

BOOK REVIEW

T.M. WILKINSON, *Ethics and the Acquisition of Organs*, Oxford University Press, 2011, Hardback, 224 pp., £35

JANET RADCLIFFE RICHARDS, *The Ethics of Transplants: Why Careless Thought Costs Lives*, Oxford University Press, 2012, Hardback, 256 pp., £16.99

The ethical literature on the procurement of organs for transplantation is extensive but, despite some excellent papers, on the whole the philosophical quality is not very high. Book length discussions of the problem are rare, with the exception of books focusing on organ sale. Hence, the publication within a year of two books by philosophers of known competence is a highly welcomed event. The books are very different. Wilkinson aims to present a comprehensive discussion of the main ethical issues on the acquisition of organs, and to defend positions on all of them. His book is clearly written, using many felicitous and occasionally memorable phrases, and is well-informed, well-structured, and tightly argued. Wilkinson is remarkably fair in considering or even constructing objections to views he favours. Of course, in surveying a field which has been tilted for so long, not every discussion can be equally original, as the author recognises in Chapter 10 on organ sale and elsewhere, but all chapters contain some original elements, and some of them many. This is particularly evident in Chapter 5 on the role of the family, a strangely neglected topic in the literature; Chapter 6 where he presents a new defence of opt-out systems, discussed further below; and Chapter 9 where he offers arguments in favour of directed donation.¹ The discussion of ‘donation’ by young children in Chapters 7 and 8 is also interesting and controversial.² Wilkinson’s book thus provides a very good starting point for any person new to the subject and with some philosophical background. It will also be an inescapable point of reference for any further treatment of the topics it discusses.

In contrast, Radcliffe Richards’ presents her work as an essay; it does not aim at being comprehensive. That it is highly selective in its choice of the issues to be discussed cannot, therefore, be a matter of complaint, but it is a weakness that no clear rationale for the choice is given. As a consequence, some of her arguments are incomplete; I will give

¹ Wilkinson, ‘The Dead and their Families’, ‘Consent and Uncertainty About the Wishes of the Dead’, and ‘Impartiality, Acquisition, and Allocation’, respectively.

² Wilkinson, ‘Conscription’ and ‘Living Donor Organ Transplantation’, respectively.

some examples below. However, there is much to enjoy in this book too. Radcliffe Richard's prose is a great pleasure in itself because of its rare combination of passion and clarity. The book contains many fine arguments; for example, the defence of the idea that identifying the 'moment' of death is a normative issue because it is underdetermined by the facts.³ It is also self-reflective in an interesting way because many passages, even whole chapters, consider the proper format of the arguments which can have any force in considering a topic like this.⁴ The book will be particularly helpful to transplant doctors, health lawyers, and others with a professional or personal interest in transplantation who want to know what ethical argument can contribute to their thinking.

Books like these bring the discussion of their subject to a higher level but, of course, they do not end that discussion. They force us to rethink some of our own positions, but not necessarily to abandon them. In this spirit, by explaining some of my remaining doubts and disagreements I only intend to confirm my praise of the virtues of these books, not to distract from it. I will address three areas in this review; directed donation, the procurement system of postmortal organs, and organ sale.

In the area of living donation, most legal systems permit Samaritan donation; donation to strangers. This is often called anonymous donation but one of the key questions about it, which should not be prejudged by terms or definitions, is whether such donations should always be anonymous. Normally, living donation makes a certain organ, usually a kidney but occasionally also a part of a liver or lung, available to a specific person; a partner, relative, or friend. The organs from Samaritans, however, are normally allocated in the same way as organs acquired from dead people. A controversial question is whether the donor in such a case should be permitted to request deviations from this allocation system by restricting the range of eligible recipients in some way; for example, to children or people from a certain region, religion or even race, or to a specific person. This is usually called directed donation. A standard objection to directed donation is that it violates a requirement of formal justice; people who are in need of an organ have a right to be treated according to the maxim that equal people should be treated equally. Allocation should thus only use impartial criteria, such as need, urgency, or waiting time. Favouritism of any kind cannot be allowed. To this objection Wilkinson has two replies, confessing that he is more confident of the first than of the

³ Radcliffe Richards, 'Penumbral Problems', Ch 5.

⁴ Wilkinson also regularly, if only briefly, comments on his methodology (pp 17, 26, 45). His view appears to be a mixture of foundationalism and coherentism; some of our basic intuitions cannot be surrendered, not even in order to restore coherence.

second (pp 156–58). The first is that even if accepting a directed donation violates a requirement of impartial allocation, we should still accept it if at least someone profits and nobody will be the worse for it. If the organ is only available on condition that it is given to a specific person, no one else on the waiting list will lose out if the condition is accepted; indeed, everyone who occupies a lower place on the list than the recipient will profit indirectly.⁵ Wilkinson concedes that it is a contingent fact that a policy change will be Pareto-optimal in this way. For example, if directed donation is made possible, some Samaritans who now agree to donate unconditionally might start stating conditions which would mean that organs would be redirected, and some people would be worse off. However, that such an effect would occur, to some unknown extent, is not merely possible but highly probable, and the effect would be worse than Wilkinson recognises. The redirected organs could no longer be given to the person who on medical grounds is most suited to receive them,⁶ nor could they be used to start a cascade of optimally matched transplantations, or could only do so on rare occasions. Wilkinson's second reply to the objection of formal injustice is that no requirement of formal justice would apply to begin with to a transaction which only involves a private donor, a private recipient, and a transplant team willing to act on their behalf.⁷ Indeed, as Radcliffe Richards says, no queue-jumping occurs when you offer to bring someone who is waiting for the bus home in your car (p 179).⁸ The prior question, however, is whether we should allow such private transactions when they have negative external effects on (some) others. The success of this second reply may, therefore, depend on the cogency of the first one.

In her chapter on procurement from the dead, Chapter 4, Radcliffe Richards notes that the issue of directed donation is usually raised in connection with living donation; but it is, of course, equally conceivable for people to allow their organs to be taken after their death only on the

⁵ Radcliffe Richards also considers this: p 176.

⁶ G Pennings, 'Directed Organ Donation: Discrimination or Autonomy?' (2007) 24 *J Applied Phil* 41.

⁷ It is initially clearer that the objection of formal injustice applies to a living donor list exchange scheme because such a scheme necessarily involves the participation of a public transplant service: G den Hartogh, 'Trading with the Waiting List: the Justice of Living Donor List Exchange' (2010) 24 *Bioethics* 190.

⁸ Wilkinson gives the analogy of a fund which aims at providing scholarships to eligible students from a certain region or religion. He muddies the waters somewhat by supposing the fund to be administered by a public university, which some would find objectionable. His reason for this supposition is that he believes a public transplant service to be somehow involved anyway; but we have first to decide whether it should be (p 157).

condition that they go to certain recipients. She queries how it can be so obvious to people that such conditions cannot be accepted. Before discussing this issue, she considers why people generally insist that organs can only be taken with the consent of either the deceased or their relatives (pp 165–169). Apparently people consider their mortal remains a kind of property which is under their own control as long as they live, and under the control of their heirs afterwards.⁹ They can decide to do what they like with these goods, and even if it is praiseworthy to give them to the needy, they are not to be blamed if they do not. On this standard view of postmortal donation it is, indeed, inconsistent not to allow directed donation. Radcliffe Richards does not share that view, however, although she does not offer her reasons for rejecting it. Rather, she is in favour of a conscription system, or at least a system which recognises donation as the default not to be overruled by family veto (pp 167–68). Unfortunately, this means that she does not give us a final assessment of directed donation. Even if our dead bodies are, in some sense, our ‘property’, that does not decide whether we have such exclusive control over it as the common view supposes. Property rights are limited in all kinds of ways by the interests of other people. I may have the full ownership of a house but that does not mean that I am allowed to change its outward appearance in any way I prefer, to pull it down if it is a registered monument, or to refuse to pay taxes on the basis of its market value. For this reason, not even a conscription system would be inconsistent with claims to ownership, it would merely create another limitation to the extent of our control. Popular rhetoric is oddly confused about this, and proposals for an opt-out system are routinely criticised by saying that the state does not own our bodies.¹⁰

One way to argue for such a limitation on our control over our own bodies would be to start from a duty of rescue. If you are in a unique position to save a person from utter disaster by an effort which only requires you to incur some relatively modest costs, that person has a (moral) right that you make that effort. On this view, it is not an inherent characteristic of positive duties of beneficence that they do not correspond to rights of the beneficiary. It is only a result of logistical problems. For each needy person there are many possible helpers, and for each person with the resources to provide help, there are many people whom they could provide it to. That is why no needy person has a specific claim to any specific aid. But this logistical problem can

⁹ Wilkinson also considers the analogy between the right of control over our dead bodies and property rights and gives an interesting list of disanalogies and unsettling similarities (pp 51–2).

¹⁰ For example, Radcliffe Richards, p 166.

be solved by coordination.¹¹ This is provided by, for example, a national health insurance system and other welfare state arrangements. It is also provided by organisations like Eurotransplant and UK transplant, and the legal framework within which they operate. By their impartial allocation criteria, they artificially bring you into a unique position to provide help to some specific people on their waiting lists.¹² Your obligation (whether or not it is legally enforced) is then to contribute to that system, and not to go on making private arrangements. You are required, so to speak, to leave the state of nature.¹³

Even if directed donation is within the area of control over our ‘property’ to donate or to refuse donation, the same conclusion can be reached. Having discussed directed donation, Radcliffe Richards presents a spirited defence of a system of reciprocity in which only registered donors have a claim to an organ in case of organ failure, or at least to get a higher place on the waiting list (pp 188–93). In such a system, a pool of organs is created by the contributions of all participants and only these contributing participants have full claims on the pooled resources in case of need. Because of this strong connection between contribution and claim, both contributions and benefits must be ‘equal’ on relevant measures. We cannot allow contributors to choose beneficiaries, any more than we can allow people to direct the use of the tax money they pay. The basic reason for such a system is that it is unfair, a kind of parasitism, for people who are not prepared to donate their organs themselves to have an equal claim on such organs when they need them. Such considerations of fairness apply to any scheme, whether or not it implements a priority rule. Hence, directed donation of postmortal organs should not be permitted. All in all this chapter is a little disappointing, not because of anything it says but because possible connections between the subjects it singles out for treatment are not noticed and discussed.

Returning to Wilkinson’s book, in Chapter 6 he offers an interesting new argument for preferring an opt-out system of postmortal donation.¹⁴ He warns us that the system he defends may, in the end, not be very different from the systems we know. For in both opt-out and

¹¹ J Feinberg, *Harm to Others* (Oxford University Press, Oxford 1984) 134; A Buchanan, ‘Perfecting Imperfect Duties: Collective Action to Create Moral Obligations’ (1996) 6 *Bus Ethics Q* 27.

¹² I have developed this argument: G. den Hartogh, ‘The Political Obligation to Donate Organs’ *Ratio Juris*, forthcoming.

¹³ Special responsibilities to a partner, relative, or friend can override this obligation, and this is equally true of postmortal donation. Therefore, the decision in the Ashworth case in 2008 was unfortunate. On this case see AJ Cronin, ‘Directed and Conditional Deceased Donor Organ Donations: Laws and Misconceptions’ (2010) 18 *Med L Rev* 275.

¹⁴ ‘Consent and Uncertainty About the Wishes of the Dead.’

so-called opt-in systems, it is invariably the relatives who make the final decision in all cases in which no refusal of the deceased can be traced. They even do so, whatever the law says, in cases in which the deceased has registered their willingness to donate. The starting point of his argument is that people's dead bodies belong to the domain of their personal sovereignty. That is why both their consent and their refusal have authority. If they have not made any such authoritative decision at all, the question how to proceed is open and, in that case, we should try to act in their best interests as much as possible.¹⁵ But should we not rather say that the question is not open because the barrier against entering someone's personal domain can only be lifted by their consent? Certainly no existing opt-in system conforms to that view, for in that case it could not leave the decision to the family. Moreover, there are other situations in which a similar question is universally considered to be an open one. For example, if a patient needs medical treatment to avoid harm to their life or health but they are temporarily unconscious or lack capacity and have neither consented to nor refused such treatment before they were in that position and no legal representative can be found, then we act on what we consider is in their best interests. We do not leave such a patient to die because they have not considered such a situation in advance or made an advance decision/directive. In some cases, we may have evidence about the deceased's wishes, and hence about their interests, in the absence of any publicly registered decision. In particular, relatives may present such evidence, sometimes reliably. But in many, probably most, cases no such evidence will be available, and Wilkinson recognises that in the absence of personal evidence the most probable wish to ascribe to people is to have their families decide (p 64). Furthermore, the decisive consideration may be the fact that in polls most people turn out to be in favour of donation.¹⁶ This means that by taking the deceased's organs the probability of acting in their interests is greater than by not taking them; and in considering the person's interests, rather than their consent, there is no safe side to err on.

This argument provides a more plausible way of reconciling a preference for opt-out with personal sovereignty than the usual appeal to 'presumed consent' but, in the end, it is still unconvincing. As regards the domain of people's personal sovereignty, we do not normally consider their interests directly because they themselves are responsible for

¹⁵ In 'The Possibility of Posthumous Harm', Ch 3, Wilkinson argues that it makes sense to ascribe to people posthumous interests.

¹⁶ For relevant evidence see M Taelis and WF van Raaij, *Bellessystemen, beloningen en orgaandonatie, Eindrapport in opdracht van het Ministerie van VWS* (2008) <<http://parlis.nl/pdf/bijlagen/BLG16260.pdf>>.

taking care of these. That responsibility is an integral part of their sovereignty. If we make use of a person's property without their consent, we cannot justify our behaviour by pointing out that we have evidence that they wish us to act in that way. This is not good enough when we could simply have asked them. The case of the temporarily unconscious patient is different because their vital needs (life and health) are at stake, not merely preferences. That the case is different is confirmed by the fact that these needs are protected by special, and stronger, rights than a right to self-determination only; the 'inalienable' rights to life and bodily integrity.¹⁷ That my right to the integrity of my body does not cover my dead body has been forcefully argued by Wilkinson himself in earlier work.¹⁸

I agree with Wilkinson that it is plausible to ascribe to people a power to make authoritative decisions in regard to their dead bodies. Whether it is helpful to consider this power a part of a general right of self-determination or 'personal sovereignty' is another matter, because this general right seems a fairly heterogeneous collection of Hohfeldian liberties, claims, powers, and (maybe) immunities which may have different moral weights in different contexts. Property can be seen as one rather distinct kind of sovereignty, and the authority over our dead bodies looks, indeed, in many ways like a property right, although we should be aware, as Radcliffe Richards points out, of the very limited scope of the decisions actually open to us (p 159). But how do we determine the proper domain of our authority and, in particular, the limits of that domain when other people's urgent needs are at stake? Which kind of argument do we need? Radcliffe Richards helpfully suggests that for any moral consideration appealed to in this area, it matters whether it is seen as a constraining principle which can only be overridden by some exceptionally strong conflicting consideration, or as a consideration pro or contra to be simply taken into account in a final balancing judgement (pp 134–46).

At first sight it might seem that an appeal to personal sovereignty can only be a constraining principle because of the peremptory nature of authority. Authority, it seems, can never be merely considered a value to be balanced against other values, for if a person has the authority to make a certain decision, it is up to them to weigh the values required for making it, and if they commit a mistake in weighing, that will not mean that their decision does not stand. We should, however, distinguish

¹⁷ For more extensive expositions of this argument and my criticism thereof see TM Wilkinson, 'Consent and the Use of the Bodies of the Dead' *J Med Phil*, forthcoming; G. den Hartogh, 'In the best interests of the deceased: A possible justification for organ removal without consent?' (2011) 32 *Theoretical Medicine and Bioethics* 259.

¹⁸ TM Wilkinson, 'Individual and Family Decisions About Organ Donation' (2007) 24 *J Applied Phil* 26. Cf Wilkinson, pp 15–7.

between two ranges of considerations. The first concerns the considerations left to the person with authority to be taken into account, the second range the considerations relevant to fixing the limits of their authority and, therefore, of the first range. There will be many disastrous things that I am allowed to do to the registered monument I own, but I am forbidden to pull it down. That prohibition results from balancing the value of people exercising property rights in a 'peremptory' way on the one hand, against the public interest in protecting the cultural heritage on the other. In a similar way, it can only be after we have first decided about the proper domain of people's authority as regards their dead bodies that appeals to other people's conflicting interests can be ruled out. That decision itself should be made by some kind of balancing. Personal sovereignty could at the same time be a quasi-absolute principle normally overriding paternalistic and moralistic considerations.

In his discussion of conscription, Wilkinson seems to vacillate between these two formats. He argues that no one has shown why the needs of patients can override the negative right which prohibits taking postmortal organs without consent but not the negative right which prohibits taking living ones (pp 113–4). But I would say that, if no one else has done so, he has shown that it is much easier to reject the conscription of living organs than of dead ones because the conscription of living organs¹⁹ would violate the right to bodily integrity (pp 103–7). That right, indeed, is more plausibly seen as a quasi-absolute constraint than property and similar rights. When he concludes from his discussion that people have rights to make authoritative decisions about their dead bodies and that we have been given no adequate reason to override them (p 119), he again seems to consider personal sovereignty to be a quasi-absolute constraint. But it is not sufficiently clear what, for him, would constitute an adequate reason; is the judicial power to order an autopsy covered by one such reason? If so, why exactly is the appeal to a duty of rescue inadequate in comparison?²⁰

In support of his thesis, Wilkinson points out that a mere net gain in utility is only a necessary but not a sufficient condition for overriding our right. I agree; that is implied by the peremptory nature of that right. What should be put into the balance is *giving* that right, not exercising it once it has been given. Wilkinson also argues that the fact that giving us that right will result in a larger number of deaths is not sufficient to deny it, for that is true of many rights and liberties we enjoy, such as the right to drive a car. Again I agree; increasing the aggregate

¹⁹ As proposed by C Fabre, *Whose Body Is It Anyway? Justice and the Integrity of the Person* (Clarendon Press, Oxford 2006) Ch 5.

²⁰ Feinberg would not think so: see n 11 above, pp 130–59.

number of lives saved might only be an imperfect duty which does not correspond to any particular person's right. But neither of these arguments is sufficient to refute the appeal to a duty of rescue as I have explained it. Wilkinson concedes that a conscription system might be justifiable when some hypothetical conditions have been fulfilled, in particular including a large utility gain in comparison to all alternative systems, but he does not explain why under present conditions the utility gain would not be large enough (pp 114–9).

Many other points he makes are valid, but only provide relevant reasons for and against conscription in comparison to alternative systems. For example, he agrees with Radcliffe Richards that it is unfair for people who are not prepared to donate their organs to have an equal claim on such organs when they need them (pp 163–6). That is an argument for conscription in comparison to an opt-out system. But a reciprocity system would be equally effective in ruling out parasitism and would obviously do better than conscription in respecting personal sovereignty. However, Wilkinson is less optimistic than Radcliffe Richards about the chances of a reciprocity system to give us a higher yield of organs, even in the long run. If a conscription system could be consistently applied, it will obviously give us much higher yields. The question is then can it be consistently applied if we allow for conscientious objections, as we should, or would it then turn out to be indistinguishable from an opt-out system, because it would be impossible or too costly to check the conscientious character of reasons for opting out? On the other hand, even feasible reciprocity arrangements could have their own problems of stability. These are all relevant considerations; they have to be weighed with considerations of merely local relevance (popular support in a democratic society, the probability of backfiring), in order to arrive at a proper policy decision. The value of personal sovereignty is merely one of the items to be thrown into the balance. Interestingly, as regards organ sale, Wilkinson does not consider the appeal to sovereignty to be a decisive argument, only an argument to be weighed against possible drawbacks. If that is the proper format, conscription cannot simply be rejected by pointing out that it curtails personal sovereignty.

Finally, with regards to the vexed question of organ sale, this issue was put on the ethical agenda by a ground-breaking paper of Radcliffe Richards, published in 1996, in which she showed that all the arguments for the almost universal legal prohibition on selling organs were question-begging, fallacious, or otherwise defective.²¹ Since then

²¹ J Radcliffe Richards, 'Nepharious Goings On: Kidney Sales and Moral Arguments' (1996) 21 *J Med Phil* 375.

numerous papers and at least four books have repeated the exercise,²² together building a quite formidable case for permitting payment for organs in some regulated way.²³ Attempts to rebut the case have been few and feeble but, until now, this discussion has had little effect on policy making.²⁴ One cannot expect Wilkinson and Radcliffe Richards to add many new insights to this by now extensive literature, but both present helpful introductions to it. Only Wilkinson considers the option of payment for postmortal organs (pp 173–4). As regards a futures market, people being paid for registering as donors, he is sceptical about such a market emerging. Only the state or a state-directed organisation could do the buying as a monopsonistic buyer but, given the extreme low probability of anyone actually becoming a donor, it realistically could only offer prices which might be too low to attract sellers. Even if a futures market would be a practical possibility, it has its moral drawbacks. People have weighty moral reasons, both of beneficence and fairness, to make their organs available after their death and Wilkinson does not deny this, although, as we have seen, he believes that people stay within their rights if they disregard these reasons. But it is objectionable for a person to treat the fact that their obligation cannot be enforced as an opportunity to request payment for fulfilling it.

With regards to postmortal donation, the alternative would be to pay relatives for not using their veto power. This is more than slightly objectionable. Wilkinson convincingly argues that relatives have really no moral standing to make authoritative decisions about the organs of their beloved one, neither as delegates nor in their own right (Chapter 5). The only reason why transplant teams cannot avoid respecting their veto is that overriding their objections might stir up a scandal in the press,

²² S Wilkinson, *Bodies for Sale: Ethics and Exploitation in the Human Body Trade* (Routledge, London 2003); M Cherry, *Kidney for Sale by Owner* (Georgetown University Press, Washington DC 2005); JS Taylor, *Stakes and Kidneys* (Ashgate, Aldershot 2005); Michele Goodwin, *Black Markets: The Supply and Demand of Organs* (Cambridge University Press, Cambridge 2006). See also Fabre, *Whose Body Is It Anyway?*, Ch 6.

²³ Radcliffe Richards is critical of any proposal for regulation which would introduce more stringent regulation of this particular market than of any other (p 145). Cf her comments on the proposal for an ethical market in organs by CA Erin and J Harris, 'An Ethical Market in Human Organs' (2003) 29 J Med E 137; J Radcliffe-Richards, 'Commentary: An Ethical Market in Human Organs' (2003) 29 J Med E 139. In their reply, Erin and Harris concede her point, to my mind too quickly: CA Erin and J Harris, 'Janet Radcliffe Richards On Our Modest Proposal' (2003) 29 J Med E 141.

²⁴ For example, PM Hughes, 'Constraint, Consent, and Well-Being in Human Kidney Sales' (2009) 24 J Med Phil 606. The opponents usually fail to distinguish sufficiently between criticism of market arrangements as such, market arrangements with special regulations to prevent some unwanted feature (eg differential access to organs), and market arrangements with the normal regulations to prevent coercion or fraud.

with possibly disastrous results for people's readiness to donate. If this is so, by accepting payment relatives would make use of their nuisance value to extract money for goods which they had no title to begin with. That is what we call extortion. Neither of these arguments is necessarily decisive, they have to be weighed against the possible effects on the organ pool of permitting sale, in comparison with other arrangements including conscription and reciprocity. But they show that the case for a market in postmortal organs has still to be made.

Both Wilkinson and Radcliffe Richards show how weak most, if not all, the objections are to permitting payment for living donation. There is one objection, however, which can, to some extent, be salvaged from the wreckage; the idea that payment offends against human dignity, an idea which all pro-sale authors find extremely mysterious. Having concluded her requisitory, Radcliffe Richards queries how it is possible for a moral condemnation to be so widely and intensely felt when it rests on such shaky grounds (pp 120–34). She proposes that throughout history people who were in such dire straits that they had to carve into their bodies to have anything at all to offer for sale had the lowest possible social status, comparable to the status of serfs or prostitutes. This explanation is, she thinks, confirmed by the appeal to human dignity. But this is only offered as an explanation of the discomfort, or even disgust, which the idea of organ sale commonly evokes (even, as she confesses, in her own soul); it does not give these feelings any moral relevance. Is it true that they do not have such relevance? The argument points out that organ sale has a conventional meaning of self-degradation, and it is clearly true that it does not violate human dignity for any intrinsic reasons, as slavery and torture do. But in such matters, it is hard to argue with convention because if some action is universally seen as expressing lack of proper respect then it does so, whatever the genealogy of the convention.²⁵ In the famous dwarf tossing case Manuel Wackenheim was forbidden by the Conseil d'État to allow himself to be thrown around in the circus.²⁶ This case is particularly interesting because personally I cannot fully understand the discomfort in this case. Would it also be degrading to a person of normal stature to throw them around? The practice seems to be restricted to people of smaller stature because it is beyond anyone's physical abilities to use larger ones, not for discriminatory reasons. Nevertheless, if the sentiment of discomfort is widely shared it can be appropriately expressed by appealing to human dignity. Other things

²⁵ For the same reason, the appeal cannot be refuted by showing it to be a mere atavistic remainder of traditional religious morality in a secular ethics.

²⁶ CE ass., 27/10/1995, Recueil Dalloz 1966, Jur. P. 177. Confirmed by the ECHR, 16/7/1996, and the UN Human Rights Committee, 26/7/2002.

being equal, generally one should not act in ways which evoke such feelings. That seems to me a moral reason. It is, of course, an empirical question how general these feelings are. My guess is that in the case of organ sale they are widely shared, and this hypothesis is confirmed by the fact that it provides the most natural explanation of the almost universal legal prohibition, far more plausible than Radcliffe Richards' suspicion of power play by physicians. It is also confirmed by the large numbers of people who report in polls that they are opposed to any kind of payment for organs.²⁷ It is true that they may be opposed for other reasons than disgust but, on the other hand, such reasons may be mere rationalisations of disgust.

Of course, other things are not equal; they seldom are. For Wackenheim, the decision seems to have meant taking away the only possible way in which he could participate in social life, earn his own money and, thereby, preserve his self-respect.²⁸ Talk of human dignity is often misleading because it suggests a reason of absolutely decisive importance but when the actual objection is not an objection to any harm being caused, only to offence being called forth by the conventional meaning of some action, such a reason might be easily overridden, in particular when the only alternative action causes real harm. As Feinberg points out, this is particularly true when the harm is done to the very good which is symbolically protected by the prohibition that causes the harm; in the case of organ sales, the human body and its proper functioning.²⁹ Feinberg calls the overrating of symbolic values a kind of sentimentality; it could also be called a kind of idolatry. So even if one recognises the force of the appeal to human dignity, it is still a long way to justifying the prohibition of payment.

Wilkinson and Radcliffe Richards both doubt whether people's attitudes at present really are the obstacle to change they are often taken to be. I am less optimistic.³⁰ Moreover, most governments, in particular European ones, have rushed in on the basis of strong feelings and weak arguments to commit themselves to international treaties which now

²⁷ For example, 68–94% were reported to be opposed to this in several German polls: see F Breyer and others, *Organmangel: Ist der Tod auf der Warteliste unvermeidbar?* (Springer, Berlin 2006) 170. Similarly, in Austria: D Mayrhofer-Reinhartshuber and others, 'Effects of Financial Incentives on the Intention to Consent to Organ Donation: A Questionnaire Survey' (2006) 38 *Transplantation Proc* 2756, and the Netherlands: Taels and van Raaij, n 16, above, p 38.

²⁸ T Pech, 'La dignité humaine. Du droit à l'éthique de la relation' (2001) 3 *Éthique publique* 103.

²⁹ J Feinberg, *Offense to Others* (Oxford University Press, Oxford 1985) 72–7.

³⁰ See n 27, above.

block the way to legal change.³¹ For these reasons, the introduction of both conscription for postmortal organs and payment for either postmortal or living donation is politically and legally unfeasible at this time. The support for a reciprocity system, however, is somewhat greater and seems to be growing.³² Whether it meets any decisive obstacles in international law is, at least, debatable. For both popular support and legal acceptability, it is essential that the system is seen as implementing a principle of fairness and not merely as one way among others of providing incentives to donate.

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³¹ In particular, the European Convention on Human Rights and Biomedicine and the Additional Protocol on Transplantation.

³² M Schweda and S Schicktanz, 'Public Ideas and Values Concerning the Commercialization of Organ Donation in Four European Countries' (2009) 68 *Soc Sci Med* 1129.