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A "Queen of Hearts" trial of organ markets: why Scheper-Hughes's objections to markets in human organs fail

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Nancy Scheper-Hughes is one of the most prominent critics of markets in human organs. Unfortunately, Scheper-Hughes rejects the view that markets should be used to solve the current (and chronic) shortage of transplant organs without engaging with the arguments in favour of them. Scheper-Hughes's rejection of such markets is of especial concern, given her influence over their future, for she holds, among other positions, the status of an adviser to the World Health Organization (Geneva) on issues related to global transplantation. Given her influence, it is important that Scheper-Hughes's moral condemnation of markets in human organs be subject to critical assessment. Such critical assessment, however, has not generally been forthcoming. A careful examination of Scheper-Hughes's anti-market stance shows that it is based on serious mischaracterisations of both the pro-market position and the medical and economic realities that underlie it. In this paper, the author will expose and correct these mischaracterisations and, in so doing, show that her objections to markets in human organs are unfounded.

not generally been forthcoming. (The few critics of Scheper-Hughes's anti-market work include Hippen,² Taylor³ and Marshall.⁴) This is regrettable, for a careful examination of Scheper-Hughes's anti-market stance shows that it is based on serious mischaracterisations of the pro-market position and the medical and economic realities that underlie it. In this paper, I will both expose and correct these mischaracterisations, and show that her objections to markets in human organs are unfounded. Like the Queen of Hearts' sentencing of the Knave, then, Scheper-Hughes's moral condemnation of such markets is unwarranted.

SCHEPER-HUGHES'S MISCHARACTERISATIONS

It is important to dispel Scheper-Hughes's mischaracterisations of the pro-market position, and of the medical and economic realities that have led to its development, for two reasons. Firstly, Scheper-Hughes's mischaracterisations give the impression that a market in human organs is not only morally repugnant but that its supporters are as well—or else they are simply naïve. Dispelling this impression is thus conducive to engaging in dispassionate debate over the moral status of such markets. Secondly, once the sound and fury of Scheper-Hughes's mischaracterisations have been dispelled, it becomes easier to identify the actual arguments that she levels against markets in human organs. Once these arguments are identified, it becomes clear just how weak they are.

An assumed right to buy

One of the initial ways in which Scheper-Hughes mischaracterises the pro-market position concerns the basis of the arguments that its proponents offer in favour of organ markets. According to Scheper-Hughes, people who defend markets in human organs presuppose that they have a right to purchase life in the form of transplant organs and that this right is based on an assumed universal desire to live a longer or better quality of life at any cost.³ This characterisation of the pro-market position is mistaken in three major ways. Firstly, not all who advocate such a market believe that people have a right to buy (or, more accurately, a right to offer to buy) transplant organs. I, for example, have argued for such a market on the broadly utilitarian grounds that it is required out of respect for the (primarily) instrumental value of personal autonomy and concern for human well-being,³ whereas Erin and Harris⁶ defend their "ethical market in human organs" on the grounds that it is needed to save lives. These pro-market approaches are based on the fundamental claim

When, in *Alice's Adventures in Wonderland*, the Knave of Hearts was tried for stealing the Queen of Heart's tarts "all on a summer day", the Queen demanded that he be sentenced before the jury's verdict was delivered.¹ Fortunately for the Knave, Alice successfully objected to this impropriety, thus saving him from almost certain execution. Unfortunately for markets in human organs, some people approach the question of their ethical status as the Queen approached the Knave's trial, sentencing them to moral condemnation before considering the arguments for them. Nancy Scheper-Hughes is one of the most prominent of such Queenly critics of markets in human organs. Scheper-Hughes's immediate rejection of markets in human organs is of especial concern given her influence over their future. She is an adviser to the World Health Organization (Geneva) on issues related to global transplantation, and the co-founder and Director of "Organs Watch", an influential "medical human rights project" based at the University of California, Berkeley (see <http://anthropology.berkeley.edu/nsh.html>).

Given the extent of her influence, it is important that Scheper-Hughes's moral condemnation of markets in human organs be subject to critical assessment. Such critical assessment, however, has

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that it is morally acceptable for people to live with the aid of the organs of another, without committing themselves to the additional claim that they thus have a right to offer to buy such organs. (Note that we can hold that it is morally permissible for a person to offer to buy an organ from another to save his or her own life, without thereby holding that people have the right to make such offers to buy, for we can hold that such offers are permissible while denying the existence of rights.) This is a plausible claim. After all, if we deny that it is morally acceptable for one person to continue to live with the organ of another, we must reject not only markets in human transplant organs, but also their altruistic donation.⁷ Secondly, even those who do cast their pro-market arguments in terms of rights neither ground such rights in a person's desires nor assume that there is a "universal desire to live a longer or better quality of life at any cost". That this is so is not surprising, for it would be odd either to claim that a person had a right to X simply because he or she desired X or to assume that every person wished to continue to live at any cost. But even without noting the implausibility of the views that Scheper-Hughes groundlessly attributes to those who favour markets, a glance at the literature on organ sales will show that she is wrong to do so. Cherry,⁸ for example, grounds the right to buy or sell an organ in "the significance of bodily integrity and individual authority regarding the use of one's body", whereas Kyriazi⁹ grounds it in self-ownership, and Savulescu¹⁰ grounds it in people's abilities to make decisions for themselves. Finally, people who defend markets in human organs do not assume that the desire that Scheper-Hughes believes they attribute to people is universally held. For example, in the same article in which he defends the moral permissibility of certain types of organ sales, Beauchamp¹¹ explicitly recognises that Jehovah's Witnesses do not desire to live longer, or better, at any cost. This is not surprising, for it is implausible to assume that people universally want to live a longer life, or one of better quality, no matter what the cost to themselves or others. Thus, although the pro-market arguments may be wrong, they are not as obviously wrong as Scheper-Hughes portrays them to be.

Are transplant organs luxury goods?

Scheper-Hughes also mischaracterises the motivations of those who participate in transplantation, for she misunderstands the medical realities of transplant waiting lists. According to Scheper-Hughes, "Global market capitalism, together with advanced medical and biotechnologies, has incited new tastes and desires for the skin, bones, blood, organs, tissues, marrow and reproductive and genetic material of others."¹² On this view, it appears, organ transplant technology has developed as medical practitioners seek new ways of making profits from their patients. Such technological developments have enabled medical professionals to transplant organs when they could not before, including transplant to new populations of people (such as elderly people) who previously would have been unsuitable transplant recipients, but who now have transplants "dangled before... [their]...eyes".¹³ Since this expansion in the number of people who can now receive transplant organs was the result of technological development, the current shortage of organs that are available for transplant is, for Scheper-Hughes, "invented", as it would not exist were there not the means to transplant organs. Similarly, for Scheper-Hughes, people's needs for transplant organs are "artificial", since their satisfaction relies on the existence of "artificial" technology.¹⁴ Having established that people's desires and needs for transplant organs are "invented" and "artificial", Scheper-Hughes treats them as though they were the product of a mere taste for the "'fresh' bodies" of others.¹⁵

To read Scheper-Hughes's characterisation of the buyers of human transplant organs and the medical professionals who

serve them, one might think that "the rich, tired of gold plating their bathrooms and surfeited with larks' tongues, had now idly turned to collecting kidneys to display with their Faberge eggs and Leonardo drawings".¹⁶ But Scheper-Hughes misunderstands the implications of the fact that technological advances have made organ transplantation possible. It is true that without such technological advances there would be no shortage of organs available for transplant, for if organ transplantation was not a possibility then there would be no waiting lists of potential organ recipients. However, this does not show that there is no real need for transplant organs. The fact that vaccines are the result of technological advances does not show that the demand for them is "invented" and "artificial", such that no real medical need will go unmet if there is ever a shortage of them. Scheper-Hughes's characterisation of patients' desires for transplant organs as being "invented" as they are the result of technological development thus cannot support her inference that there is no real medical need to satisfy them.

Concentration camps, human sacrifice and organ transplants

Scheper-Hughes's characterisation of the nature of societies that seek to reduce their waiting lists for organ transplantation is similarly inaccurate—indeed, egregiously so. According to Scheper-Hughes,

Until very recently, only highly deviant authoritarian and police states—Nazi Germany, Argentina in the 1960s and 1970s, and South Africa under apartheid—had assumed this capacity [i.e., "to define and determine the hour of death and to claim...the 'first rights'...to the disposal of the body's parts"] in the 20th century...the creation and maintenance of a surplus population of "living dead"...the "disappeared" in Argentina, or those walking cadavers kept hostage in Nazi concentration camps.¹⁷

Scheper-Hughes is here explicitly comparing the use of policies of presumed consent (whereby a person will be presumed to have consented to have his or her organs removed for transplantation if they are suitable for this, unless he or she has expressly indicated otherwise) with the atrocities that "highly deviant authoritarian and police states" have visited upon their citizens. She has similarly harsh words to say about organ sale (which she has repeatedly described as cannibalism) and even organ donation, which she claims "carries some trace elements of Aztec hearts ripped—still beating—from the chests of state-appointed ritual scapegoats".¹⁸

Yet despite Scheper-Hughes's rhetoric, there is a vast ethical gulf between Argentinean death squads and Nazi concentration camps on the one hand, and policies of presumed consent, legal organ sales and organ donation on the other. In particular, voluntary trades in human organs that take place between consenting adults, untainted by force or fraud, make all parties to them better off. As such, the burden of proof in this debate should rest with those who claim that such sales are immoral. And this will be a considerable burden to meet, as the lifesaving nature of such sales differentiates them from the typical market transaction in an important way: people who sell their organs are possibly motivated to do so by considerations of virtue and finance. As Kishore¹⁹ puts it, "A person who sells his organ does so because he knows that his organ is going to save the life of a fellow human being and as such he is convinced that he is not doing anything immoral or inhuman." To prohibit such transactions would thus not only restrict voluntary commercial activity but also prohibit people from acting virtuously and

expressing solidarity with strangers in virtue of their shared humanity.

In response to this rejection of her above comparisons, Scheper-Hughes may claim that, economic theory aside, it "pretty much... [turns]...out to be the case" that "in the real world, we cannot find any happy kidney sellers..."²⁰ There initially seems to be ample support for this claim. Scheper-Hughes provides anecdotal evidence from kidney sellers that they were made worse off by the sale of their organs, owing to the shame and social stigma that was attached to them as a result of their sales. For example, one kidney seller said, "We [kidney sellers] are worse than prostitutes because what we have sold we can never get back. We have given away our health, our strength, and our lives."²¹ Moreover, vendors in currently existing markets for human kidneys typically receive less for their organs than they agreed to accept, and fail to receive the postoperative care that they were promised, whereas end-use purchasers often receive diseased organs or organs that do not match.²² However, such evidence does not undermine the claim that voluntary transactions untainted by force or fraud make both parties to them better off, for it is taken from the experiences of people who trade in black markets in human organs. As people who trade in such markets cannot legally enforce the contracts that they make, fraud is endemic and so it is to be expected that many who participate in such markets will fail to benefit from their transactions. In a legal, regulated market for human organs, however, contracts will be enforceable, and so both vendors and buyers could expect to reap the benefits of voluntary trade. Moreover, in addition to this theoretical reply to Scheper-Hughes's possible response, it should be noted that Scheper-Hughes herself had earlier recognised that in Manila kidney sellers typically did benefit from the sale of their organs, using the money they gained to buy "new VCRs, karaoke machines and expensive tricycles".²³ It is thus unclear why she holds that "pretty much" no such happy kidney sellers can be found.

SCHEPER-HUGHES'S ANTI-MARKET ARGUMENTS

With Scheper-Hughes's mischaracterisations of the pro-market position, and the medical and economic realities that have led to it exposed, the implicit objections to markets in human organs that they underwrote can also be dismissed. Thus, it is not the case that the defenders of organ markets accept the implausible view that people have a right to buy organs simply because they want them, or that they believe that people universally desire to prolong their lives at any cost. It is also not the case that the demand for organs is driven by a profit-motivated transplant profession, eager to encourage people to desire organs that they do not need. And it is most certainly not the case that societies that wish to increase the number of organs available for transplant are the ideological descendants of Nazis, Argentina's "dirty warriors", or Aztec human sacrificers.

With these implied objections to markets in human transplant organs dismissed, three anti-market arguments can be developed from Scheper-Hughes's work on organ sales. The first is the Argument from Interpersonal Coercion. As per this argument, markets in human organs should be opposed on the grounds that they will make the selling of organs easier. As such, the argument continues, it will be easier for people who would coerce others into selling their organs, and taking the proceeds, to do so. Thus, the argument concludes, to help protect people who would be vulnerable to such coercion markets in human organs should continue to be prohibited. The second argument that can be drawn from Scheper-Hughes's work on organ sales is the Argument from the Black Market. This argument begins with the observation that abuse is

endemic in black markets in human organs. This argument then continues with the premise that the legalisation of markets in human organs would stimulate the black market trade in them. Thus, this argument concludes, to counter the abuses of the black market in human organs one should advocate their continued prohibition. The final argument that can be drawn from Scheper-Hughes's work on organ sales is the Argument from Repugnance. This argument is simply that such markets are so "macabre" and repugnant that this in itself is indicative of their immorality.²⁴

I have argued elsewhere that the first two arguments that can be drawn from Scheper-Hughes's work are mistaken.^{23 24} The last fares no better. Clearly, not everyone shares Scheper-Hughes's view that markets for human organs are repugnant. She herself recognises that, worldwide, people are eager to participate in such markets as both vendors and buyers without feeling repulsed by them. It thus does not appear that "we intuit and feel, immediately and without argument, the violation of things that we rightfully hold dear", as her argument requires.²⁵ Moreover, even if there was a general feeling of repugnance towards markets in human organs, this would not in itself show that they are immoral. Those who hold that if it is generally believed that a practice is immoral this indicates that it is immoral need to show why such feelings of repugnance are peculiarly moral feelings. Without such an account the Argument from Repugnance is, at best, incomplete. Yet, once an attempt is made to explain why the feeling that, for example, organ markets are repugnant is a moral feeling, the philosophical work is no longer being done by the feeling of repugnance itself but by the account that is being offered to explain why it is justified.²⁶ Thus, without a distinct argument for the immorality of markets in human organs, Scheper-Hughes cannot rely on the Argument from Repugnance alone to oppose them.

CONCLUSION

The arguments in this paper do not in themselves show that markets in human organs are morally permissible, for they only establish that, despite their widespread influence, Scheper-Hughes's objections to them are unfounded. However, as noted above, a living vendor's voluntary sale of an organ would be likely to make all parties to this transaction better off, and as such sales could be construed not only as commercial, but also as virtuous actions. The burden of proof rests with those who oppose such sales to show that they are immoral. Like Alice at the Knave's trial, then, we should hold that the default position should be that markets in human organs are "innocent until proven guilty". We should hold that such markets are morally permissible until shown otherwise. Thus, such markets should be allowed unless it has been shown beyond reasonable doubt that they should be prohibited.²⁶

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