. The cost is my organs. If I die in appropriate circumstances, my organs could restore four or five people to health—but that will not happen unless my estate is paid.

PROVOKING A RESPONSE The question is, what is your response to my Directions? As I write these words, I want to engage you in a real question, a vital question, not something abstract. Imagine that later today you feel (or perhaps your child feels) a twinge in the lower back, or shortness of breath, or abdominal pain and fatigue. This time, the pain is not mere muscle strain or influenza; this time it is the first sign of a failing organ. This time it is the beginning of the end, an end that can only be forestalled by the transplantation of a healthy replacement organ. So here is the question: Are you willing to pay me \$864.27 for an organ to save your life or your child's life?

Unless you are the most unfeeling fanatic, you will answer in an instantaneous affirmative. The next question is, do you feel the slightest sense of moral guilt at having paid an additional \$864.27 to restore yourself or your child to health? Would that cost trouble you more than the tens of thousands of dollars that were paid to the surgeons, nurses, hospitals, drug manufacturers, equipment vendors, patent holders, etc.?

Those questions are too easy! Maybe we can make it more difficult. I have just given you or your child a reprieve—it is just a muscle strain! But now there is another parent out there with



a dying child. Do you believe that by barring this commercial transaction and thereby condemning that child to death, you are recognizing and expressing “the intrinsic, ineliminable, ineluctable value of human life and health”? Because life is precious, indeed priceless, and we must reinforce that shared understanding, is it morally necessary that we enforce a prohibition on the sale of organs? If it is, are you ready to explain that moral necessity to the parents of the 12-year-old girl dying of end-stage liver disease?

The evil of the current regime is not that innocent people are dying to uphold a principle. Indeed, it is only for prin-

ciples that people should be compelled to die. It is, rather, that this is a pretentious counterfeit principle. Which is more offensive to human dignity: the use of market forces to increase the supply of life-extending vital organs or criminally punishing the use of the market to harness self-interest in the cause of saving the lives of thousands of people who are dying for want of organs? I submit that if the patient dying of end-stage renal disease were able to occupy the same stage as the medical ethicist, the latter’s arguments against employing market incentives to increase the supply of organs would be revealed as drivel. It is only because these

smarmy feel-good sentiments are indulged at a great distance from those suffering and dying from organ failure that such arrant nonsense is not laughed out of the court of public opinion.

CONCLUSION

My goal is to expose the emptiness of those sentiments and the cruelty of the current policy so as to generate the political will to change the law and permit compensation for organ donation. So I offer these Directions to make real and unambiguous the costs of the current legal prohibition. I call on others to join me in making and publicizing similar statements. Put them on Web sites. Shout them from rooftops. The only way that we can escape the current lunacy is by making its price real to the public and the policymakers.

I do not take this path as a first choice, but as a last resort. Had I been more prescient and courageous, I would have done this 15 years ago and perhaps generated the political energy to have changed public policy long before now. It is 15 years of frustration and the final recognition that our opponents cannot be swayed by reasoned argument that leads me down this path.

Please join me. You can find the Directions for the Disposition of My Vital Organs at my Web page, <http://mason.gmu.edu/~lcohen2>. Please download it, adopt it, and add your name to the list. As the numbers of people who do so increase, the price of the legal prohibition will become larger and more real. Perhaps it will even become impossible for our elected representatives to ignore. **R**

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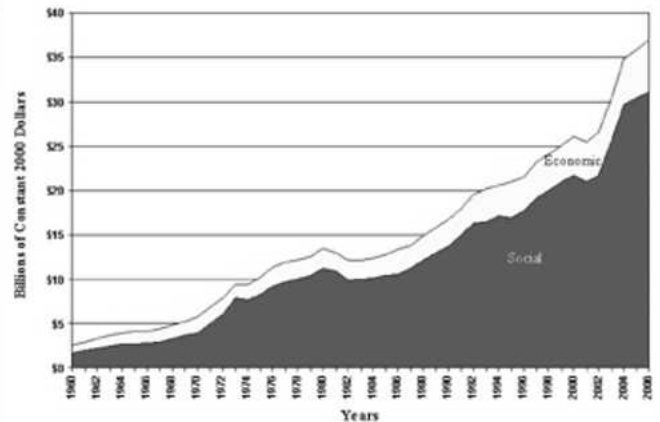
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