

Distributive justice, best options, and organ markets: a reply to Semrau

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Abstract

How important is it, morally speaking, that banning the sale of organs removes the best option available to would-be organ sellers? According to a widespread argument called the best option argument, this is very important. In a recent article, I criticized such reasoning, drawing on considerations of distributive justice. Luke Semrau has argued that I have misunderstood the best option argument. In this article, I respond to Semrau's criticisms and elaborate on my original argument.

Introduction

In a recent article, I argued that distributive justice matters for our assessment of an organ market and that this has implications for a common argument in this debate: the *best option argument*.^[1] The best option argument forcefully points out that banning organ markets removes the would-be seller's best option. Briefly, I argued that considerations of distributive justice should lead us to reconsider the moral importance of pointing out that selling a kidney would be the best option available to would-be sellers if and when even better options could be brought about. In his interesting reply to my article, Semrau contends that I have misunderstood various

aspects of the best option argument.[2] Here, I reply to these concerns and provide further reflections on the best option argument. The replies here do not follow the order in Semrau's article because I have placed the shorter replies first.

My supposed mistakes

First, Semrau states that my argument relies on a changed meaning of the notion of the best option. He writes that the term does not refer to the objectively best option.[2] Instead, 'the 'best option' is the one *the subject* regards as best.'[2] Had I done this, my argument would perhaps be problematically paternalistic and, indeed, less interesting. However, this is not what I do. All that is needed for my argument to work is that better options, as judged by the would-be organ sellers, could (often) be brought about. As soon as that is the case, it becomes less important that the option of selling an organ is judged best compared to a ban by the would-be seller. This is because it would not have been considered best had better options been brought about – or so I argue.

The second mistake Semrau attributes to me is that I address the best option argument as if it is trying to show 'that kidney sales are all-things-considered justifiable'.[2] I take this to mean that Semrau thinks I bring in concerns that are not directly related to those the best option argument pertains to. On the one hand, I see Semrau's point here. If considerations of justice were never a reason to prefer organ markets over a ban from the point of view of those putting forward the best option argument. In that case, such concerns are external to this argument and should be discussed separately, along with other concerns mentioned by Semrau. I've sketched such a separate discussion elsewhere [3] and agree it could be treated as a separate concern. On the other hand, what justice pertains to and the advantage levels of the would-be sellers (or the fulfillment of their interests) would often overlap. This makes

the distributive justice-based complaint less external, if at all, to the best option argument. At any rate, my argument could be restated without a reference to justice, merely referring to the extent to which having certain options improves people's situation as they see it. Then, the driving claim in the argument would be that other options could be brought about, which would be even better according to the would-be sellers. So, this mistake, if it is one, is not essential.

The third mistake Semrau identifies is that the dialectic context of the best option argument is not a debate over regulated kidney markets. It could, Semrau contends, be offered against a ban on any market (regulated or not) that it would improve the position of would-be sellers to remove. I happily acknowledge that the best option argument would apply elsewhere and is, indeed, used elsewhere. I would contend that it would often have flaws similar to those I have pointed out in this context.

In this particular context, the first thing to note is that it is false when Semrau remarks that the best option argument 'is not raised ... in discussions of market regulation.' My references demonstrate that people do raise it in the context of a regulated market. But this is less important than what I consider Semrau's central claim to be in this regard. This is the idea that the best option argument should, in this context, merely be a reply to a defence of prohibiting organ markets but not an argument in favour of organ markets. It has, so to speak, much weaker implications than I take it to task for. This weaker interpretation of the argument is clearly present in Semrau's depiction. Semrau's standardised version of the argument merely concludes that 'prohibitions set back the interests of those denied access'. He writes that the best option argument 'has no immediate practical upshot'.^[2]

However, elsewhere in Semrau's description, a seemingly stronger version appears. One, which it seems less unfair to understand as an (all else being equal) argument in favour of an organ market. Semrau writes that the counter the best-option argument offers against a ban 'implies that such concern should lead one to *support* a market'.^[2] The difference between these weaker or stronger descriptions may be negligible. This depends on our interpretation of them. Perhaps the 'no immediate upshot' formulation merely allows for other considerations to count against having an organ market, even when a concern for the seller's interests cannot. Absent such concerns, being in favour of removing a prohibition would be to support having a market. So, while the best option argument is not an all-things-considered argument in favour of organ markets, it is less clear how it is not an all-else-equal argument.

Interestingly, and as a further reflection, there is, however, at least one other way in which wanting to remove a ban can be different from wanting a market. Fleshing this out moves the debate forward. Perhaps an organ market needs some form of government oversight or intervention to work properly. If this is the case, then having an organ market requires more than removing the prohibition. Given the existence of opportunity costs, pursuing one option as a society may mean not pursuing another, or as I wrote, 'In the real world, the choice concerns which solutions societies prioritise in the face of extensive human suffering and poverty'.^[1] However, if this is one's reason for saying that the best option argument has no practical upshot in terms of an organ market, then the relevance of my original contribution is unaffected. In weighing up such options, saying that the organ market is the best option is indeed irrelevant to choosing between competing alternatives. Importantly, it is only the best option for those who would pursue it because we brought about that option and not another, better one. So, while what Semrau calls 'the pretense' for the

well-being of would-be sellers might very well suggest that banning the organ market and doing nothing is wrong, it provides little insight into what we should then do and what we should think about an organ market. Semrau might contend that the argument never wanted to do this and insist that the best option says nothing about whether we should have a market – but we should observe that it is indeed employed to this effect.

A concluding reflection

A final clarification of my original argument and its limits is perhaps called for. As it is a crucial part of my argument that society might be able to provide people better options than selling a kidney (and that we have justice-based reasons to do this under unjust circumstances), there are two sets of scenarios where considerations of distributive justice do not count against the best option argument. The first scenario is a situation where distributive justice obtains. Here, considerations of clearly distributive justice do not tell against having a market in kidneys. The second scenario is that if it is true that no better options could be brought about, then the best option argument is strong, even if it would leave people in unjust circumstances. I contend that these scenarios are likely to be rare. Thus, if I am correct, the applicability of the best option argument is less wide than its proponents suggest.

References

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- 2 Semrau L. The best option argument and kidney sales: a reply to Albertsen. *Journal of Medical Ethics*. 2024.
- 3 Albertsen A. Organ Markets. In: Di Nucci E, Lee J-Y, Eagner I, eds. *The Rowman & Littlefield Handbook of Bioethics*. Rowman & Littlefield 2023:170–84.