

ORGAN SALES NEEDN'T BE EXPLOITATIVE (BUT IT MATTERS IF THEY ARE)

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ABSTRACT

This paper considers two arguments that are common in the literature on organ sales. First, organ sales are exploitative and therefore should not be permitted. Second, it doesn't matter whether organ sales are exploitative or not; the only thing that matters is that we do what is in the interests of those who need to be protected.

In this paper, I argue that both of these arguments are too simplistic. My intention, however, is not to argue for or against organ sales. My conclusion, rather, is simply that we cannot hope to address the issue of organ sales if we lack a good understanding of exploitation. We should not attempt to answer the question of whether or not organ sales should be banned on the grounds that they are exploitative without acknowledging and addressing the nuances involved in understanding exploitation.

INTRODUCTION

This paper was largely conceived as a reply to two very simple responses to the issue of exploitation in relation to the debate on organ sales, neither of which seems to acknowledge the nuances of the various arguments relating to exploitation. In this paper, I take 'Organ Donation and Retrieval: Whose Body Is It Anyway?' by Eike-Henner W. Kluge, and 'The Case for Allowing Kidney Sales' by Janet Radcliffe-Richards et al., as paradigmatic cases of these two contrasting responses.

Kluge argues simply that organ sales are exploitative and therefore should not be permitted, and states that 'the poor would become the walking organ banks of the well-to-do.'¹

Radcliffe-Richards et al., on the other hand, counter this sort of argument by claiming that, ultimately, *it doesn't matter* whether organ sales are exploitative or not. What matters is the welfare of the people who are in need of protection. On this view, we should recognize that the banning of organ sales would simply remove an option from the poor, and to remove an option from the poor

just makes them worse off. We shouldn't, they claim, pander to the well-off who feel uneasy about the possible exploitation. We should do what is best for the poor.

My aim is to look at exploitation in more detail and to demonstrate that both views are too simplistic.

In response to Radcliffe-Richards et al., I argue that we should not be too quick to claim that exploitation is morally insignificant. In response to Kluge, however, I argue that the sale of organs needn't be exploitative. In short, (contrary to Kluge) organ sales needn't be exploitative, but (contrary to Radcliffe-Richards et al.) if they are, it may be morally significant that they are.

Clarifications

Clarification 1: Mutually beneficial exploitation

It is important to clarify, from the start, that there can be such a thing as *mutually beneficial* exploitation.² And it is also important to stress that this is not the same as *mutual exploitation*. If we claim that an exchange involves mutual exploitation we claim that two people *exploit each*

¹ E-H. Kluge. 2006. Organ Donation and Retrieval: Whose Body Is It Anyway? In *Bioethics: An anthology*. 2nd edn. H. Kuhse & P. Singer, eds. Oxford, UK & Malden, Mass: WileyBlackwell: 484.

² See A. Wertheimer. *Exploitation*. Princeton, NJ: Princeton University Press: 13–15, 18–28.

other. If we claim that an exchange involves mutually beneficial exploitation, the claim is *not* that two people exploit each other. Rather, one exploits the other and one is exploited. The 'mutual' refers not to the exploitation, but to the benefit. Only one party is exploited, but both *benefit* from the transaction. And it is important to stress also that the exploited party benefits from the *transaction*, not from the exploitation. Presumably, he would benefit more from a non-exploitative transaction, but the point is that they benefit from the transaction, compared to an alternative in which there is no transaction.³

In this paper, I will be interested primarily in the issue of mutually beneficial exploitation. As such, it is worth stressing that the claim that the poor might benefit from organ sales is not sufficient (even if it is true) to demonstrate that the transactions are not exploitative.

Clarification 2: benefiting the poor

Unless I state otherwise, I will work on the assumption that organ sales can benefit the poor. This might appear to be in conflict with the empirical research presented by Goyal, Mehta, Schneiderman et al. in 'Economic and Health Consequences of Selling a kidney in India'. On closer inspection, however, it is far from clear that there is a conflict here, at least in the context that I am interested in.

In 2001, Goyal, Mehta, Schneiderman et al. surveyed 305 individuals who had 'sold a kidney in Chennai, India, an average of 6 years before the survey'.⁴ Key claims include:

Family income actually declined by one third,⁵ and most participants were still in debt and living below the poverty line at the time of the survey . . . most participants would not recommend that others sell a kidney . . . nephrectomy was associated with a decline in health status.⁶

The last of these statements seems to be the most significant, in that this one fact would presumably explain the others. For example, they write:

Previous qualitative reports suggest that a diminished ability to perform physical labor may explain the observed worsening of economic status.⁷

³ Ibid.

⁴ M. Goyal et al. Economic and Health Consequences of Selling a Kidney in India. *JAMA* 2002; 288(13): 1589.

⁵ The way this result is stated, it is not clear how this should be interpreted. Presumably, this is an average or some other generalisation, but this is not explained.

⁶ Goyal et al., *op. cit.* note 4, pp. 1591–1592.

⁷ Ibid: 1592.

If this is true, the main point seems to be that selling an organ results in a decline in health.⁸

As such, it is crucial that Goyal et al. also state that 'Persistent pain and decline in health status have *not* been reported in previous long-term follow-up of volunteer donors in developed countries.'⁹ This suggests that the problem relates to the particular conditions in India and not to the procedure itself.

I don't want to contest the claim that, in cases like those discussed by Goyal et al., organ sales are exploitative and also harmful and should not be permitted. I want to consider the question of whether organ sales would be exploitative even if the healthcare provision was such that we could reasonably expect that the seller's health would not decline significantly after selling a kidney. If we are considering the question of whether a developed country (with a good record regarding the health of organ donors) should legalize organ sales, this, presumably, is the relevant question to ask.

In response to this, some might point to another result of this research, which was that safeguards didn't seem to be effective, and conclude from this that we couldn't expect our own safeguards to be effective either. But it is not clear why we should accept this conclusion any more than we should reach the conclusion that we cannot trust the results of elections in the UK on the basis of research about elections, and the ineffectiveness of safeguards, in Zimbabwe or Iran.

EXPLOITATION AND EQUALITY

To be clear about the issue of exploitation, it is also essential that we make a clear distinction between the issue of exploitation and the issue of equality.

Consider again Kluge's concern that, 'the poor would become the walking organ banks of the well-to-do.' First, depending on what *sort* of sales were permitted, this needn't be true. Second, this is best understood as a concern about inequality, not exploitation.

We can, for example, object that the rich can buy organs while the poor cannot, without this having anything to do with exploitation, or without claiming that

⁸ It is also worth noting that the amount received as payment was, on average, \$1070, and both 'middlemen and clinics promised on average about one third more than they actually paid.' (p. 1591.) Presumably, if they had been paid significantly more (and if there was no discrepancy between what was promised and what was given) then some may have considered the exchange to be acceptable, even with the decline in health.

⁹ Goyal et al., *op. cit.* note 4, p. 1592. J. Radcliffe-Richards et al. also write: 'the risk involved in nephrectomy is not in itself high, and most people regard it as acceptable for living related donors.' J. Radcliffe-Richards et al. The Case for Allowing Kidney Sales. In *Bioethics: An anthology*. 2nd edn. H. Kuhse & P. Singer, eds. Oxford, UK & Malden, Mass: WileyBlackwell: 488.

those who do buy organs are exploiting the poor, or anyone else. If I claim that it is unfair and unjust that the rich can *buy* health care not available to the poor I am complaining about inequality. I am not necessarily complaining about exploitation.

Likewise, we can also complain that A exploits B even if we don't think there is anything wrong with inequality in healthcare provision. Suppose, for example, that I am not an egalitarian, and therefore do not object to the fact that the rich can buy superior healthcare that is not available to the poor. I can still argue consistently that A exploits B if A takes unfair advantage of B.

As such, these two issues ought to be considered separately.

If we are concerned about the unequal distribution of healthcare resources, in this case providing organs to the rich rather than providing them on a first-come first-served basis, or on the basis of need, the government (or some other institution) could buy the organs and distribute them according to the appropriate principle – and make it illegal for *individuals* to buy organs. In this case, the law against *private* organ sales would be based on considerations of equality, *not* exploitation, and would allow people to sell their organs, but only to certain institutions.

This still leaves the question of exploitation unanswered. The buying of organs might still be exploitative, whoever buys them, but now we can ask this question without the issue being mixed with, and muddled by, the separate issue of equality.¹⁰

WHO IS EXPLOITED IN ORGAN SALES?

In most discussions of organ sales, the assumption is that it is the person selling their organs who is being exploited. But it is not clear that this can be taken for granted without careful consideration.

Wertheimer claims that, at its 'most general level, A exploits B when A takes unfair advantage of B.'¹¹ In cases where B consents to the transactions, and where the consent is informed consent, what usually explains the fact that B consents to the transaction, despite it being exploitative, is that B lacks the bargaining power necessary to negotiate a fairer exchange (and the unfair transaction is better than no transaction at all).¹²

As such, in these cases, the imbalance in bargaining power is crucial. This account suggests that, where there

are no other defects (such as deception or coercion) it is the imbalance of bargaining power that explains why one side is in a position to make unreasonable and unfair demands, knowing that the other person will have little or no choice but to accept the unfair offer.

Now we can ask, is there an imbalance in bargaining power in the case of organ sales, and, if so, whom does the imbalance favour? Without selling an organ, B will be poor and struggle to pay debts, and is likely to suffer from ill health and decreased life expectancy as a result of poverty. Without an organ, A will have to live on dialysis, and will have a decreased life expectancy as a result of their illness.¹³ Furthermore, in a particular case, the doctor may predict that A needs a transplant if he is to live more than another year or two.

Thus, it is not clear that B is the most desperate of the two and the most likely to be exploited here.

Consider the following report from the *Daily Mail*:

Mark Schofield has waited for more than four years for the kidney transplant which would save his life and let him see his children grow up.

But after finally losing patience, he flew to the Philippines with £40,000 in savings ready to buy a new organ from a living donor.

The 43-year-old hopes to find a poverty-stricken Filipino desperate enough to sell him a kidney.¹⁴

It is not clear why the *Daily Mail* should present the story in this way. We could, instead, characterize the person looking to *sell* a kidney as looking for a disease-stricken Brit desperate enough to part with his life-savings.

If both are desperate in their own ways, it is not clear where the imbalance in bargaining power lies and it is not clear who is in a position to exploit who. But, if the balance is such that it is not clear who is exploiting who, we should take seriously the possibility that *neither* is being exploited: there just isn't an imbalance of bargaining power.

This, however, is not my final conclusion on this matter. I will come back to this point, to consider further details that are relevant to this sort of case.

Mutual exploitation

One response to this might be to say that it is mutual exploitation. But, again, given the analysis of exploitation, it is not clear that mutual exploitation is

¹⁰ Radcliffe-Richards et al. also make this point, *op. cit.* note 9.

¹¹ Wertheimer, *op. cit.* note 2, p. 10.

¹² *Ibid.*, ch.1. There are, of course, other ways in which A can take unfair advantage of B, but I think it is fair to say that it is the imbalance of power that is most common and most relevant to the issue of organ sales.

¹³ Of course, this is statistical life expectancy, and any particular individual on dialysis may live a long and fulfilled life. But, of course, the same will also be true regarding the life expectancy of the poor.

¹⁴ *The Mail Online*. 7 Dec 07. Available at: <http://www.dailymail.co.uk/news/article-499447/Father-flies-Philippines-buy-400-000-kidney-waiting-4-years-NHS-transplant.html> [Accessed 14 Oct 2009].

possible.¹⁵ Bargaining power is relational. They can't *both* have less bargaining power than the other. There can't be an imbalance in both directions.

It may be tempting to say that both sides are guilty of 'using' the other, but remember that A exploits B when A takes *unfair* advantage of B, so we need to locate the unfairness. It is not clear how this exchange can be unfair to both sides. (I am excluding, for the moment, cases in which there is a middleman. In this case, of course, both seller and buyer can be exploited. But this is not mutual exploitation. It is two people being exploited by a third.)

Now, it could be the case that they are both in a bad position, and it may be that it is unfair that they are both in the position they are in, but *that* unfairness lies somewhere else – not in the transaction. As Wertheimer says, there is a distinction between taking advantage of an unfair situation and taking *unfair* advantage of a situation.¹⁶

Alternatively, someone might want to argue that there could be mutual exploitation if A knows that B's health will suffer as a result of giving an organ (because of the conditions in which they are selling) but he also knows that B has been told that his health will not be effected significantly, while at the same time B knows that A would not benefit from his kidney (perhaps because he knows that that particular kidney is not healthy) but A believes that he will benefit.¹⁷

I think we could consider this to be mutual exploitation – but this would be an example of *harmful* exploitation without valid informed consent. This is not a case of exploitation in which the unfairness is located in the balance of bargaining power. The exploitation is a result of the lack of informed consent and the harms involved.

I am not convinced that we can say anything similar to explain the possibility of mutual exploitation in the case of mutually beneficial exploitation (with complete information) where the unfairness is located in the imbalance of power, precisely because this form of exploitation is based on the relation between the two people: if the transaction is unfair, it has to be because one person has an advantage over the other. As such, this form of exploitation can only go in one direction. And it is this case that I wish to focus on. I take it for granted that we want to protect people from *harmful* exploitation, especially if there is also a lack of informed consent. It is the case of mutually beneficial exploitation that is more controversial. And, in these cases, if the balance is such that it is not

clear who has the greater bargaining power, the most obvious conclusion is that neither A nor B is exploited.¹⁸

Incomparability

One response to my claim that there can't be an imbalance in both directions might be to appeal to incomparability. It might be tempting to say that organs and finances cannot be compared. As such, we can say that, with respect to money, A exploits B, but, with respect to organs, B exploits A. But a claim of incomparability seems to undermine the exploitation claim, rather than supporting it. In the cases we are considering, A exploits B when A gains *more* than fairness allows and B gains *less* than fairness requires.

But if we appeal to incomparability, we can't say that £1000 is not a fair price for a kidney. This claim relies on the very comparison that is ruled out according to incomparability. If the two are incomparable, we cannot say that someone got a raw deal if they received only £1000 (or only £10) for their kidney. And, likewise, we can't say that a buyer got a raw deal if he had to resort to selling his house, giving up his life savings and taking out a loan he could never afford to pay back, in order to be able to pay £1,000,000 for a kidney. These claims rely on an appeal to comparability.¹⁹

THE QUESTION OF WHO IS EXPLOITED REVISITED

Of course, there might be other features (besides the needs of each individual) that can affect the balance of power, such that there could be an imbalance of power even in cases where there is a similar level of *need* on both sides.

Competition

Suppose, for example, that A is desperate for a kidney. Even if we imagine the most extreme situation, in which A will simply die if he cannot have a transplant, A may still have significantly more bargaining power than B if he could also buy a kidney from C, D or E, and if the desperation of B, C, D and E all competing against each other resulted in them offering lower and lower prices. So these other considerations could make a difference to the bargaining power, and it could be the case that, while both A and B are in a desperate situation, there could still be an imbalance in bargaining power such that A is in a

¹⁵ At least in mutually beneficial exploitation that results from an imbalance of bargaining power.

¹⁶ Wertheimer, *op. cit.* note 2, p. 298. (And note, taking unfair advantage of a situation includes taking unfair advantage of an unfair situation. Either way, it is the 'taking unfair advantage' that is crucial to exploitation, not the unfairness of the situation.)

¹⁷ Thanks to Daniel Elstein for this point (though he appealed to a different example).

¹⁸ Unless, of course, the reason that it is not clear who is being exploited is simply that we do not have all of the facts.

¹⁹ Wertheimer makes similar points in *op. cit.* note 2, pp. 102, 222.

position to take unfair advantage of B's desperation, while B is *not* in a position to take unfair advantage of A's.

It may, therefore, be true after all that organ sales could involve exploitation and also that it is the seller, rather than the buyer, who is most likely to be exploited. My point was simply that we should not be too quick to jump to this conclusion.

Third parties

Also, a third party, C, could be exploiting both A and B. I have not said much about this, however, because if this is our concern, this is not primarily a concern that organ sales by their very nature are exploitative. Rather, we might be concerned, for example, that if C is the only organ trader, he might offer B \$1000 for a kidney, saying 'take it or leave it' and then sell that same kidney to A for \$40,000, saying 'take it or leave it.'

This, presumably, is a concern about monopolies as much as anything else, and could presumably be addressed by regulation and/or competition. Of course, if there was good reason to think that this kind of exploitation would be very likely if organ sales were legalized, this might count as a strong argument against legalizing organ sales.²⁰ My point, however, is that this sort of exploitation doesn't seem to be an inevitable consequence of legalizing organ sales and if it was this specific problem that was stated as the problem with organ sales, the proponents of this argument would have to explain why the sale of organs (rather than anything else) would be especially susceptible to this particular problem.²¹

PROHIBITION AND OPTIONS

In considering whether or not organ sales should be prohibited in order to protect individuals from exploitation, it is important to consider the consequences of prohibiting particular transactions.

One obvious consequence is that this policy removes an option. A less obvious consequence is that this policy may also provide *additional* options that didn't previously exist.

An obvious effect of introducing a minimum wage, for example, is that it removes an option – the option to work (legally) for less than the minimum wage. However, the

²⁰ I say 'might' because we haven't yet considered the force of exploitation claims.

²¹ This is not meant to be a purely rhetorical challenge, implying that the challenge cannot be met. I am willing to accept that an explanation could be provided. But the challenge remains, and the explanation is required.

point of a minimum wage is to *provide a new option* – the option to work for a fair wage (or at least a *better* wage).²²

Wertheimer discusses this in detail and considers three possible justifications for the banning of exploitative transactions: paternalistic intervention, strategic intervention and perfectionist intervention.

I am working on the assumption that we can justify the banning of organ sales if these transactions are not only exploitative but also harmful (as seems to be the case with organ sales in India). As such, I am taking for granted that paternalistic intervention can be justified.²³ The question I am concerned with in this paper is whether we can justify the ban on organ sales even if we assume that these transactions are not harmful, and if the exploitation involved (if there is any) is mutually beneficial exploitation.²⁴ If this is the question we are concerned with, paternalistic justifications will not be relevant. As such, I will consider only strategic and perfectionist interventions.

Strategic interventions

Regarding strategic interventions, Wertheimer stresses that:

[T]he strategic argument is distinct from both paternalistic and perfectionist reasons for limiting liberty. In the case of paternalistic intervention, we protect B from the effect's of B's judgement as to what serves B's interests or well-being. By contrast, the strategic argument does not paternalistically protect B from false consciousness. It seeks to facilitate B's own judgement about his or her interests *by changing the bargaining situation* so that B is better able to obtain what he or she wants *but finds it difficult to obtain* without help.

By contrast with perfectionism or legal moralism, the strategic argument does not seek to prohibit exploitative transactions because exploitation is a 'free floating evil' or to deny A an 'ill-gotten gain.' No, it seeks ordinary, nonmoral improvements in welfare for (potential) exploitates.²⁵

However, Wertheimer also stresses that while a strategic intervention may provide new options for a group of people (providing better conditions and better wages for workers, generally, for example) it may not provide a new option for a particular person. The individual who could

²² See Wertheimer, *op. cit.* note 2, pp. 300–305.

²³ I don't mean to suggest that paternalism is uncontroversial or easy to defend. Rather, it is simply not my intention to address these issues and so I assume, for the sake of argument, that paternalistic interventions can be justified.

²⁴ Which it seems it could be if these transactions took place in developed countries with the standard of care involved in organ donations, and with a decent price paid for the organ.

²⁵ Wertheimer, *op. cit.* note 2, p. 304. (My italics.)

previously find work (at a very low wage) may be unable to get a job that pays the minimum wage.²⁶

This is an important clarification, because it focuses our attention on another complication regarding exploitation and organ sales. And that is that preventing a transaction between A and B may not be in the interests of B, and may even harm B (by removing an option without providing a better option), but might nevertheless be justified on the grounds that preventing transactions of this sort will help others *like* B, even if not B himself.

This may be one reason why libertarians are unsympathetic to the claim that this sort of transaction is exploitative, and why they object even to strategic interventions. For a libertarian, presumably B's right to sell (and A's right to buy) is the deciding factor here. For non-libertarians, however, there is a real conflict between defending B's interest and defending the interests of other Bs.²⁷

In some cases, this conflict may be an illusion. Wertheimer states that 'to say that a regime may be better for most Bs *ex post* is often to say that it is better for any given B *ex ante*.'²⁸ On this account, there may be no conflict between B and others like B. Considered *ex ante*, B may benefit too. And, as Wertheimer claims, it is often the case that we need to consider regimes *ex ante* – to do otherwise distorts the picture.²⁹

Note, however, that Wertheimer states that it is *often* the case that saying a regime is better for most Bs is just to say it is better for B *ex ante*. This may often be the case, but it won't always be. Even *ex ante*, B may be worse off. And even if we can't identify which particular individual will be worse off, we might be able to identify a group of people, or type of person, who will be worse off, and Wertheimer agrees: 'strategic intervention can help one subset of Bs and hurt another' and 'may sometimes work to the detriment of the *worst-off*.'³⁰

Whether this could be the case in relation to organ sales, I am not sure. Either way, though, the important point, in relation to *this* paper, is that an appeal to the strategic argument does not look likely to justify the banning of *all* organ sales. At least, I cannot see any way in which the complete ban of organ sales could benefit B

(or the class of Bs) by providing new options that wouldn't otherwise be available. On the contrary, a strategic response to the problem of exploitation in organ sales would seem to require something analogous to a minimum wage and better working conditions. A strategic intervention into organ sales would involve not the banning of organ sales but the regulation of organ sales, ensuring (for example) that the person selling the kidney receives good quality medical attention (during and after the operation), good quality accurate information (with financial advice as well as the medical information) to ensure that there is informed consent, and a fair price for the kidney.

Just to clarify, I should stress that I do accept that there could be *other* reasons for prohibiting *all* organ sales. As far as we are considering the strategic intervention in isolation, however, my claim is that *strategic intervention* doesn't justify a complete ban. An anonymous referee claimed that my argument was flawed because it would have implausible implications. The referee wrote: 'Banning killing-for-profit does not create new options (in fact, it limits them); therefore banning killing-for-profit is not acceptable as a strategic ban.' I do not consider this to be a problematic implication at all. It is, in fact, absolutely right. A strategic ban is intended to introduce new options. Banning killing-for-profit does not do this, so it is not acceptable *as a strategic ban*. This, however, is perfectly consistent with killing-for-profit being prohibited for other reasons.

In the case of organ selling, it may or may not be the case that there are other reasons to prohibit the sale of organs. I, however, am ignoring the other possible reasons for prohibiting organs, in order to focus solely on the issue of exploitation. As such, I am – *of course* – working on the assumption that organ sales should not be prohibited for other reasons. Of course, I grant that this means that if it does turn out that organ sales should be prohibited, then the arguments in this paper may be irrelevant. However, as many of those who oppose organ sales do so on the grounds that they would be exploitative, it is worth considering that issue in isolation.

Perfectionist interventions

Wertheimer considers three forms of the perfectionist argument.³¹ In this paper, I will ignore the first two, as I think Wertheimer's rejection of these is persuasive,³² and I will focus on the final form of the argument. According to this version, some acts are *simply wrong*, and 'society

²⁶ Ibid: 300–305.

²⁷ A further complication following from this is that, if the interests of others outweigh or defeat B's right to sell, it may be the case that A is not the only person who does wrong when A buys from B. It might also be the case that B does wrong, by weakening the bargaining power of others. Wertheimer compares this with a case in which a worker fails to join a union or refuses to participate in a strike: 'Although we do not criticize a scab for seeking the inadequate income that employment provides, we do criticize a scab for breaking ranks with other workers.' (Wertheimer, *Exploitation*, p. 295.)

²⁸ Wertheimer, *op. cit.* note 2, p. 301. Also see pp. 84–85.

²⁹ Ibid: 57, 84–95.

³⁰ Ibid: 303.

³¹ Wertheimer says that he will consider *two* (Wertheimer, *op. cit.* note 2, p. 305) but the second of these is further divided into two.

³² Ibid: 305–308.

should seek to prevent and punish some forms of wrongdoing³³ even if this may involve a net cost to society (and even to the exploitee).

This is the sort of argument that Radcliffe-Richards et al. (among others) seem to have in mind when they characterize objections to organ sales as being driven by ‘feelings of repugnance among the rich and healthy’,³⁴ and contrast them with *real* concern for the destitute and dying.

At first sight, there is something very appealing about this rejection of the perfectionist argument, considering the perfectionist argument to be nothing more than a feeling of repugnance. But this is not a fair characterization of the position. The perfectionist argument may still be flawed, but it might not be. Either way, we should at least characterize it accurately. The perfectionist understanding of the wrongness of exploitation is *not* a mere feeling of repugnance. The argument, like many in ethics, is based on a judgment that individual wellbeing is not the only morally relevant consideration. This judgment might turn out to be wrong, but this is something that needs to be established. Any non-consequentialist ought to be open to the possibility that doing something morally wrong can have better consequences³⁵ than the morally permissible alternative.³⁶ Of course, consequentialists often characterize *any* appeal to nonconsequentialist constraints as appeals to emotion, or to mere feelings of repugnance, arguing that consequentialism is founded on reason alone, while nonconsequentialism is founded on mere intuition or emotion. But this is not a fair characterization of the difference between consequentialism and nonconsequentialism. Nonconsequentialism does not rely on intuitions any more than consequentialism does. As Frances Kamm says, consequentialists like Peter Singer also rely on intuitive judgments – ‘those about the plausibility of general principles, such as “maximize the good”’.³⁷

In response to the above, in an earlier draft, Wertheimer commented that the case against perfectionism might be stronger than I allow. He wrote:

One could accept deontological prohibitions against allowing harm to some in order to benefit others while

rejecting deontological arguments with respect to mutually beneficial and consensual transactions. The standard arguments against consequentialism reject its ‘aggregative’ commitments, but no such commitments are necessary to reject perfectionism in this context.³⁸

I should stress, in response to this objection, that my argument here is not meant to be an argument in favour of perfectionism, and I am not committing myself to the claim that *only* consequentialists can reject perfectionism. The argument is much more modest. I am comparing Radcliffe-Richards’ characterization of moral concerns (they are nothing more than ‘feelings of repugnance’) with the consequentialist’s characterization of deontological constraints (they are nothing more than appeals to emotion and intuition), and arguing that we should reject both of these characterizations. As such, at this stage, I am simply trying to characterize the perfectionist account correctly: it is *not* just an appeal to a feeling of repugnance. It is a claim that there is a *moral constraint* against exploitation.

In addition, the concern about aggregation is not the only concern about consequentialism. It is also true of many deontologists that, on their account, the problem with consequentialism is that it only recognizes one duty: the duty to maximize the good.³⁹ The deontologist, in contrast, insists that there are other duties, such as the duty not to lie, the duty not to break promises, and (I am arguing) the duty not to exploit people.

As long as we reject consequentialism, we can reject the claim that the considerations of welfare considered by Radcliffe-Richards et al. are conclusive and we can reject the claim that anything other than an appeal to welfare must be a mere feeling of repugnance. But this is all that I take myself to have established at this point. Now we can consider other arguments for or against perfectionism.

Wertheimer, as I have said, discusses the perfectionist arguments in a little more detail, but I think he too is a little too quick to reject them.

Wertheimer starts by saying that he is unsure what to say about the idea that societies should seek justice even at a cost to its members, but he goes on to say that he thinks that we do not need to resolve the matter, because these considerations are not relevant to the issue of exploitation.

In order to justify his claim that these considerations are not relevant to the issue of exploitation, Wertheimer appeals to the distinction between criminal law and civil law.

Essentially, his claim is that it is only in the case of criminal law that we would consider the possibility of

³³ Ibid: 308.

³⁴ Radcliffe-Richards et al., *op. cit.* note 9, p. 489.

³⁵ In terms of aggregate wellbeing.

³⁶ A standard example is ignoring an individual’s rights, and killing them in order to use their organs to save five lives.

³⁷ F. Kamm. 2007. *Intricate Ethics: Rights, Responsibilities and Permissible Harm*. New York: Oxford University Press: 417. Also see R. Lawlor’s review of Kamm, *ibid*, in *Mind*, forthcoming; and R. Lawlor. 2009. *Shades of Goodness: Gradability, Demandingness and the Structure of Moral Theories*, Basingstoke, Hants; Palgrave Macmillan: 134–138; D. McNaughton. 2002. An Unconnected Heap of Duties? In *Ethical Intuitionism: Re-evaluations*. P. Stratton-Lake, ed. Oxford: Clarendon Press; and Wertheimer, *op. cit.* note 2, p. 308.

³⁸ Wertheimer, commenting on an earlier draft of this paper.

³⁹ D. Ross. 2002. *The Right and the Good*. P. Stratton-Lake, ed. Oxford: Clarendon Press: ch. 2; and McNaughton, *op. cit.* note 37, p. 78.

preventing (or punishing) wrongdoing at a cost to society. In criminal law, the wrongdoing is seen as a crime against society, and not merely against the person, and 'the crime itself is a matter of public law, not private law. It is 'the people' who bring the case against the criminal, not the victim.'⁴⁰ He continues:

It seems to me that we do not typically understand the wrong of exploitation as a wrong against society or its norms. It is a wrong against the exploitee. Precisely because exploitation is a wrong against the exploitee, it would seem that society has no basis for prohibiting the wrong if the exploitee is prepared to allow the wrong to go through. Just as society cannot sue A for a tort against B when B prefers not to do so, it would seem that society has no basis for preventing A from exploiting B, even though A's behaviour is wrongful.⁴¹

There are a couple of problems with this argument. First, as a statement about how the law does, as a matter of fact, consider exploitation, it is not clear that Wertheimer is right. It may be true that there isn't a crime of exploitation, which you can be convicted of (in the way you can be convicted of murder). It may, nevertheless, be the case that you can be convicted of other crimes, and that the justification for punishing people for those particular acts is based (partly, primarily or wholly) on the wrongness of exploitation.

If I offer someone £2000 for their kidney (in the UK), I would be prosecuted under the Human Organ Transplants Act 1989,⁴² and it would not just be up to the individual to bring civil action against me. If the purpose of this law is (at least partially) to protect people from exploitation, it seems that the criminal law *is* concerned with exploitation.

Similarly, if the purpose of laws against prostitution is to protect people from exploitation, this too would be an example of exploitation coming under criminal law, and not merely civil law.

Second, even if Wertheimer is right and I am wrong about this, it is still not clear that this is a strong argument. Even if the law *didn't* consider exploitation to be a crime against society, and didn't include exploitation within the criminal law, it wouldn't mean that it *shouldn't*. We could argue that the law *ought* to take exploitation more seriously.

Wertheimer could insist now that this is not an argument that he missed, and I would agree. He did in fact discuss what the law ought to be, and not just the law as it stands. When Wertheimer claims that 'we do not

typically understand the wrong of exploitation as a wrong against society or its norms'⁴³ he is not merely making an empirical claim about what people believe. He is endorsing this view. He writes: 'It is a wrong against the exploitee.'⁴⁴

However, the claim that the wrong of exploitation is not typically understood as a wrong against society is misleading. It implies that exploitation is unusual, and differs from crimes like theft and murder, in this respect. But this is clearly not the case. We could replace 'exploitation' with almost any major crime and the statement would be just as plausible. For example:

We do not typically understand the wrong of murder as a wrong against society or its norms. It is a wrong against the person murdered.

Regardless of what we might say about crimes being wrongs against society, most crimes have victims and we typically consider those crimes to be wrongs against those victims and not (primarily) against society or its norms. This is as true of murder as it is of exploitation.

Of course, we might then focus on the question of whether the crime is *also* a crime against the society, as well as against the individual. But here it is not clear that Wertheimer has said anything to support his claim that exploitation is *not* a crime against society and its norms, as well as against the person exploited. And, in the case of *serious* exploitation, it seems plausible to think that exploitation *can* be a serious wrong, which is not merely a crime against the individual, but a crime against society and its norms.

Indeed, given that so many people are concerned that permitting organ sales would lead to the exploitation of the poor, and think that this is reason to prohibit organ sales, it is far from clear that Wertheimer can justify his claim that people generally do not typically see exploitation as a wrong against society and its norms. Many people do seem to hold this view. Indeed, it seems to be this sort of view that is caricatured (by those in favour of organ sales) as being nothing more than a feeling of repugnance. But now we have an alternative characterization of this view. Those who oppose exploitation (even when it is mutually advantageous) are not merely appealing to feelings of repugnance. Rather, they are committed to the following claims:

1. 'Society should seek to prevent and punish some forms of wrongdoing even if it is a net cost to society to do so.'⁴⁵
2. The sort of wrongdoing that society ought to seek to prevent, even at a cost, is the sort of wrongdoing that

⁴⁰ Wertheimer, *op. cit.* note 2, p. 309.

⁴¹ *Ibid.*: 309.

⁴² Human Organ Transplants Act. 1989. Available at: http://www.opsi.gov.uk/acts/acts1989/ukpga_19890031_en_1#l1g1 [Accessed 14 Oct 2009].

⁴³ Wertheimer, *op. cit.* note 2, p. 309.

⁴⁴ *Ibid.*: 309.

⁴⁵ *Ibid.*: 308.

is a wrong against society and its norms, and not only a wrong against the victim.

3. The wrongness involved in exploitation can be a wrong against society and its norms, and not just against the person exploited.

Regarding the claim that we *ought* to see exploitation as a wrong against society and its norms, Wertheimer doesn't seem to provide a conclusive argument against this claim.

There is, of course, one significant difference between mutually beneficial exploitation and most other crimes, such as murder, and that is simply that it will often be in the exploitee's interests to be exploited.⁴⁶ Wertheimer states:

The general point is that we should at least be clear about whom we are helping when we prohibit parties from engaging in exploitative transactions.⁴⁷

This is a powerful point, but I am still not convinced that it is conclusive. Indeed, Wertheimer himself doesn't consider it to be decisive. He continues:

If I am right, the prohibition of exploitation may sometimes be justified not because it helps the exploited party but in spite of the loss to the exploited party that such prohibition imposes.⁴⁸

Here though, given that Wertheimer is unsympathetic to the perfectionist arguments, I take Wertheimer to be referring to strategic intervention in cases in which the prohibition of exploitative transactions is meant to protect others *like B*, though not *B* himself.

But if *B*'s interests (and *B*'s right to sell) can be outweighed by consequentialist considerations, perhaps they can also be outweighed by the nonconsequentialist considerations, such as the wrongness of exploitation.⁴⁹

In support of perfectionist interventions

As a matter of autobiography, I had never been convinced by the perfectionist arguments, until I considered a particular type of case. Now, in contrast, I am not sure

⁴⁶ If it sounds odd to say that it is in someone's interests to be exploited, remember that I am not contrasting the situation in which there is an exploitative transaction with a situation in which there is a fair transaction. If we are discussing prohibition rather than regulation, this is not the appropriate contrast. Thus, I am contrasting the exploitative transaction (no prohibition) with a situation in which there is no transaction (prohibition).

⁴⁷ Wertheimer, *op. cit.* note 2, p. 309.

⁴⁸ *Ibid.*: 309.

⁴⁹ And note, if you are not sympathetic to the idea of some wrongs being wrongs against society, the same point can be put simply in terms of nonconsequentialist reasons for not permitting exploitative transactions.

that I can reconcile Wertheimer's rejection of perfectionist strategies with my intuitions about these particular cases. Of course, that could mean that I simply have to rethink my intuitions about the particular cases. Or it could be that I *can* reconcile Wertheimer's account with these cases – I just have to work a little harder to explain how.

The sort of case I have in mind is highlighted by a number of films made in America (now banned) called *Bum Fights*, in which homeless people are filmed fighting, and performing dangerous stunts (and in one case pulling out their own teeth with pliers) in exchange for food, clothing, alcohol or money.⁵⁰

In this case, I don't think it is plausible to appeal to strategic intervention. First, it seems unlikely that those involved in producing these films would be interested if they were required to pay a fair wage and provide acceptable working conditions. As such, banning the exploitative transactions is unlikely to produce new unexploitative options. Second, and perhaps more importantly, my concern is simply that this sort of response would somehow miss the point.

Clearly, risking serious injury for a drink looks like harmful exploitation, such that intervention could be justified on paternalistic grounds. However, my thought is that the film makers could improve the conditions and pay to the point at which it was (just about) in the interests of the homeless person to accept the offer (such that we would have mutually beneficial exploitation, and we couldn't justify intervention on paternalistic grounds). At this point, it is important to remember that the homeless person may be in a pretty desperate situation. As such, it might be the case that a transaction that involves the homeless person humiliating himself, degrading himself and putting himself in danger of injury in return for a decent meal and somewhere to sleep could actually be a mutually advantageous exchange.

If this is right, I find it difficult to resist the intuition that there is good reason to prohibit this kind of exploitative transaction even if the prohibition cannot be justified on strategic or paternalistic grounds. Of course, my intuitions could simply be at fault here, and Radcliffe-Richards et al. could be right that it is nothing more than a feeling of repugnance. Nevertheless, we should at least acknowledge what their arguments commit us to, and their arguments *would* count against the prohibition of

⁵⁰ See http://news.bbc.co.uk/1/hi/entertainment/tv_and_radio/2007681.stm
<http://www.signonsandiego.com/news/metro/20060406-1743-bumfights.html>
<http://archives.cnn.com/2002/US/05/10/homeless.fighting.film/index.html>
<http://www.smh.com.au/articles/2002/10/03/1033538715422.html>
http://www.signonsandiego.com/uniontrib/20040717/news_1m17fights.html [Accessed 14 Oct 2009].

this sort of exploitative exchange as well as counting against the prohibition of organ sales. Perhaps this implication of their arguments doesn't worry them, but it worries me.

CONCLUSION

Ultimately, I think the position defended in this paper is closer to the views of Radcliffe-Richards et al., than to Kluge's. However, my view differs from Radcliffe-Richards et al.'s in one crucial respect. Radcliffe-Richards et al. argue in favour of regulation rather than prohibition on the grounds that it doesn't matter whether organ sales are exploitative or not: the only thing that matters is the welfare of the poor. In contrast, I argue that regulation might be better than prohibition, on the grounds that the appropriate strategic intervention could benefit the poor *and* eliminate (or at least limit) the exploitation.

However, if the strategic intervention could not eliminate the exploitation (or at least prohibit it, so that no exploitation was *endorsed* by law)⁵¹ then we would need to take seriously the view that there is something wrong with allowing people to exploit others and that we should

not permit this particular wrong, even if prohibiting exploitative transactions does not benefit the potential exploitee. The simple dismissal of this view as being nothing more than unjustified feelings of repugnance is not sufficient, and is over-reliant on a consequentialist view of ethics, and in particular on the consequentialist's caricature of the difference between consequentialism and nonconsequentialism.

Furthermore, the arguments presented by Radcliffe-Richards et al. do not take into account the possibility, highlighted by Wertheimer, that preventing A from exploiting B may not be in the interests of B, but may be in the interest of others like B. We should not attempt to answer the question of whether or not organ sales should be banned on the grounds that they are exploitative without acknowledging and addressing the nuances involved in understanding exploitation.

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⁵¹ After all, as long as there is a black market, even prohibition is unable to *eliminate* exploitation.