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# The Harm Reduction Argument for Legalizing Kidney Markets<sup>1</sup>

**Abstract:** In the illegal kidney trade, sellers are often ripped off, coerced, not given proper medical care, and misled about the dangers and illegality of nephrectomy. Recipients often pay for poor quality surgery and unhealthy or mismatched kidneys. Some writers argue that the illegality is what causes these harms and wrongs, not the trade in itself. They say the legalization of kidney sales would reduce harm. This harm reduction claim is what I develop and assess in this article. The article sets out the ethical and empirical components of a utilitarian version of harm reduction. It explains how legalization would probably reduce the harms of black markets but why we do not know how legalization would affect the supply of organs or the number of harmful transactions in a white market. In short, we cannot be confident that legalization would reduce harm overall. However, I try to show how the case for legalization might be strengthened by adding to the utilitarian focus on aggregate welfare. A special concern for the worst off and a concern to avoid the wrongs of sale both turn out to be likely better met by legalization than criminalization. The harm reduction argument does not settle the debate about legalizing the organ trade but it has more force than critics of sale have realized.

**Zusammenfassung:** Im illegalen Nierenhandel werden Verkäufer oft über den Tisch gezogen, sie werden genötigt, es wird ihnen angemessene medizinische Betreuung vorenthalten und sie werden über die Gefahren und die Illegalität der Nierenentnahme in die Irre geführt. Die Empfänger bezahlen oft für qualitativ schlechte Operationen sowie ungesunde oder unpassende Nieren. Einige Autoren argumentieren, es sei die Illegalität, die dieses Leid und dieses Unrecht verursachen, nicht der Handel an sich. Sie argumentieren, die Legalisierung von Nierenverkäufen würde das Leid verringern. Dieses Leidensverringeringungsargument ist es, das in diesem Aufsatz entwickelt und untersucht wird. Es werden zunächst die ethischen und empirischen Bestandteile einer utilitaristischen Version von Leidensverringeringung dargelegt. Und es wird erklärt, wie eine Legalisierung das Leiden auf Schwarzmärkten vermutlich verringern würde, aber auch, warum wir nicht wissen, wie die Legalisierung das Angebot an Organen oder die Anzahl leidvoller Transaktionen auf 'weißen Märkten' beeinflussen

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würde. Kurz gesagt, wir können nicht sicher sein, dass seine Legalisierung das Leiden insgesamt verringern würde. Dennoch versucht dieser Aufsatz zu zeigen, dass die Argumentation zugunsten von einer Legalisierung gestärkt werden kann, wenn man dem utilitaristischen Hauptanliegen des aggregierten Wohlergehens etwas hinzufügt. Den besonderen Anliegen der am schlechtesten Gestellten und dem Unrecht des Verkaufsakts kann man durch Legalisierung besser gerecht werden als durch Kriminalisierung. Das Leidensverringernsargument entscheidet diese Debatte über die Legalisierung des Organhandels zwar nicht, aber es ist entscheidender als Kritiker bislang zugestehen wollten.

**Keywords:** utilitarianism, quantity and quality of organs, harms to sellers, priority to worst off, treating sellers wrongly

## Introduction

Kidneys are illegally traded in numerous countries. In recent years, sellers have originated from India, Pakistan, Nepal, The Philippines, Moldova, Romania, Israel, Syria, Brazil, and Sudan; and that is only a partial list.<sup>2</sup> Sometimes the transplants are in their home countries but often sellers go abroad to have their kidneys taken. Sellers tend to be paid in the equivalent of the low thousands of US dollars. They are often underpaid compared with what was promised, coerced by threats, not given proper post-operative medical care, misled about the dangers and drawbacks of nephrectomy, and misinformed about the illegality of sale. As for the recipients, they take a risk because they have no guarantees that the kidneys are healthy or suitable for them or that the transplantation will be done properly.<sup>3</sup>

What were just described were the harms and wrongs of a trade that is illegal. Some argue that it is the illegality that causes these harms and wrongs, not the market in itself. They say that if markets were legal, then the law of contract and tort, the threat of its being applied, and the importance of good reputation would give the assorted brokers, hospitals, and medical personnel the incentive

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<sup>2</sup> It is not an ideal term, but I shall use ‘sellers’ to mean the people from whom kidneys are taken in exchange for payment. The sellers are not, then, the brokers or other intermediaries who also get paid. ‘Recipients’ will mean the people with kidney failure who receive the sold kidneys.

<sup>3</sup> Sources for these claims can be found under ‘Resources’ on the website of the Declaration of Istanbul, <https://www.declarationofistanbul.org>.

to be honest and do a good job. Sellers would not be deceived and recipients would get good kidneys. Moreover, if a free market would produce objectionable conditions, such as exploitatively low pay, the market could be regulated to set minimum conditions. The conclusion is that the very reasons that were offered to make markets illegal in fact support legalization.<sup>4</sup>

The problems in black markets can be the basis for thinking of legalization as a harm reduction strategy. Harm reduction strategies are familiar in public health, notably for dealing with certain recreational drugs. About drugs, one commentator wrote, “Under the Misuse of Drugs Act 1971, the law was changed in the United Kingdom to ensure that the production and supply of dangerous drugs should henceforth be in the hands of criminal organizations... Some people have argued that this is not the ideal arrangement.”<sup>5</sup> Similarly, writers have argued that the illegality of organ markets puts some transplantation in the unreliable hands of criminals and it would be better to follow the example of, say, the Netherlands with drugs and decriminalize organ sales.<sup>6</sup> Their argument appears non-partisan and of potentially wide appeal because it does not speak only to those who are already enthusiastic about kidney markets. The harm reduction argument is independent of whether white markets would be better or worse than having no markets at all, black or white. One could sensibly say that the best thing would be to have no markets but, given that they would exist, better to have them white than black. Equally, one could favour white markets as better than no markets and still cite harm reduction as a further support for legalizing in the real world.

What is a harm reduction strategy? It turns out that it is easier to recognize than define.<sup>7</sup> Nonetheless, I think the following description captures the idea. A harm reduction strategy is one that tries to reduce the harms of the organ trade and its method would involve abandoning prohibition. People who endorse the harm reduction strategy typically do not think it is possible to abolish markets. They think making markets illegal drives them underground and underground markets have more harms than legal markets.

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4 Vgl. Wilkinson, S. (2003): *Bodies for sale: Ethics and exploitation in the human body trade*. London, 132.

5 Donaldson, W. (2004): *Brewer's Rogues Villains and Eccentrics: An A-Z of Roguish Britons Through the Ages*. London, 219.

6 Ambagtsheer, F., Weimar, W. (2012): A criminological perspective: why prohibition of organ trade is not effective and how the Declaration of Istanbul can move forward. In *American Journal of Transplantation* 12(3), 571–575.

7 Holland, S. (2015): *Public health ethics*. Cambridge, ch. 8.

It is important to realize that a harm reduction strategy as I have just described it could cause more harm than prohibition. Just calling itself a ‘harm reduction’ strategy does not mean it would reduce harm any more than calling a government’s policy a ‘full employment’ policy would mean that it would succeed in reducing unemployment. As I mean the term, ‘harm reduction strategy’ characterizes an aim and a perception of the options and both could be misguided. Furthermore, it is more questionable than one might think whether reducing harm should be the decisive criterion against which to assess policy on kidney sales. Reducing harm is, of course, ethically relevant, but one could challenge the idea that harm should be reduced in total, since that implies trading off different types of harms to different people. And several arguments on both sides do not lend themselves to being construed in terms of harm and harm reduction. The argument for legalization that people have a right to control their own bodies and so to sell their organs is not a harm-based argument. Nor is the argument against legalization that a market for kidneys is incompatible with human dignity.<sup>8</sup>

The harm reduction argument is then an argument of potentially wide appeal that is more complex to assess than it might initially appear. We can better inspect its empirical and ethical premises if we set the argument out more formally, and this chapter begins with a utilitarian version. The premises of this argument will be assessed in the light of the literature on kidney sales. We will also see what happens when the premises are altered. Perhaps surprisingly, it turns out that the case for legalization could be strengthened by dropping some of the utilitarian elements, such as the aggregation of welfare and the exclusion of considerations besides welfare. Put another way, one cannot easily avoid the harm reduction argument by refusing to be a utilitarian.

## The utilitarian harm reduction argument

The leading ethical foundation for harm reduction strategies is utilitarianism.<sup>9</sup> I shall understand utilitarianism to make two claims:

1. It is better if there is a bigger sum of benefits.
2. That is all.<sup>10</sup>

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<sup>8</sup> In the interests of full disclosure, I should say I supported the right to sell and criticised the anti-sale arguments from commodification, dignity, and altruism in Wilkinson T.M. (2011): *Ethics and the Acquisition of Organs*. Oxford. Nothing in this paper depends on my claims there.

<sup>9</sup> Holland 2015, 168–170.

‘Bigger sum of benefits’ should be understood to mean ‘bigger sum of benefits net of harms.’ ‘That is all’ means that no considerations count ethically besides having the biggest sum of benefits. The price of a bigger sum of benefits might be more harms, but harms that are outweighed by the benefits. Utilitarianism and harm reduction might then appear to diverge since valuing a reduction in harms without taking account of compensating benefits would run counter to utilitarianism. Since ignoring compensating benefits would also have absurd results, I shall assume that harm reduction means reducing overall harms net of benefits.

The harm reduction strategy of legalizing organs can then, as a first approximation, be argued for like this:

1. Only two options exist: white markets or black markets.
2. White markets have a bigger sum of benefits than black markets.
3. It is better if there is a bigger sum of benefits.
4. That is all.

Therefore:

5. White markets are all-things-considered best.

If we then add that legislators ought to bring about the all-things-considered best outcome, a further conclusion is:

6. Kidney markets should be legalized.

This argument is a skeleton. In what way should markets be legalized? There are many possible options. Even free markets of private sale and purchase could vary in how they specify property rights or compensation for breach of contract. A regulated market could take many forms, with price minima or maxima or set rates, or with the state’s being the only buyer or one buyer or not a buyer at all,

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**10** I got this formulation of utilitarianism from a lecture given by Derek Parfit nearly 30 years ago and he said he got it from Shelly Kagan. A similar version in print says ‘when we are choosing between two acts or policies, one relevant fact is how great the resulting benefits would be. For Utilitarians, that is all that matters.’ Parfit, D. (1997): Equality and priority. In: *Ratio*, 10(3), 202–221 at 202.

or with trades between only co-nationals allowed, and so on.<sup>11</sup> These details could all in principle be decided on utilitarian grounds.

Let us now go through premises 1-4 of the harm reduction argument.

## Only two options exist

The harm reduction strategy compares two options: only black with only white markets. This comparison is too crude. Black markets do not exist alone because we also have the legal donation system. However, supporters of white markets also envisage legal donation persisting alongside sales. I shall therefore ignore this complication, although I will comment shortly on the possible effect of legalization on the extent of donation. ‘Only two options exist’ implicitly sets aside two further options. The first is having no black and no white markets. The second is having black and white markets co-existing.

Critics of the harm reduction argument object that when the choice is put as being between black and white, it overlooks the prospect of reducing black markets.<sup>12</sup> They cite various real or proposed methods to disrupt black markets, such as increasing the supply of donated kidneys or preventing health insurers from covering transplant tourism. But they tend not to suggest that black markets could be made to disappear altogether. It is indeed highly likely that some sort of market would form for so long as kidneys are very scarce and kidney transplantation remains superior to other treatments for end stage renal disease. However, if black markets are not going to disappear, then the comparison cannot be between white markets and no markets. It is still between black and white, albeit possibly a smaller black market. Shrinking the size of the black market is ethically relevant, as we soon see when discussing the number of sales, but we can rule out the option of having neither black nor white markets for the foreseeable future.

The other missing option is with black and white markets co-existing. This option is easily avoidable in one way. States choose what to make illegal so, if they did not forbid or regulate selling, black markets could not exist.<sup>13</sup> However, many who favour white markets do not want to scrap all restrictions on sale.

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<sup>11</sup> T.M. Wilkinson 2011, 168–170.

<sup>12</sup> See e.g. Koplin, J. (2014): Assessing the likely harms to kidney vendors in regulated organ markets. In: *The American Journal of Bioethics*, 14(10), 7–18.

<sup>13</sup> Andreas, P. (2011): Illicit globalization: myths, misconceptions, and historical lessons. In: *Political Science Quarterly* 126(3), 403–425.

They would like some regulations. Suppose a rule were adopted against transactions unless between co-nationals; or suppose a rule limited the price paid. Such a regulated market might not produce enough kidneys for sale in rich countries to meet demand. Buyers might then go abroad for illegal organs. Or they might subvert the domestic regulations, for instance with illegal top up payments (which would make the market more a grey one than black or white). Hence black and white markets would coexist. Consequently, the first premise of the harm reduction argument may be wrong. What if it were?

The bare possibility that black markets would persist despite legalizing kidney markets is no reason to prohibit. As Janet Radcliffe Richards pointed out, one would not say that all immigration should be stopped just because legal immigration would coincide with illegal immigration.<sup>14</sup> However, it is at least conceivable that the black market would not shrink and may even grow because markets were legalized. In that case, the persistence of a harmful black market would be an argument against white markets. Thus the first premise may, but also may not, be wrong in a way that damages the argument. We cannot take any further this element of the discussion without knowing the form in which a market would be legalized and having a sense of its effects.

## White markets have a bigger sum of benefits than black markets

No one should pretend that it would be easy to trace all the direct and indirect effects of white or black markets on welfare. To keep the analysis simple (but therefore limited), let us focus only on the recipients and the sellers and ignore harms and benefits to assorted intermediaries, such as the surgeons and physicians, the tissue typing firms, the hospitals where the transplants take place, the brokers and recruiters who organize the match between sellers, recipients, and medical personnel, the providers of the dialysis that would no longer be needed, the affected families of sellers and recipients, and so on.

Let us assume that potential recipients would benefit from a new kidney so long as it was of some reasonable quality and match and transplanted with some reasonable skill. Let us subsume all these factors into 'quality'. Two con-

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<sup>14</sup> Richards, J. R. (2012): *The ethics of transplants: why careless thought costs lives*. Oxford, 87–90.

siderations then arise in assessing harms and benefits to potential recipients as a class: the quantity of kidneys for transplanting and their quality.

No one really knows what would happen to the quantity of organs if kidney markets were legalized. Perhaps the introduction of a positive price in a legal market would bring in new sellers who would not sell in a black market. But perhaps making kidneys legally sellable would drive down altruistic donation. Overall, the supply could go up, down, or stay the same.<sup>15</sup> Anyone who asserts with confidence what would happen is going way beyond the evidence. As for the quality of kidneys, much would depend on how far white markets replaced black markets. I think it is plausible that white markets would produce organs of higher average quality than in black markets and not much different from kidneys that are altruistically donated now. It seems likely that the quality of black market organs is variable, affected by such factors as whether they are transplanted by small owner-operated clinics of dubious quality or ‘top-notch’ surgeons and hospitals operating on the edge of legality.<sup>16</sup> As for kidneys donated now, many fall under what are euphemistically known as ‘expanded criteria’ (ECD) kidneys, in particular ones that are old. Medical skill combined with a shortage of kidneys has meant that altruistically-donated kidneys are accepted despite being less than pristine because good enough results can be obtained.<sup>17</sup>

Let us turn to the interests of the sellers. Most sellers in current black markets are very poor and live in poor countries. Social science research on the effects on sellers of kidneys often shows that only rarely do they gain a major long-term financial benefit and that many report ill-effects and in fact regret selling.<sup>18</sup> In my view, that sellers suffer ill effects or that the money does not lift

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<sup>15</sup> Wilkinson, T.M. 2011, 170–173.

<sup>16</sup> A likely example of the first is the Medicus Clinic in Kosovo. See the case report in Ambagtsheer, F., Gunnarson, M., De Jong, J., Lundin, S., Van Balen, L., Orr, Z., Weimar, W. (2014): Trafficking in human beings for the purpose of organ removal: a case study report. In: *The HOTT Project* 91, 100. The description ‘top notch’ comes from Mendoza, R. L. (2010): Price deflation and the underground organ economy in the Philippines. *Journal of Public Health* 33(1), 101–107 at 102. On the risks and variability, see Anker, A. E., Feeley, T. H. (2012): Estimating the risks of acquiring a kidney abroad: a meta-analysis of complications following participation in transplant tourism. In: *Clinical transplantation*, 26(3), 232–241.

<sup>17</sup> ‘By definition, ECD kidneys have a 70% greater likelihood of failure compared with one from a 35-yr-old male donor who died from a motor vehicle accident.’ Rao, P. S., & Ojo, A. (2009): The alphabet soup of kidney transplantation: SCD, DCD, ECD—fundamentals for the practicing nephrologist. In: *Clinical Journal of the American Society of Nephrology*, 4(11), 1827–1831 at 1827.

<sup>18</sup> For a literature review, see Koplin 2014. Iran has a legal cash-for-organ program. The evidence about the effects on sellers there is scanty and disputed but one study does say that most

them out of poverty would not show that they were harmed overall. The money could still make it worthwhile to them. It is the evidence of regret that most strongly supports the claim that selling harms the sellers, that they themselves thought they had made a mistake.<sup>19</sup>

Even if black market sellers were harmed, that would not refute the harm reduction argument. What counts is whether legal markets would have less harm than black markets, not whether they would have no harm at all. This point is sometimes missed. Consider the (very good) paper by Julian Koplin, who disagrees with harm reduction arguments for white markets.<sup>20</sup> Almost the whole of his paper elaborated the following: supporters of white markets argue that the harms in black markets are the consequence of illegality; but the evidence suggests that not all the physical and psycho-social harms of sellers in black markets are due to the illegality; one would therefore expect harm to sellers to occur in white markets. Koplin's argument does not make the right comparison. The harm reduction argument for a white market does not have to claim that all the harm of sale would disappear on legalization. All it has to claim is that a white market would have less harm than the black market. Suppose sellers in even legal markets would feel stigma, or physical pain, or have long-term complications, just as do many sellers in black markets. At least they would not be defrauded if promised funds or care, or deceived about the health and legal risks. They would therefore be less harmed overall.<sup>21</sup> Compare a harm reduction argument for the legalization of heroin: if heroin were legal and regulated, then some harms would be reduced. For instance, people could get clean needles and reduce their chances of infection, or the purity of heroin could be controlled better thus reducing the number of accidental overdoses. This argument does not have to claim that heroin would become safe.

An obvious reply to the harm reduction argument is that the legalization of kidney sales would lead to a greater number of potentially harmful sales than in black markets (and the analogue in debates about drugs is whether legalizing

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of them regret it. Zargooshi, Javaad. Quality of life of Iranian kidney “donors”. In: *The Journal of urology* 166(5) (2001), 1790–1799.

**19** Wilkinson, T.M. (2011), 180.

**20** Koplin 2014. Only at the end does he consider the lesser of two evils argument that is the equivalent of harm reduction, and there he makes the insufficient point reported above that the black market might be shrunk.

**21** Obviously, this argument would fail if legal kidney markets would have as much deception and coercion as black markets. The second paragraph of this chapter gave some reasons to think they would not.

them would lead to greater consumption).<sup>22</sup> For some reason, this point is almost never made explicitly in the context of kidney markets, although it is implicit I think in the claim that the black market can be shrunk by proper enforcement. This reply makes a causal assumption: the legalization of markets would cause more sales than in a black market alone. Suppose this assumption is correct.

The greater number of sales would be a problem for the harm reduction argument if the expected harms of selling for people who consent exceeded the expected harms to them of not selling. If transactions were either neutral or beneficial, then a greater number of them would not cause an increase in net harm to sellers.

Suppose, however, as Koplin and other critics argue, that the harms of selling are probably greater than the harms of not selling even for those who consent in a legal market. Obviously, the question would then be why all or most of these sellers would consent to something that would probably harm them more than not selling. This question has not, I think, been answered properly, but suppose nonetheless that sellers would consent to a harmful transaction. Then an increase in the number of these likely-to-be harmful transactions would be a harm-based reason not to legalize. But it still would not be decisive because we would have to take account of the greater harms to individuals in the black market.

Recall the way in which Koplin's comparison misfired. The harm reduction argument said that sellers are less harmed in white markets than in black. Koplin said that some of the harms sellers suffered in black markets could be expected to be suffered in white markets. Obviously that is consistent with sellers suffering more in black markets than in white. If you suffer one harm from the nephrectomy and another as a result of being deceived, that is more harm than just the harm from the nephrectomy. If legal markets would largely not involve deception, then sellers in those markets would be less harmed at the individual level than sellers in black markets.

The following summary may help with the points just made about the interests of sellers (ignore it if it does not).

Let  $Q_1$  denote the number of sales in black markets. Let  $Q_2$  denote the number of sales in white markets. By assumption,  $Q_1 < Q_2$ .

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<sup>22</sup> Kleiman, M.A.R., Caulkins, J.P. and Hawken, A. (2011): *Drugs and Drug Policy: What Everyone Needs to Know?* Oxford, 18–21.

Let ‘average harm B’ denote the average harm to sellers in black markets compared with not selling. Let ‘average harm W’ denote the average harm to sellers in white markets compared with not selling.

By assumption, average harm B > average harm W. Plus, we have grounds to think that sellers are harmed in black markets, so the average harm B is a positive sum.

We have two salient possibilities.

(1) In white markets, the average harm of selling is zero i.e. sellers are either better off or at least no worse off for selling.

In that case, white markets must have less harm than black markets.

(2) In white markets, the average harm of selling is positive i.e. on average, sellers are harmed for selling.

In that case, it must be decided whether

$Q_1 \times \text{average harm B}$  is greater than, less than, or equal to  $Q_2 \times \text{average harm W}$ .

This problem in turn raises the difficulty of interpersonal comparisons of welfare. The comparison is between a larger group of sellers who suffer the harms that would occur in a white market and a smaller group that suffer the harms that occur in a black market. Some sort of comparison of welfare across these two groups would have to be done in order to decide which has the smaller total of harm. Whether these comparisons are possible is a long-running question in discussions of utilitarianism.<sup>23</sup> Assuming that some sorts of comparison are possible, then the overall expected harm would depend on how many more transactions occur and how much more harmful a black market transaction is than a white one. If most of the harm from a kidney sale came from the sale itself, legal or not, and if a white market greatly increased the number of sales, then one might expect that legalizing would cause more harm. If most of the harm from a kidney sale came from the illegality and if a white market increased the number of sales by only a little, then one might expect that legalizing sales,

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<sup>23</sup> Griffin, J. (1986): *Well-being: Its meaning, measurement, and moral importance*. Oxford, ch. 7. Another question is whether acting on the comparisons is ethically right, a question for the next section.

and thereby reducing the number of black market transactions, would reduce harm.

We have been assessing the premise that white markets have a bigger sum of benefits than black markets. Whether they do cannot be answered with certainty. We do not know what would happen to the quantity of kidneys if sale were legalized. Nor do we know how much harm on average sellers in white markets would suffer, although we might think that on the whole well-informed people would not consent to a harmful sale, and that people who sell could be well-informed. What we do know is that not enough kidneys are supplied by the current combination of legal donation and illegal sale. We also have no good reason to doubt the quality of kidneys that a legal market would supply. And we have grounds to think that sellers in black markets often suffer serious harms. My own view is that, without much certainty about it, we should think that white markets would have a bigger sum of benefits than black.

## **It is better if there is a bigger sum of benefits**

The utilitarian version of a harm reduction argument is aggregative. In effect, this aggregative view has a trade off rate, where a bigger harm to one person could be ethically compensated for by preventing smaller harms to each of two people. In the context of kidney sales, two distinct trade offs might need to be made. The first is across the classes of buyers and sellers; the second is within the class of sellers. The aggregative question in both would be whether the gains to some people ethically outweigh the losses to others. One might then object to regarding people's interests as substitutable at all or one might object specifically to the way in which utilitarianism does the substituting.

The previous section considered separately the interests of sellers and recipients. How could they be joined together to assess overall harm? It is possible that the interests of both would coincide. One coincidence would be if sellers gain by selling and recipients gain by receiving. The alternative coincidence would be if sellers were worse off for selling and the class of potential recipients would also lose, as they might if legalizing sale reduced supply. It may not be easy to tell whether either of these coincidences holds but if it could be ascertained that one did, assessing the net harm or benefit of organs would be straightforward. If sellers and buyers gained from legalization, it would reduce harm. If both lost, it would increase harm. However, if the interests of sellers and buyers conflict, we have the trade off problem: does the gain to a recipient outweigh the loss to a seller?

The Declaration of Istanbul would say ‘no’. It declares that “A positive outcome for a recipient can never justify harm to a live donor; on the contrary, for a transplant with a live donor to be regarded as a success means that both the recipient and the donor have done well.”<sup>24</sup> It is not too much of a stretch to interpret this quotation as objecting to utilitarian aggregation and holding that gains to recipients do not ethically outweigh losses to donors (or sellers).

Suppose we accept the Declaration’s view of what a good outcome would be. We then need to return to the interests of sellers. The previous section mentioned two possibilities. In the first, people would be at least no worse off for selling than not selling in white markets. If so, sellers’ and recipients’ interests would not conflict and white markets would be better than harmful black markets as far as the interests of sellers is concerned. The other possibility was that sellers would be worse off for selling in white. Then a utilitarian would have to compare the larger group of sellers in the white market, who suffer some harms on average, with the smaller group in black markets, who suffer more harms on average.

A ban on aggregation would say that sale could not be justified by gains (if any) to recipients alone. Sellers must not lose. But here we must compare sellers in black markets with sellers in white markets. Sellers in black markets would be on average worse off for selling than sellers in white markets for selling. They stand to lose both from the nephrectomy and the effects of illegality. Suppose we reject utilitarian aggregation and instead focus on those who stand to lose most. It might be more important to prevent these extra harms being suffered than it is to prevent a greater number of smaller harms from legal sale even if, were the harms all totted up, the total of harm would be greater in a legal market. Dropping utilitarian aggregation in favour of avoiding the greater harms suffered by individuals in black markets would support legalizing sale.

## That is all

Utilitarianism states that fundamentally all that counts is the aggregate of welfare. Rules and principles, such as ‘do not lie’, or ‘do not cut people up without their consent’ have force only in a derivative way, according to how they protect

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<sup>24</sup> The Declaration of Istanbul on Organ Trafficking and Transplant, 2. Tourism [http://multivu.prnewswire.com/mnr/transplantationsociety/33914/docs/33914-Declaration\\_of\\_Istanbul-Lancet.pdf](http://multivu.prnewswire.com/mnr/transplantationsociety/33914/docs/33914-Declaration_of_Istanbul-Lancet.pdf).

or promote welfare. Since many people believe in moral principles that they do not think depend for their force on maximizing welfare, the ‘that is all’ part of utilitarianism is controversial.

In the context of kidney sales, rules and principles about rights and dignity have been adduced that do not seem to have a utilitarian justification. As was said early on, not every argument should be construed as an argument about the harms to participants. I want to raise a question about how the comparison between black and white markets bears on the wrongs, as opposed to the harms, of legalization.

As often happens in debates, participants in this one tend to think that they have all the right on their side. Supporters of sale think that legal markets would provide more kidneys, reduce harm, help the badly off sellers, and respect their autonomy and they also think that the dignity, altruism, and anti-commodification counter-arguments do not state genuinely important and opposing considerations. Opponents of sale think they do and also think that sales would not provide more organs, would cause harm to sellers, would fail to respect their autonomy, and so on. Maybe all good, or bad, things really do go together in the case of kidney sales but what if they do not? What if allowing sales would reduce harm but instantiate some wrongs? What if, on the other side, stopping people from selling would infringe on their rights of bodily control but would also stop them harming themselves? Since it seems unlikely that either the right to sell or avoiding commodification are so important that they would override any amount of harm, the harm reduction argument has the potential to push both opponents and supporters of legalized markets to clarify the weight of the non-harm considerations they cite.

But the wrongs of legal sale would also have to be compared with the wrongs of illegal sale. And here we come to a similarity between harm reduction and wrong reduction. Black markets contain wrongs, as all sides agree. That is, they agree on what happens and they agree that these are wrongs. People are deceived about risks, payment, and possibly post-operative care, and some are coerced by threats. When it comes to white markets, opponents think these contain the wrongs of commodification and the like; supporters do not think these are wrongs. But all sides could agree that white markets would have less deceit and fewer coercive threats than black markets. Thus all sides could agree that in one way white markets have fewer wrongs than black markets. One could therefore make a wrong-reduction analogue of the harm reduction argument. Whether or not white markets do have wrongs, they have fewer wrongs than black markets and fewer wrongs are better than more. But then, just as with harm reduction, numbers might be relevant. If white markets have more

transactions than black markets, they would have in one way a greater number of whatever the wrongs in selling.

When wrongs will be done no matter what, the suggestion floating here is to minimize the aggregate sum of wrongs. This suggestion seems foreign to the thinking of those who stress wrongs rather than harms. They commonly think that wrongs are supposed to be directly action-guiding: we should not do wrong. They might say, in the case of kidney markets, that it would always be possible to refuse to commit the wrongs of participating in a white market. Other may commit the wrongs of being in a black market but that is a matter for them. One is not forced to choose between different ways of doing wrong.

But the problem of comparing wrongs is not so easily avoided. It might be possible to avoid participating in the market but if we are asking about policy, such as legislation, the perspective of potential participants is the wrong perspective. Legislators are not themselves typically going to participate in black or white markets. They are trying to decide what to let happen. And if the choice is between black markets or white markets, and if legislators are supposed to decide whether to legalize in part on the basis of wrongs, then they must choose between the wrongs of the black market or the purported wrongs of the white market. I do not know how this choice should be resolved. The point here that dropping the utilitarian 'That is all' premise, or even focusing entirely on the wrongs of sale and not harm, may weaken the case against legalization, not strengthen it.

## Conclusion

A harm reduction argument may seem like a realistic and straightforward way to settle long-running disputes about whether to legalize organ sales. But before we are persuaded, we must realize that any such argument will have controversial ethical and empirical aspects. Setting out formally a utilitarian version of a harm reduction argument lets us see where controversy and our ignorance lies. We do not know whether legalizing would reduce harm. It would probably reduce the harms of black markets but, since we do not know the overall effect on the supply of organs or on the number of harmful transactions in a white market, we cannot be confident that the overall effect would be less harm. I think this is the leading problem for a harm reduction argument. By contrast, I have argued that the case for legalization might be strengthened by dropping the utilitarian's sole focus on aggregate welfare. If a special concern for the worst off replaces aggregation of welfare, it seems more important to avoid the greater

harms of the black market than the lesser harms of the white market. And if we add a concern to avoid the wrongs of sale, black markets may well have more wrongs than white markets. The harm reduction argument certainly does not settle the debate about legalizing the organ trade but it has more force than critics of sale have realized.

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