Paternalistic Public Policy and the Organ Trade

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Since the publication of Thaler's "Nudge" in 2008, the idea of liberal paternalism has spread like wildfire across the spheres of policymaking and academia alike. In this essay, Eoin Campbell applies this concept to the highly contentious issue of trade in organs. In a finely balanced piece, he shows a keen awareness of both the advantages and pitfalls of the legalisation of the organ trade.

Introduction

The first human organ transplant was carried out in Boston in 1954. The market took off in the 1970s, due to technological advances, and since then demand has grown exponentially faster than supply. The USA is a striking example: currently there are around 96,000 people on the waiting list for kidneys alone, while only 16,812 (11,043 from deceased donors, 5,769 live donations) transplants took place last year (National Kidney Foundation, 2013). The problem is the same worldwide. Financial incentives remain illegal in all countries (bar Iran).

Does paternalism have a role to play? The concept of paternalism derives from family interactions, where the head of the family makes decisions, forcibly if needs be, on behalf of other family members in their best interests. Often a difficult term to define without making normative statements, paternalism can be viewed in varying degrees. 'Hard' paternalism where coercion by a supposed enlightened elite entirely diminishes an individual's freedom of choice (Prowse, 2008) is differentiated from "soft" or "libertarian paternalism" where policy "tries to influence choices in a way that will make choosers better off, as judged by themselves" (Thaler and Sunstein, 2009, p.5). Paternalism would appear to contradict the implicit assumption of economics that people are the best judges of their own welfare:

> *"He is the person most interested in his own well-being… with respect to his own feelings and circumstances, the most ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by any one else"(Mill, 2005).*

Can paternalism be justified when it is aimed at protecting welfare and freedom? Illegal markets are perceived to mentally and physically damage the health of the populace. This essay enquires if paternalism, or lack of, can ease the shortage of organs supplied.

Libertarian Paternalism

At present the buying and selling of organs is illegal, yet the voluntary donation of organs is not only legal but viewed at altruistic. Within the current system, how can we encourage such altruistic behaviour? Thaler and Sunstein (2009) show how the use of "choice architecture" can achieve this. Libertarian paternalism or a "nudge" is "any aspect of choice architecture that alters people's behaviour in a predictable way without forbidding any options or significantly changing their economic incentives" (Thaler and Sunstein, 2009, p.6). The nudge in this case is the setting of default consent. Explicit consent, where proactive steps are needed to become a donor, is the most common default setting, but with this system willingness often doesn't result in necessary action. A Gallup report in 2005 stated 95.4 per cent of Americans "strongly support" or "support" organ donation, yet 53.2 per cent joined a registry, carry a donor card or granted consent on their drivers' licenses (Kahan, 2012). Human inertia plays a role here deterring progressive action.

Under a system of presumed consent people would be assumed to be consenting donors, but have the opportunity to remove their consent easily, thus preserving the freedom of choice. An experimental online survey devised by and Goldstein (2004) illustrates the power of the default rule. When, under explicit consent, participants had to opt-in to becoming an organ donor, only 42 per cent of participants agreed. On the other hand when they had to opt-out 82 per cent gave consent. Singapore, Spain, Austria and some other continental European nations use the opt-out setting with notably higher rates of consent than opt-in countries. Only 12 per cent of German citizens give consent under the opt-in system while 99 per cent of Austrians do (Thaler and Sunstein, 2009).

At this point, a change in the default rule may seem to be a logical policy solution, yet it is important to stress the default rule is not the only important aspect. On average donation rates are higher in presumed consent nations, but not by a significant amount (Abadie and Gay, 2004). The infrastructure of the system is often incomplete with presumed consent often trumped by next of kin decisions after the donor is deceased. Live relative to cadaveric donations are becoming increasingly important with rising demand. Default rules have little impact on living donors (ibid).

A different type of "nudge" or "non-financial incentive" is what is put forward by non-profit organ donor network "Lifesharers"; when voluntarily agreeing to donate when you die, you will receive a better chance of receiving an organ, through the network, should you need one in order to live (Levitt and Dubner, 2007). Live donors have been targeted by transplant experts, with discussion of incentives of guaranteed health insurance, tax breaks, retirement account bonuses and educational scholarships/grants (Satel,

2006). These incentives are obviously more heavy-handed paternalistic policies. Interestingly while all of these incentives are in some form "financial", they are not straight up cash payments that are, in sharp contrast, viewed as immoral and unacceptable by many communities.

Community Values

The prohibition of organ markets are an expression of cultural and community values. Society favours philanthropic or altruistic actions. Selling an organ diminishes any altruism or utility potentially gained from a donative transaction. However Becker and Elias (2007) point out that altruism has so far not come close to solving the supply shortage problem. There is limited, if any, empirical evidence on the importance of altruism because it cannot be measured accurately (ibid). Altruism is arguably stronger in the context of intra-family donations. NBA basketball player Gregg Ostertag donated a kidney to his sister at the height of his career. Although this is no doubt altruistic, his intentions may have been somewhat necessary (as it was a close family member) rather than voluntary. It is "arguably something of a misnomer to call the current organ procurement system 'voluntary'; it might be more accurate simply to call it 'uncompensated'" (Hansmann, 1989, p.). Becker and Elias (2007) enquire why is it better for Ostertag to give his kidney to his sister (and risk his career) rather than paying for a donation from someone else? Buying a kidney certainly appears pareto-optimal, yet society states the former option is morally better than the other.

Critics of legalisation believe the commodification of the body is immoral. Yet hair, skin, eggs and sperm can all be bought and sold in markets. Many nations let people buy from surrogate mothers where the risk of mortality from renting out your womb is 6 times greater than being a live kidney donor (The Economist, 2006). One could go so far as to suggest that when registering for a voluntary army, one is effectively commodifying the whole body exposing oneself to injury/death (Becker and Elias, 2007).

There exist markets where altruism and commerciality can co-exist to a certain extent. Most modern day medical systems are built around this premise. Dan Pallotta (2013) explains the perverse stigma attached to high wages of charity CEOs, asking why their wages are so low compared to CEOs in the financial sector, when their motivations are obviously more humanitarian. Pallotta is essentially remarking that the way communities perceive charity is wrong; the same could be said about the ethics of the organ trade. Policymakers may wrongfully adhere to cultural values to appease voters, ignoring the true objective of paternalism:

> *"In political life, perhaps the most basic incentive comes from the need to be re-elected" (Besley, 2004 p.196).*

Legalisation of the Market

Hard paternalism is imposed on undesirable markets to prevent people from harming themselves. Whether this is justified in organ trade is questionable. If we take away what an individual regards as their best option, they are worse off, as judged from their own perspective. This best option may be to sell ones organ, thus it is worth investigating whether the legalisation and liberalisation of the market can solve the organ supply shortage, while justifying freedom.

In the illegal organ market, prices are higher and supply is limited due to penalties on suppliers and stigma. With no rule of law, interactions within an informal market are that of a Nietzschean anarchy - strong dominating the weak with exploitation rife (Hillman, 2009). Hillman emphasises that "criminalization of supply introduces criminals into supply" (2009, p.379). Those willing to sell on the black market are often misled and manipulated.

Would it not be better to legalise and regulate the market, clearing waiting lists? Becker and Elias (2007) provide a price-determining framework (based on risk of death, quality of life, ability to perform market activities after operation) for the organ market, that would result in increasing numbers of organs supplied and the shift from inelastic to highly elastic supply of organs. An organ market would improve efficiency of transplants. A larger pool of donors to draw from means improved tissue matching is likely. The element of timing is also eliminated, as cadaveric donors are no longer heavily relied upon (Hansmann, 1989). When harvesting cadavers, kidneys are only viable for transplant for 48 to 72 hours (Becker and Elias, 2007). Live sellers and buyers can agree on suitable operation times. Iran legalised the organ trade in 1988 and within 11 years it was the only country in the world that cleared its waiting lists (The Economist, 2011). Of course many organ donors in Iran suffer subsequent health problems, yet this is a by-product of the quality of the health industry, a problem potentially overcome in many wealthier nations. With legalisation comes problems of self-control or, as will now be discussed, "hyperbolic discounting".

Hyperbolic Discounting

Hillman (2009) explains that different people use different discount rates to compare personal costs/benefits over time. When faced with a decision a hyperbolic discounter values present costs/benefits at a zero discount rate with increasing discount rates as movement is made away from this present date/time. As the individual moves to a future time/date (second hyperbola) past benefits are worth little in retrospect. Applying this to selling one's organ, an individual undervalues future health costs at the time of surgery. At a future date, financial incentives received in the past are worth little in retrospect. Put simply; "hyperbolic discounters choose immediate gratification, and in the future regret past decisions" (Hillman, 2009). A striking example of this comes from a 17 year-old Chi-

nese teenager called Zheng who sold his kidney illegally for RMB 22,000 (only around £2,000) in order to buy a newly released IPad2. He subsequently suffered health complications (Foster, 2011). Paternalistic policies seem justified here in altering decisions of hyperbolic or irrational discounters for their own benefit. Yet state policy is subject to asymmetric information problems: whether the individuals are indeed acting irrationally and the discount rate that acts as basis for choice is unknown.

With legalisation of the market, poor people appear vulnerable to irrational or impulsive decisions, selling organs out of desperation. Assuming low income is correlated with low health, markets would be flooded with poor quality and diseased organs. However this problem already exists on the black market, with over 2000 organs sold each year in Pakistan alone (Cohen, 2013). In a legal market all administration would be above board with a potential screening process for drug use, Aids, Hepatitis and other diseases, with refusal an option. A more realistic outcome, taking this into account, would be a donor pool made up of a middle class and a healthy poor class. Hansmann (1989) suggests the exclusion of low-income earners/persons in debt from the supply side of the market. He acknowledges a large number of poor people suffer from organ failure and, with a new more affordable price for organs, a net benefit for such demographics could arise. This aspect, although somewhat contradictory to liberalisation, could be incorporated into the screening process.

Becker and Elias (2007) even suggest a "cooling-off period" (allocated time between registration to sell and any final decision) to deter the possibility of hyperbolic discounting and recklessness. Another soft paternalistic necessity in state policy would be bridging the information gap and providing accurate estimates of risk elements. There is an estimated 0.06 per cent chance of mortality when undergoing a live organ transplant (National Kidney Foundation, 2013). A study of more than 80,000 live kidney donors in the USA found no difference in their long-term mortality rates suggesting kidney donation is very safe in the USA (Cohen, 2013).

Conclusion

As with most policy decisions the answer to improving the current situation isn't black and white. It is not simply a question of hard paternalism vs. libertarianism but more how paternalism should be applied, what kind and to what extent. This essay makes the case that hard coercive paternalism isn't justified in the organ market and a legalised regulated market could potentially clear organ waiting lists. Complete liberalisation is not an objective and not even plausible; "Every market has some rules and boundaries that restrict freedom of choice" (Chang, 2010). The regulation within the market is paramount in incentivising individuals to make rational and beneficial choices.

John Stuart Mill (2005) believed we become the best judges of our own welfare, with time and practise. As selling/donating one's kidney is a once off event, paternalism on some level has a role to play. Someday the development of artificial organs may render this debate beside the point, but until science takes over economics will remain at the forefront of debate.

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