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CONTENTS



The Duty to Remove Statues of Wrongdoers <i>Helen Frowe</i>	I
Kidney Sales and the Burden of Proof <i>Julian J. Koplin & Michael J. Selgelid</i>	32
Not a Defence of Organ Markets <i>Janet Radcliffe Richards</i>	54

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The Duty to Remove Statues of Wrongdoers

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ABSTRACT

This paper argues that public statues of persons typically express a positive evaluative attitude towards the subject. It also argues that states have duties to repudiate their own historical wrongdoing, and to condemn other people's serious wrongdoing. Both duties are incompatible with retaining public statues of people who perpetrated serious rights violations. Hence, a person's being a serious rights violator is a sufficient condition for a state's having a duty to remove a public statue of that person. I argue that this applies no less in the case of the 'morally ambiguous' wrongdoer, who both accomplishes significant goods and perpetrates serious rights violations. The duty to remove a statue is a defeasible duty: like most duties, it can be defeated by lesser-evil considerations. If removing a statue would, for example, spark a violent riot that would risk unjust harm to lots of people, the duty to remove could be outweighed by the duty not to foreseeably cause unjust harm. This would provide a lesser-evil justification for keeping the statue. But it matters that the duty to remove is outweighed, rather than negated, by these consequences. Unlike when a duty is negated, one still owes something in cases of outweighing. And it especially matters that it is outweighed by the predicted consequences of wrongful behaviour by others.

1. INTRODUCTION

This paper argues that if someone perpetrates serious rights violations, then this gives the state grounds to remove public statues of that person. By ‘public statues’, I mean statues on display in, for example, public parks, public squares, shopping centres and public buildings.¹ (I suggest that there may be an exception for statues on display in certain types of public museums or galleries, and that it can be permissible to move statues of wrongdoers to those public locations.) While I focus on statues, my arguments also apply to portraits and other depictions of historical figures that are on public display. Much of what I say also applies, perhaps with some adjustment, to other types of cultural property that do not depict historical figures but are in some way connected to them, such as buildings named after such figures.

I argue that a person’s being a serious rights violator is a sufficient condition for a state’s having a duty to remove a public statue of that person. Keeping public statues of serious rights violators is incompatible with the state’s duties to condemn and repudiate serious wrongdoing. We should recognise that a range of features can ground a duty to remove a public statue. There are, for example, lots of reasons to remove statues of Confederate soldiers: amongst other things, such statues cause distress, (Timmerman, forthcoming) give credence to white supremacist views, (See ‘Take Em All Down’) and affirm existing social injustices (Moore, 2017).

The duty to remove a statue is a defeasible duty: like most duties, it can be defeated by lesser-evil considerations. Consider the following familiar example. I have promised to meet you for lunch, but pass a child drowning in a pond on my way to the restaurant. I can easily save the child, but not without missing our lunch date. While my promise to you confers on me a duty to meet you, that duty is defeated by my more stringent duty to save the child’s life. I thus justifiably fail in my duty to meet you for lunch, given the harms at stake. This is not to say that my duty to meet you was not a genuine duty—I still seem to owe you an explanation for my absence, for example, and perhaps an apology. The claim is rather that it was all-things-considered permissible for me to fail to discharge my duty in this case. I take this to be the

1. I understand ‘public’ to here mean something that is either owned by the state, or receives (substantial) financial state support. I do not address the issue of statues on private property.

general structure of lesser-evil justifications for failing in one's duties. Contrast this with a case in which I promise to meet you for lunch, but then realise that you have no intention of showing up (perhaps you mistakenly send me an email revealing that our lunch date is a cruel joke on your part). In this case, my duty to meet you seems to be negated rather than outweighed—that is, I simply cease to be under a duty to.

If removing a statue would, for example, spark a violent riot that would risk unjust harm to lots of people, the duty to remove could be outweighed by the duty not to foreseeably cause unjust harm. This would provide a lesser-evil justification for keeping the statue. But it matters that the duty to remove is outweighed, rather than negated, by these consequences. Unlike when a duty is negated, one still owes something in cases of outweighing, as when I justifiably fail to discharge my duty to meet you for lunch in order to save the child. As I will argue, it especially matters that the duty is outweighed by the predicted consequences of wrongful behaviour by others.

In Section Two, I defend the claim that public statues of persons typically express a positive evaluative attitude towards the subject. I defend this claim against the view that statues are primarily non-evaluative historical records and against the view that statues honour achievements rather than persons. In Section Three, I argue that a subject's having engaged in serious rights violations gives us grounds to remove a public statue. In Section Four, I argue that states have duties to repudiate their own historical wrongdoing and to condemn other people's serious wrongdoing. Both duties are, I argue, incompatible with retaining public statues of people who perpetrated serious rights violations. In Section Five, I argue that this also applies in the case of the 'morally ambiguous' wrongdoer, who both accomplishes significant goods and perpetrates serious rights violations. In Section Six, I reject the view that we ought to remove statues of wrongdoers only when those statues cause harm. In Section Seven, I argue that the removal of statues is typically preferable to their recontextualization through explanatory plaques and the like. Section Eight concludes.

2. STATUES AS TYPICALLY EVALUATIVE

My account is partly motivated by the view that public statues of historical figures typically express *positive evaluative attitudes* towards that figure. We build and display public statues primarily as a means of honouring people, and such statues thus express a claim that the depicted figure is worthy of admiration or respect. Not

all statues do this: some statues are intended, for example, to mock or degrade the subject.² My account does not support a duty to remove statues that critically depicts a wrongdoer performing a wrongful act, where the statue is clearly condemnatory. But the vast majority of statues of wrongdoers are not like this: they merely depict the person (often in a manner meant to convey their heroic or otherwise admirable status), and they are erected as expressions of esteem. Statues of historical figures are thus distinct from other types of commemorative monuments. A public statue commemorating a massacre, for example, need not express a positive evaluative attitude towards the massacre. But a public statue of a person who participated in a massacre is inappropriate precisely because such a statue would denote a positive evaluation of that person.³ As I will argue, it is because statues of historical figures are typically evaluative in this way that their being publicly displayed is typically incompatible with the duties to condemn and repudiate wrongdoing, and we thus have duties to remove them.

The *positive evaluation* view has two components: first, that statues honour, and, second, that the object of this honouring is the depicted person. I defend each component in turn.

2.1 STATUES AS HONOURING

The positive evaluation view can be contrasted with what I will call the *historical record view*, which holds that statues are merely or primarily historical records. According to this view, statues convey only importance or significance, and have no connotations of admiration or respect (several commentators defend views that are variations on this theme, see Kuznar, 2017 and Beard, 2015).

If the historical record view were true, the dearth of public statues of, say, Hitler in Britain would be baffling. It's hard to imagine a more important historical figure in British history than Hitler. And yet the absence of such statues is far from baffling. Rather, it is straightforwardly explained by the fact that we do not tend to build

2. Although not a statue, Marcus Harvey's painting of Myra Hindley is a good example of a what we might call a 'mere' or even critical depiction of a historical figure, where there is clearly no expression of respect or admiration. The public reaction to Harvey's painting demonstrates our (albeit rather selective) aversion to depicting wrongdoers.

3. The statue of Josiah King, a Union soldier, in Minnesota is a case in point. King sits atop a statue honouring Union soldiers. But Native American activists have recently drawn attention to the fact that King also participated in a 1863 massacre of Native Americans. Since his role in the massacre has been publicised, there have been calls for the statue to be removed. See <https://www.mprnews.org/story/2018/09/27/iconic-minnesota-soldier-part-of-atrocity>.

statues to people whom we believe engaged in serious wrongdoing, even if those wrongs were of monumental historical significance.⁴ The same goes for less significant, but still widely-known, wrongdoers, such as the serial child killers Ian Brady and Myra Hindley. Brady and Hindley—the notorious ‘Moors Murderers’—are part of Britain’s collective national memory, but it would be incontrovertibly inappropriate to build statues of them. Importance is perhaps a necessary condition of our building a public statue of someone, but it is surely not sufficient. We build statues only to those people whom also we think it fitting to admire.

This plausibly explains why, just as it has never seemed appropriate to build statues of Hitler, we would not now build a public statue to Cecil Rhodes. Colonialism was widely admired when Oriel College, Oxford erected its now-infamous statue of Rhodes in the early 1900s. Rhodes was lauded for his part in the violent theft of land from native black Africans for ‘civilising’ use by white Europeans. By contrast, we now regard Rhodes’ colonialism as part of a wider practice of serious rights violations. If statues are mere records, Rhodes’ wrongdoing gives us no reason not to build new public statues of him. And yet his wrongdoing seems to give us decisive reason not to build new statues to him.

The important point here is that when there is broad consensus about a person’s wrongdoing, the question of building a statue of that person does not arise. Hence, the claim that statues have positive evaluative connotations seems sound. The problematic statues are built precisely because, at the time they are built, most people do not believe that the subject is a serious wrongdoer. But the fact that statues have these evaluative connotations supports not only refraining from building new statues of wrongdoers, but also taking existing statues of wrongdoers down. The fact that a statue already exists does not make it any less evaluative.⁵

While I argue that we ought to remove statues from most public spaces, I think we can make principled exceptions for some public museums and galleries.⁶ This is because museums, unlike parks or squares, *are* explicitly and primarily intended as places of historical record (see Sears, 2018). This has two relevant implications.

4. The ‘believe’ is important here: clearly, the claim is not that we do not build statues of wrongdoers, but that we don’t build statues of people whom we believe, at the time, to be wrongdoers. More on this, including on wrongdoers who also achieve important goods, in Section Five.

5. As I discuss in 2.1.2, it’s clearly the case that, at least sometimes, the removal of statues is controversial because some people do not accept that the subject was a wrongdoer. However, this is not plausibly true of all those who argue that we ought to keep public statues of e.g. Rhodes.

6. I say ‘some’ because some museums and galleries are e.g. primarily propaganda tools, rather than places of historical record or aesthetic appreciation.

First, it means that museum exhibits typically lack the evaluative dimension of other public displays. Museum exhibits are not typically restricted to things we admire—rather, we use museums to display all kinds of objectionable things, such as medieval torture implements and relics from concentrations camps. The positioning of statues in prestigious locations, such as parks, town squares, town halls and so on is an important part of what makes public statues expressive of positive evaluative attitudes. The Mayor of New Orleans, Mitch Landrieu, emphasises the social significance of putting Confederate soldiers “literally [...] on a pedestal in our most prominent places of honour.” (Landrieu, 2017). When a community chooses to display a figure in a prominent, central location, where its members must regularly confront it, this choice expresses (or is at least reasonably interpreted as expressing) the community’s view of what represents them.⁷ This is especially true given that such prominent places are, by their nature, limited in number, which means that there is inevitably a comparative dimension to the decision about who or what occupies them. Note too that the decision to continue to display a statue is not a historic decision, taken by now-dead inhabitants. Past generations may have decided to erect a statue; the decision to keep the statue—to continue to display it in the centre of the town square, or at the entrance to the public park or town hall—is made by the current generation.

Second, museum exhibits are usually accompanied by detailed explanations of their significance, and displayed with other relevant artefacts that give a broad contextual setting. As Matthew A. Sears puts it, “[at] their best, museums convey history in all its messy complexity, and encourage visitors to ask questions of the past, including how it’s being used to shape the present. Monuments, on the other hand, are blunt-force objects, and frequently discourage nuance, deliberately distorting the past to convey something in the present that may or may not be an outright falsehood.” (Sears, 2018). A statue of a slave-owner alongside examples of the tools used to punish and restrain slaves, for example, not only shows that respect or admiration would be misplaced, but also genuinely informs the viewer about the historical wrongs of slavery, including the fact that slavery was once so widely accepted that people built public statues of slave-owners. Displaying a statue in a museum in this broader context does not express admiration for the depicted person.

7. This is, I think, compatible with some community members’ wanting to remove a statue, since the protesters object to being perceived to endorse these values, even if they do not endorse them. As C. Thi Nguyen argues, “[I]t is because monuments present themselves as expressing group commitments that it matters so much to the group members that they get it right.” (Nguyen, 2019, 10)

With respect to (at least some) art galleries, displaying a statue is expressive, but it's usually expressive of an aesthetic evaluation of the statue qua sculpture, rather than of a positive evaluation of its subject. Since, again, the context makes this shift in expression clear, it could be permissible to display a statue of a wrongdoer in an art gallery. These considerations explain why it can be permissible to move a statue to a museum or gallery, even if, as I will argue, they ought not to be displayed in other public places.

2.1.2 MEANING AS SOCIALLY CONSTRUCTED

It might be objected that the expressive value of a statue is not settled by its creators or commissioners. For example, Lawrence A. Kuzner claims that, "these pieces of metal and stone have only the meaning we assign to them, and that meaning can take any form we like. They can be revered or reviled; honoured or ridiculed; or co-opted for a new purpose." (Kuznar, 2017). On this view, the fact that a statue was intended as an expression of admiration by its creator or commissioner does not entail that it does, in fact, express admiration.

It's true that the meaning of public statues is socially constructed. Such statues could have had a different meaning, and we could, over time, shift our attitudes such that building public statues is no longer expressive of positive evaluative attitudes. It might also be true that the meaning of a statue is not settled by what its creators or commissioners intend (see Burch-Brown, 2017, for a related discussion of the possibility that statues can change their meaning). As I argued above, we can shift the expressive value of a statue by moving it to a museum or gallery. But, as the earlier discussion of building new statues of Rhodes shows, it's nevertheless true—albeit contingently so—that public statues of people do typically express positive evaluative attitudes, and that we regard only those worthy of admiration as fitting subjects. Thus, the idea that we (whoever 'we' are) can simply make it the case that some particular public statue does not express a positive evaluative attitude towards its subject is unpersuasive. For as long as it is true that we build statues only to people whom we think worthy of respect, it is implausible that we can selectively withdraw this

connotation, or change the statue's meaning simply by insisting that its meaning has changed.⁸

It is especially implausible that we might do this when there is no consensus about whether the subject merits respects. Given that some people believe that Rhodes statues *rightly* honour Rhodes, and that Confederate statues *rightly* honour confederate soldiers, it's unclear how 'we' can make it the case that such statues no longer honour their subjects. The mere fact that the meaning of a type—in this case, public statues—is socially constructed does not entail that we (or some subset of 'we') can change the meaning of tokens of that type while leaving them in situ, and while there is no more general shift in our practices regarding public statues.

It is illuminating here to compare our attitudes to other honouring practices, such as the awarding of an honorary doctorate. Honorary doctorates recognise a person's outstanding contribution to a field outside of the usual academic context. J.K. Rowling received an honorary doctorate from Edinburgh University for her contributions to literature. Now imagine that we discover that Rowling did not write the Harry Potter books. We would not think that since the meaning of a doctorate is socially constructed, we can strip this particular doctorate of its honorific connotations and thus allow Rowling to keep it. If you're honoured in light of your putative achievements, but the relevant achievements turn out not to be yours, we withdraw the honour. We do not let you keep the award, but somehow strip it of its honouring. We likewise strip athletes of medals when they cheat, rather strip their medals of their meaning. Similarly, if we build a statue of someone to honour them for their actions, but then realise that their actions are not, in fact, the kind of thing we ought to honour, we cannot simply insist that this particular statue no longer honours. Its meaning is determined by our wider practices, and cannot be selectively withdrawn.

2.1.3 STATUES AS HISTORICAL RECORDS

It is even harder to sustain the idea that statues are primarily historical records once we recognise the selective nature of public monuments. Setting aside statues of royalty and fictional characters, only 3% of public statues in Britain depict women. (BBC, 2018) The same is true in Australia (indeed, Australia has more statues of

8. I address the separate issue of recontextualization in Section 6. My argument here is directed at those who claim that since 'we' no longer approve of, for example, colonialism, the meaning of a Rhodes statue has thereby been changed.

animals than of women (Spicer, 2017)). The United States does marginally better at 10% (Peled, 2017). Prior to the erection of a statue of Mary Seacole 2016, there were no statues of historical black women in the UK at all. All the permanent statues in Trafalgar Square are of white men. As Madge Dresser argues, “[m]any Black Britons today, for example, feel personally excluded by the public commemorative conventions of their country. If monuments are about remembering, who or what gets ‘forgotten’ in the public discourse can be just as significant.” (Dressler, 2008; also Hirsch, 2017). The idea that public statues are primarily historical records, and ought to be preserved as such, looks implausible in light of this selective approach to who we depict. Any account of history based on existing statues would be utterly inadequate and misrepresentative.

Of course, we might think that the appropriate response to these concerns is simply to build more statues. If the record is incomplete, we can correct this by building more statues of people from historically marginalised groups. But, again, if we care only about the record, we should also build public statues of Hitler, Stalin, and Brady. And, as I suggested above, the fact that we’re not prepared to do that suggests that statues *are* typically evaluative in the way I have claimed. This also explains the intuitive objection to attempting to ‘correct’ or complete the record by, say, putting a statue of Nelson Mandela alongside a statue of Rhodes. Rather than presenting a more rounded historical record, such a display would imply that Mandela and Rhodes are merely two sides of the same story—their actions on a moral par, their views equally reasonable, both worthy of respect. This implication is morally objectionable. Both are important historical figures about whom we need to educate ourselves. But only one merits the kind of positive evaluation expressed by a public statue.⁹

One objection to removing statues combines the claim that statues honour with the claim that they are historical records. According to this objection, the presence of the statues records the specific historical fact that these people were honoured. So, proponents of this view grant that statues honour, but think that it’s important to keep them as a record of that fact. For this argument to go through, then, we need to know why it is important to keep such a record. The most likely suggestion is that removing the statues will somehow lead us to repeat the mistakes of history. We need to remember that people used to honour colonialists and slave-traders, lest we forget

9. Note that Mandela’s participation in justified violent actions in the struggle against Apartheid does not make him a serious rights violator, even if innocent people were thereby killed. Justified transgressions infringe, rather than violate, rights.

how widely such practices were accepted. But if what I have argued here is correct, keeping these statues up will not merely record that they were historically honoured, but also *continue* to honour their subjects. As I argue below, we have reason not to honour wrongdoers. And, as I argue in Section Six, we have a range of methods for remembering serious wrongdoing. It is not plausible that public statues of the perpetrators of serious wrongs are necessary for remembering either that serious wrongdoing took place, or that some such wrongdoing was widely accepted. Given this, I doubt that the underlying claim—that keeping statues is necessary for avoiding future wrongdoing—is sound, and thus that it can defeat our reasons not to honour wrongdoers.

2.3 PEOPLE OR ACHIEVEMENTS?

We might doubt my claim that statues of historical figures honour people in light of their acts, arguing instead that statues express a positive evaluation only of some particular achievement, and express nothing about the depicted person more generally. Indeed, our explanation of why we have a statue of a person will typically be that he or she did something in particular—led the fight for votes for women, or defended Britain against the French, for example—rather than that he or she was an all-round good thing. Insofar as the celebrated achievement itself was not wrongful, nor tied to wrongdoing, perhaps we need not worry about whether the person also engaged in unrelated wrongdoing.

It is true that some honouring practices celebrate only specific achievements. Literary prizes, for example, honour a particular accomplishment rather than the person: they are awarded for a book, or a poem, or for a body of work. The same is true of scientific prizes or music awards.

Statues are not like this. Consider the myriad ways in which we can and do mark achievements, in addition to the kinds of awards just mentioned. We use, amongst other things, fountains, pillars, buildings, sculptures, bridges, parks, and trees. The fact that we choose to build a statue of a specific historical figure, rather than one of these other types of memorials, is not just the luck of the draw, then. It is *meaningful*—that is, it is meant to express something about that person, rather than merely mark an achievement. There is a difference in kind between what is expressed by a fountain marking the abolition of slavery, such as the Buxton Memorial Fountain, and a statue of William Wilberforce. The Buxton fountain expresses an attitude about the aboli-

tion of slavery. A statue of Wilberforce expresses an attitude about *him*, in light of his connection to abolition. This is further evidenced by the fact that we typically build statues of people after their death, and not immediately after their achievements.¹⁰ It would be inappropriate, I think, to strip someone of a book prize because he or she was unveiled as a child abuser. Such prizes make no claims about the general admirability of the person (but see Archer and Matheson, 2019, for a defence of the view that honouring a person's achievements encourages us to condone their wrongdoing). But it would be appropriate to remove the author's statue from the library in their home town on those grounds, precisely because statues express these more general evaluative attitudes. As Joanna Burch-Brown puts it, our assumption when we encounter statues is that "the figures involved are broadly positive and appropriate sources of pride." (Burch-Brown, 2017, 75).

3. SERIOUS RIGHTS VIOLATIONS

I contend that states ought to remove public statues of people who engaged in serious rights violations. I will assume that the category of serious rights violations includes violating the rights not to be killed, enslaved, raped, tortured and so on, as well as the violation of certain political rights, such as the right of self-determination that is plausibly violated by colonialism and unjust wars. I do not further define the notion of a serious rights violation here. I focus on serious rights violations, which threaten individuals' basic interests, because when one perpetrates a wrong of this sort, that fact becomes the dominant feature of one's moral record, in a way that, say stealing a car or lying to one's spouse does not. Serious rights violations are thus what we might call *defining* wrongs: they are always salient to our evaluation of the perpetrator, and typically negate their morally good deeds. Put bluntly, it does not matter how much money a person raises for charity if he also sexually abuses children.¹¹ I leave it open here whether the perpetration of less serious wrongs (perhaps on a wide scale) can also ground a duty to remove a public statue.

10. Thanks to Tom Douglas for this point.

11. I consider some issues surrounding reform and rehabilitation in Section 3.3

3.1 INDIRECTLY VIOLATING RIGHTS

I take it that the case for removing a public statue is clearest when the subject directly perpetrated serious rights violations herself—that is, when she killed or enslaved and so on. But it is implausible that only the direct perpetrators of wrongs violate rights: rather, those who indirectly participate in seriously wrongful practices can also thereby commit serious rights violations. Someone who owns no slaves, but runs a slave market, for example, is engaged in serious rights violations. The Mafia boss who orders hits, but never kills anyone himself, is engaged in serious rights violations.

Of course, indirect participation in a practice such as slavery is widespread, especially when slavery is legal. Participants in the United States slave trade in the 18th and 19th centuries include not only slaveowners, catchers and traders, but also legislators who passed (or blocked) relevant legislation, individuals who knowingly bought goods produced by slaves, those who informed on escaped slaves and so on. It also includes Confederate soldiers who fought for the legal right to own slaves. There is often similarly broad indirect participation in an unjust war: vast swathes of the German population contributed to the Nazi campaign of aggression and genocide during the Second World War, for example.

As above, my account does not commit us to a moral sainthood standard for statues, where only those who live utterly morally pure lives are considered fit for depiction. My claim is only that we ought to remove statues depicting people who participated in serious rights violations of the sort described above. Nevertheless, given the scale of participation in many seriously wrongful practices, the implications of my thesis are revisionary, compelling states to remove many of their public statues. This is especially so given that it applies to statues honouring serious wrongdoers not only in light of their wrongful actions, but also in light of actions or achievements unrelated to wrongdoing. The implications of the thesis are broader still if one believes that (culpable) omissions can constitute serious rights violations.

Exactly how revisionary the thesis is, then, depends on the correct account of participation in a serious rights violation. For example, many people reject the claim that civilians engage in serious rights violations by knowingly contributing to unjust wars or genocides (see for example Haque, 2017, 57, 71; Fabre, 2009). They might also deny that those knowingly buying slave-produced goods violate the basic rights of slaves. They might propose a narrower account of what it is to violate basic rights.

Perhaps only those who directly perpetrate serious wrongs (e.g. Haque, 2017.; for rebuttal see Frowe, 2019, 129), or whose contributions to those wrongs pass a certain causal threshold¹², commit serious rights violations. Alternatively, we might draw upon existing accounts of accomplice liability to set the boundaries (the literature here is vast, but see, for example, Goodin and Lepora, 2013; Dressler, 2008, 429; Kutz, 2007, 289—305; Bazargan-Forward, 2017).

My own view is that any plausible account of participating in serious rights violations is going to include lots of people who indirectly contribute to those violations, and thus generate the result that we should remove many—perhaps most—of our public statues of historical figures. Thankfully, though, we need not identify the correct account of participating in a serious rights violation here. Rather, the important point for our purposes is that my account is revisionary only insofar as we grant that those who indirectly participate in serious wrongdoing do themselves commit serious rights violations. This is compatible with the view that not all participation in serious wrongdoing constitutes a serious rights violation (this idea is explored in literature on collective harms e.g. Kagan, 2011, 105-141; Nefsky, 2011, 364—395). But when participation in a wrongful practice *does* constitute a serious rights violation, it strikes me as very plausible that states ought to remove statues of those participants. The implausible position would, I suggest, be to believe both that the participants engaged in serious rights violations *and* that it is nonetheless appropriate to depict them in public statues. As I argued above, such statues express a positive evaluative attitude towards the subject. As I'll argue below, this means that such statues conflict with the state's duties to repudiate and condemn wrongdoing.¹³

4. GROUNDING THE DUTY TO REMOVE

I focus here on states—that is, state actors—as the bearer of the duty to remove statues. This is, in part, because I am considering public statues, the presence of which (at least ordinarily) falls under the authority of the state. Since it is the state,

12. E.g. Fabre, 2009, 43-4; McMahan, 2009, 225. For dissent, see Frowe, 2014, 202-205. Of course, it is unclear how we should assess the significance of causal contributions: several metaphysicians express scepticism about the idea that one can, for example, distinguish between contributions in terms of size. See e.g. Sartorio, in press; Tadros, 2018, 402-43. For a defence of degrees of causal significance, see Kaiserman, 2016, 387-394.

13. Burch-Brown also suggests that removing statues can be a means of condemning and repudiating wrongdoing, drawing on Seana Shiffrin's work on reparations (Shiffrin, 2009). See Burch-Brown, 2017, 69.

acting for its members, who decides what occupies our public spaces, it seems helpful to begin with the question of whether state actors have a duty to remove certain types of public statues. This is compatible with thinking that private individuals may also have certain duties with respect to statues of wrongdoers—to campaign for their removal, for example. But it is at least less obvious that private citizens have duties to remove public statues (not least because many will lack the ability to remove public statues).

My focus on states also reflects the fact the state is sometimes uniquely or best situated to discharge certain duties, or express certain sentiments. There can, for example, be times when it is appropriate for a state representative to condemn wrongdoing even if individual citizens need not do so (for example, see Cunningham, 2014). This is in part because, especially in the case of widespread serious wrongdoing, condemnation should be public, and expressive of the wider community's rejection of the wrongdoing. Insofar as state actors speak for their citizens, their actions can have a significance that individual actions lack. There is, in general, something especially powerful about official rejection or condemnation of wrongdoing. Consider, for example, the significance (beyond the prospect of punishment) that victims of crimes attach to a perpetrator's being found guilty of wrongdoing by a court. Even when the victim already knows that the perpetrator is guilty, the formal recognition by the state of this wrong is deeply meaningful.

4.1 THE DUTY TO REPUDIATE

Plausibly, the state's duty to remove statues is especially stringent in cases of state collusion in wrongdoing. The state can collude in wrongdoing in at least two ways. First, it can openly endorse the wrong by legalising it, as in the cases of slavery, the denial of women's equal status, the forced adoption of Aboriginal children, and the persecution of homosexuals. Second, state actors might deliberately conceal wrongdoing by those in positions of authority and power, as with the sexual abuse of children in Catholic church, or the murder of black detainees in police custody.

There are at least three reasons why the duty to remove statues is plausibly most stringent when the state colluded in the relevant wrongdoing. First, such wrongs seem most likely to cause wider and more significant harm: if a wrong is legal, for example, it may well be much more pervasive than if it attracts criminal sanctions. Second, a wrong's being facilitated by a state or state actors has an expressive func-

tion, since it conveys public sanctioning of the act, which seems to further wrong the victims (for discussion of how laws can constitute expressive harms, see, for example, Hill, 1999; Anderson and Pildes, 2000, 1503-1575; Blackburn, 1999, 467-491). It is one thing to be wronged; it is a further wrong to have one's state fail to recognise that one is being mistreated. Whilst this most obviously applies in the case of legal wrongs, it plausibly also applies in other forms of state or state actors' collusion in wrongdoing. For example, it seems worse for state officials to destroy or conceal evidence of wrongdoing compared to private individuals (and many states treat misconduct in a public office as an aggravating feature of wrongdoing). Third, having been implicated in these wrongs confers on the state a stringent duty to *repudiate* them now. It is this third feature that I explore here.

As I will understand it here, the duty to repudiate is distinct from the duties to condemn and punish wrongdoers, and prohibit or prevent wrongdoing. Repudiation is about rejecting one's *own* past wrongdoing: it requires one to disavow certain attitudes and beliefs in virtue of one's past behaviour. To see the appeal of this view of repudiation, consider the case of Muslims who are asked to publicly reject the wrongs of Islamic fundamentalist terrorists.¹⁴ I suggest that these requests are objectionable because, whilst they are often framed in the language of condemnation, they are, in effect, implicit demands that Muslims *repudiate* the wrongdoing of terrorists—that they disavow the beliefs underpinning such attacks. And yet repudiation is appropriate only when one is somehow implicated in that wrongdoing.

Repudiation in the context of historic wrongdoing requires the state's acknowledging its past complicity in, or sanctioning of, wrongdoing, and explicitly rejecting the attitudes or values that underpinned that wrongdoing. For example, the British government's responsibility for recognising injustices resulting from slavery, and rejecting the racism underlying slavery, is distinct from its usual responsibility to aid its citizens when they are the victims of other people's wrongdoing. As the legal representatives of the British state, the current government is responsible for recognising the harms of slavery in part because the state was partly responsible for those harms. Given its historical participation in slavery, the government must take steps to disavow slavery that it need not take with respect to wrongs in which it did not participate. Repudiation requires, amongst other things, a public and sincere declaration

14. Ilhan Omar recently objected to being asked to issue a statement on female genital mutilation. See <https://edition.cnn.com/videos/politics/2019/07/23/rep-ilhan-omar-calls-question-appalling-muslim-conference-sot-vpx.cnn>

of an act's wrongfulness, and a commitment to not facilitate such wrongdoing in the future.¹⁵ And this, I suggest, is incompatible with publicly honouring the perpetrators of the wrongdoing. Hence, the duty to repudiate confers on states an especially stringent duty to remove certain cultural artefacts.

We can helpfully draw here on the philosophical literature surrounding apology, particularly political apology. For example, Allison Don and Per-Erik Milam argue that an effective political apology must, "respond to blame by repudiating the misconduct, and profess a change in quality of will that shows the apologiser to be relevantly different from the offender." (Don and Milam, draft manuscript). This notion of reform is key to several accounts of apology: someone who apologises for her wrongdoing only to commit the same wrong again shows herself to be insincere in her apology, since the repetition suggests that she fails to properly recognize the wrongness of her conduct (see Bennett, draft manuscript; Matheson, draft manuscript).

Amongst individuals, showing the apologiser to be relevantly different from the offender requires a change in the offender's quality of will—we want her to change her attitudes or beliefs, in order to count her apology as sincere. But this does not work at the level of states: we are not looking for the apologiser to show that they are not the person they were, but rather to show that the state has reformed. This demands visible, publicly-accessible actions rejecting the past wrongs. And, as Don and Milam argue,

"[t]here is a genuine risk that a poorly executed political apology can deepen the divide between victim and offender by demonstrating the opposite of what they intend—e.g. that the state does not have due regard for the victimised group and is not sufficiently committed to avoiding similar misconduct in the future. However sincere its expression, the force of an apology can be undermined by doubts about attitudes of the collective and people on whose behalf it is being made. Victims may rightly feel that a spoken apology, unsupported by a concrete and significant demonstration of sincerity, does not do justice to the offence, just as material reparation without an acknowledgement of responsibility is also inadequate." (Don and Milam, draft manuscript, 9).

I suggest that, in the absence of a lesser-evil justification for keeping it, the

15. I do not address here what else repudiation involves (e.g. the disgorging of the benefits of injustice).

refusal to remove a public statue to someone who perpetrated the wrongs in question undermines the idea that a state has reformed and genuinely repudiates its role in that wrongdoing. It thus gives victims legitimate grounds for believing that their complaints are not taken seriously by their state and co-citizens.

4.2 THE DUTY TO CONDEMN

Even when it lacks a duty to repudiate its own past wrongdoing, the state still has a duty to condemn other people's serious wrongdoing. As I will argue, the duty to condemn is also incompatible with continuing to display statues of wrongdoers. Like the duty to repudiate, this duty is grounded in what is owed to the victims of wrongdoing. As I argued above, those who are wronged with the help of their state, or state actors, are distinctively wronged, given the expressive function of state collusion. And the duty to remove statues is plausibly more stringent in collusion cases—that is, it might be less easily defeated by lesser-evil considerations—since we have particularly strong reason to recognise and make good harms for which we are responsible. Nevertheless, the duty to remove statues still obtains in the absence of state collusion in the relevant wrongdoing. It would be objectionable to remove a statue of someone who committed rights violations with the collusion of the state while leaving in place a statue of someone who committed similar wrongs without such collusion. States plausibly have duties to properly recognise and condemn wrongs done to their citizens irrespective of whether they facilitated or concealed those wrongs.

There are straightforward instrumental reasons to condemn wrongdoing—for example, that so doing deters future wrongdoing. But there are also less instrumental reasons to condemn wrongdoing. Condemnation is primarily an expressive act. Its value does not rest solely on its capacity to deter future wrongdoing or prevent harm arising from past wrongdoing. It rather reflects our intrinsic reasons to affirm victims' moral standing in the face of actions that have denied that standing by publicly asserting the wrongfulness of those actions.

In this respect, the duty to condemn is like the duty to apologise: whilst apologies can have instrumental effects, smoothing social relations and so on, whether one has a duty to apologise does not seem to depend on whether apologising will, or is expected to, produce these effects. I can owe you an apology even if, or perhaps especially if, relations between us are irreparably damaged. The apology is owed in light of the wrong you have suffered, not in light of the beneficial effects of apologising.

Similarly, states' duties to condemn wrongdoing are grounded in the reasons we have to publicly reject wrongdoers' implicit or explicit claims about the moral status of their victims. Serious rights violations deny their victims' equal moral standing; official, public condemnation of the wrong helps re-affirm that standing. Thus, unlike the duty to apologise (and the duty to repudiate), the duty to condemn obtains with respect to other people's wrongs.

Importantly, there can be duties to condemn wrongdoing even if there is no duty to blame the perpetrator (although, of course, there will be cases in which both condemning and blaming is appropriate). Moral standing can be equally challenged by blameless and culpable wrongdoing. We can, for example, imagine that some American slaveowners genuinely believed that their slaves were inferior beings, and were better off being enslaved rather than free. Perhaps slaveowners who held such beliefs were less culpable than slaveowners who were wholly indifferent to their slaves' wellbeing, or even non-culpable. It hardly follows that enslavement was less degrading for their slaves compared to the slaves of more culpable slaveowners. Thus, even if, for example, some slaveowners and Confederate soldiers were not blameworthy for their actions, this does not show that we may display public statues of them. The duty to condemn is not grounded in the claim that the perpetrators deserve blame, but rather in the claim that the victims are owed appropriate recognition of the wrong (as argued by Burch-Brown, 2017, 77).

Expressions of condemnation are particularly important when there is no question of punishing the perpetrator, as is usually the case with the subjects of public statues. Punishment serves multiple functions of condemning, blaming and penalising. When the perpetrator is dead, and escaped punishment during their lifetime, we have especially strong reason to independently condemn their wrongs, precisely because we cannot punish the perpetrator and express our condemnation of the wrong in that way.

The duty to condemn is owed most obviously to the victims of the particular wrong in question. Assuming that we can have duties to the dead, this includes victims who no longer exist. It also includes secondary victims—that is, those who suffer harm as a result of historical wrongs to others (such as the harms arising from the legacy of slavery that befall people who were not themselves enslaved). But it is also, I think, owed to citizens in general, both in their capacity as potential victims of other wrongs, and in light of their interest in living in a society in which each person's moral standing is taken seriously by their state. We all have reason to want

our states to refrain from honouring wrongdoers. As I described in Section 2.1.1, our public monuments—and our decisions about whether to keep them—express a community’s values. I have a claim that my government remove public statues of people who engaged in serious wrongdoing, irrespective of whether I am a victim of such wrongdoing, since I have a legitimate interest in not being part of society that expresses positive evaluative attitudes towards violent racists, slaveowners, misogynists and other wrongdoers; plausibly, I also have a responsibility to discourage the expression of such attitudes.

In order to count as discharging the duty to condemn, condemnation must be sincere. But one cannot sincerely condemn wrongdoing if one simultaneously honours the wrongdoer, as one does by retaining public statues of them. There’s an element here of the familiar idea that justice should not only be done, but also be seen to be done. As Adam Omar Hosein has recently argued, justice requires not only that states *actually* weight citizens’ interests equally, but also *demonstrate* that they do so, doing “a sufficient amount to secure for each member the *confidence* that her rights and interests are being given equal weight.” (Hosein, 2018) Similarly, states need to give citizens the confidence that they sincerely condemn wrongdoing. Denouncing slavery as a moral evil whilst keeping public statues of slaveowners, or of people who fought to sustain slavery, undermines a state’s claim to sincerity.

It seems to me that retaining public statues of wrongdoers is straightforwardly inconsistent with showing that one properly recognises the gravity of serious rights violations. This is true even if the state enacts other relevant measures, such as offering compensation. But even if one denies that these things are straightforwardly inconsistent, it’s certainly plausible that one might reasonably interpret a refusal to remove a statue as indicative of a failure to properly grasp or attend to the wrongs in question, especially when those wrongs concern historically marginalised groups (see also Archer and Matheson, 2019).

4.3 SHIFTING NORMS

Reflecting on the duties to repudiate and condemn gives us grounds for rejecting the *shifting norms* objection to removing controversial monuments. Roughly, this objection holds that someone who defended slavery or colonialism a century or so ago cannot be held to the moral standards that we endorse today, because those things

were legal and widely accepted back then. Thus, there is no duty to condemn such people. Hence, the duty to condemn cannot support a duty to remove public statues.

This argument is unpersuasive because, as above, there can be duties to condemn wrongdoing even if there is no duty to blame the perpetrator. The shifting norms objection seems particularly wrongheaded in the case of publicly-sanctioned or concealed wrongs. For example, the fact that social conditions in the United States might have made beliefs in the inferiority of enslaved people credible is partly what the state needs to publicly repudiate by removing the statue. It's precisely because the state facilitated these wrongs by normalising them, by making them legal, or concealing them, or failing to punish them that the state now has a duty to repudiate those wrongs. That these excusing conditions existed cannot, therefore, be a reason for retaining public statues of wrongdoers.

5. 'MORAL AMBIGUITY'

We might grant that there is a duty to remove statues of wrongdoers when the subject is honoured *for* their wrongdoing, or for achievements that were connected to that wrongdoing. Statues of Rhodes, for example, are particularly egregious because what is being commemorated—his role in the violent expansion of the British Empire (and, in the case of the statue at the University of Cape Town, 'giving' land to the university)—is the very thing that makes Rhodes morally objectionable. Similarly, statues of Confederate soldiers commemorate, specifically, their fight to retain the legal right to own slaves.¹⁶

More controversial is the claim that we should remove statues of people who perpetrated serious rights violations but also accomplished significant moral goods. For example, some people think that we should keep statues of Thomas Jefferson in light of his role as a Founding Father, even though Jefferson was a slaveowner and a rapist (Danielle, 2017). The duty to remove is similarly controversial with respect to at least some people who used unjust means to achieve significant goods. For example, Winston Churchill is largely credited with defeating Nazi aggression in Europe—clearly, an enormously significant moral good. But Churchill also authorised the use

16. It's worth noting here that some statues of Confederate soldiers are not of specific individuals, but are instead generic statues depicting a type. Since these figures do not depict specific persons, but are rather intended to represent Confederate soldiers in general, they cannot be honouring 'the person' as a whole. However, here it's very clear that what is honoured is the wrongful practice: having these statues is akin to having a celebratory memorial of a massacre. Thus, there seems to be good reason to remove these statues as well as those depicting named individuals.

of unjust means, such as the firebombing of Dresden, as part of this defeat. He is also alleged to have been responsible for serious wrongs elsewhere, such as the Bengal famine of 1943. Let us assume that Churchill was, in fact, so responsible, and that this famine violated the basic rights of the Bengalis who were thereby harmed, and that the bombing of Dresden violated the rights of at least some of the people who were thereby killed. Does it follow that we should not to have public statues of Churchill?

I think it does: it is wrong to honour those who engaged in serious wrongdoing, even if they also achieved significant goods. It is objectionable not only to honour a person for her wrongdoing, but also *despite* her wrongdoing. To do so either ignores the fact that someone perpetrated serious rights violations, or implies that our duties to the victims of those violations are outweighed by some other consideration. The first option seems like a straightforwardly disrespectful dismissal of the harms inflicted on the victims of the wrongdoing, and of their claims to appropriate recognition of those wrongs. The second is perhaps a better description of what people have in mind when they suggest that we ought to keep statues of Churchill even if they grant that he committed serious wrongs. But we must be careful not to mistake or misrepresent the considerations at stake. We are not weighing the duties to the victims against the importance of the good that the person achieved: it is not a question of whether, for example, the duty to condemn the Bengali famine is trumped by the good of defeating the Nazis.

Rather, we are weighing the duty to condemn against the good of *having the statue*. And it's very unclear what *this* good consists in, such that it could weigh against the claims of the victims of serious wrongdoing in this way. It seems very unlikely that anyone would suffer any setback of their important interests because of the absence of a statue of Churchill. Holding that erecting or keeping the statue is nonetheless more important than our duties to the victims thus seems to objectionably diminish their claims.

We might think that it's important to honour people for achieving substantial moral goods: that we have a debt of gratitude to Churchill, for example, that trumps our duties to condemn and repudiate. But if this is true, it should hold across the board. There should, for example, be a genuine question about whether our gratitude for the millions that someone raises for charity outweighs our obligation to condemn their abuse of children, given that this money could plausibly save many lives, which

is a significant moral good.¹⁷ Even if raising a couple of million doesn't do the trick, there should be some point at which one raises enough money, or saves enough lives, that the resultant debt of gratitude outweighs the duty to condemn the abuse of children, or other serious wrongs. I am sceptical that engaging in these trade-offs can support the permissibility of keeping or erecting statues of wrongdoers. Moreover, we need not deny that we owe gratitude to Churchill in order to satisfy our duties to condemn. We need only refrain from having public statues of Churchill. This is compatible with the permissibility of alternative expressions of gratitude that do not express the general admiration of the person in the way that statues do. A different sort of memorial can celebrate Churchill's winning of the war, just as the Buxton Fountain celebrates the abolition of legal slavery.

I have suggested that serious rights violations dominate the perpetrator's moral record, making public statues of them inappropriate. But what should we say about someone who engages in serious wrongdoing, but is later fully repentant, perhaps duly punished, and works hard to lead an admirable life of good deeds? Such cases raise philosophical questions concerning the persistence of personhood across time and changes of character that I cannot address here. But we should notice that reformed wrongdoers are importantly different to the 'morally ambiguous' characters we are considering here. Reformed wrongdoers are those who undergo some change in their quality of will, ceasing their wrongful actions. Jefferson's wrongdoing, in contrast, was contemporaneous with his achievements; the slave-owning Jefferson *was* the Founding Father Jefferson. So too with Churchill.¹⁸ So, even if we think we may have public statues of those who renounce their wrongdoing and go on to achieve great things, this does not undermine the claim that we may not keep public statues of Jefferson and Churchill.

17. The Savile case is the obvious comparison here, although that case is complicated by the connection between Savile's abuse of children and his fundraising activities (that is, he used the position he obtained in a children's hospital as a result of his charity work as a means to abuse the children). But I doubt that in an otherwise similar case in which the abuse was not enabled by the charitable works we would be any keener to engage in the kind of weighing described above.

18. The converse can also occur, of course. Whatever we think about building statues of people who commit wrongs before reforming and achieving significant goods will probably also settle the question of building statues to those who achieve goods and then 'regress' and commit wrongs. The Myanmar politician Aung San Suu Kyi is an example (for discussion of this case, see Matheson, 2019)

6. HARM AS A CONSTRAINT ON REMOVAL

We might think that there can plausibly be a duty to remove statues of serious rights violators only if there currently exist, or will exist, people who are harmed by their wrongs, or if the statues themselves cause harm. That is, we might think that there is a *harm constraint* on a duty to remove statues. One possible attraction of such a constraint is that it seemingly limits the revisionary implications of my thesis. Most writers on this topic are keen to show that their view does not require taking down vast numbers of statues, particularly very old statues (see Timmerman, forthcoming, 7; Burch-Brown, 2017, 78). For example, Johannes Schulz argues that Germans have no reason to feel degraded by Roman statues of Julius Caesar, despite Caesar's brutal treatment of Germanic tribes, because the "hierarchy between the citizens and soldiers of the Roman Empire and the allegedly 'barbaric' tribes in Germania and Gaul no longer has any correspondence in the social reality of present-day Europe." (Schulz, 2018, 5-6).

Thinking about genocide gives us good reason to reject a harm constraint on a duty to remove statues.¹⁹ Imagine a successful genocidal campaign that kills all the members of a certain group, but causes no harm to other people. Supporters of the genocidaires erect a statue in their honour, to which everyone else is indifferent. If we have reason to remove statues only when there are current or future victims of the relevant wrongs, or when the statue causes harm, it would follow that there is no duty to remove a statue honouring the genocidaires. The same concern speaks against Schulz's suggestion that we ought to remove statues that express degrading ideologies only when they are connected to existing wrongful social hierarchies. If one simply erases the members of the disadvantaged group, there is no persisting wrongful hierarchy. But the case for removal of honorific statues seems stronger, rather than eliminated, in such cases.

Thinking about Schulz's example also suggests that a harm constraint might not, in fact, limit our obligations to remove statues. Much depends on how we identify the relevant degrading ideology. We might, like Schulz, describe Caesar's ideology as the view that members of Germania and Gaul were inferior to Romans, and agree that since there is currently no wrongful social hierarchy between these groups—perhaps the tribal groups don't even exist anymore—there is no reason for Germans to feel degraded by statues of Caesar. But we might equally offer a broader reading of

19. Thanks to Derek Matravers for suggesting this.

Caesar's ideology: he believed that not all humans enjoy equal moral standing, and that those of lesser standing may be murdered and enslaved. *This* ideology certainly corresponds to current social realities. Of course, on this broader reading, Germans have no special reason to feel degraded by statues of Caesar. But anyone who is currently harmed by a wrongful hierarchical system might legitimately object to, and feel degraded by, the commemorating of someone who perpetrated the belief that some types of people are inferior, and may be treated as such. It strikes me as wholly appropriate for, say, an African-American to feel degraded by statues to racial supremacists *in general*, rather than only by those who believed specifically in the inferiority of blacks. Moreover, it seems wholly appropriate for *people* in general to object to the presence of public statues of racial supremacists, irrespective of whether they themselves are harmed by the presence of racist hierarchies. The Germans might have no *special* complaint about the Caesar statues, but they may complain nonetheless.

7. WHY REMOVAL?

We might grant the force of the duties that I have articulated, but deny that they require us to remove statues from public display. Proponents of keeping statues of wrongdoers often claim that monuments can trigger conversations about the serious wrongs of the past, thereby presenting opportunities to educate ourselves about those wrongs (see also Beard, 2015; Schulz, 2018). If we remove the statues, the thought must go, we remove these valuable opportunities. Even though I have not ruled out the permissibility of keeping statues in museums, we might think that many people do not visit museums, and thus we would be denying valuable educational opportunities to, say, those from less privileged backgrounds.

Schulz argues that whether removing a controversial statue is appropriate depends on whether removal, rather than “various kinds of contextualisation”, is most likely to “further the establishment of relations of respect” between citizens (Schulz, 2018, 12). Schulz cites the decision not to rename the IG-Farben-Haus building at the University of Frankfurt as an example of a successful alternative to removal. Schulz describes how, “students and the administration agreed on contextualising the building, rather than renaming it. A large plaque [...] now alludes to the involvement of IG Farben in the Holocaust. A critical analysis of the company's as well as the university's actions during the Nazi period is part of campus walking tours.” (Ibid, 15). Schulz concedes that where a historical figure is “ambiguous”, in the sense described

above, greater contextualisation may be needed. For example, if the University of Virginia wants to keep its statues of Jefferson, its students might be required to take classes, “on the history of slavery and Jefferson’s relation to it”. (Ibid, 21).

But the use of these contextualising measures—plaques, critical commentaries, classes on slavery—does not require, and therefore cannot justify, keeping statues of serious rights violators or naming buildings after them. A re-named building can have a plaque noting that it used to be named after a company that participated in genocide, thus sparking the same conversation about past injustices that Schulz describes. A campus tour can make the same observation. It can also point to where statues used to be, before they were removed or replaced. The historical fact of, for example, a building’s having been named after Holocaust collaborators is not rendered inaccessible by renaming the building (see also Burch-Brown, 2017, 75; Timmerman, forthcoming, 5). The historical facts that justify compelling students to take classes on slavery persist even if we take down statues of Jefferson.

Once we recognise that these ways of informing ourselves about past injustices are available even in the absence of these commemorations, it is unclear why keeping the commemoration but improving its context is preferable to removing it. It is an illusion to think that statues, or a building’s having a particular name, provide *valuable* opportunities to educate ourselves about past wrongs. Since those opportunities are no less available in the absence of those commemorations, their provision by statues and the like is not valuable. Since the names and the statues play no essential role in facilitating the conversations that Schulz thinks can promote relations of respect, his argument does not support a permission to keep them.

This might seem at odds with the explanation in Section Two of why it could be permissible to display a statue of a wrongdoer in a museum, which points to the wider contextualisation that such venues provide. But recall that it’s not the mere contextualisation that renders such displays permissible—or rather, it’s not merely the lack of contextualisation that makes public displays impermissible. The location of public statues is also morally significant: having a statue of a slaveowner on public display—particularly, for example, in the centre of your campus, or at the entrance to your library—is also expressive of a positive evaluative attitude towards that person. The comparative dimension is also significant: to keep the statue of Jefferson is to judge that having a contextualised statue of a slaveowner and rapist is better than having a statue of someone who did not perpetrate serious rights violations.

Of course, there is a range of recontextualization measures that one might

employ, in addition to the explanatory plaques and so on that Schulz has in mind. These include defacing public statues, as happened with the Rhodes statue at the University of Cape Town and many Confederate statues. Such actions can certainly express a rejection of the subject's wrongdoing. But, crucially, they do not, ordinarily, constitute a rejection of that wrongdoing by the state. Rather, they are usually unauthorised, illicit acts of vandalism carried out as acts of resistance to the state's refusal to remove the statue. I think they are permissible, but this permissibility is partly explained by the fact that the state ought to remove the statues. In other words, whilst defacing public property is usually wrong, it might not be wrong when the state has failed in the duty that I have defended—namely, to remove the statue from public display.

Of course, the state could sanction such defacing as a means of repudiating and condemning the wrongdoing. But, first, it is not clear to me why this is better than removing the statue (and, say, replacing it with a memorial to those who suffered the harms of slavery or colonialism). And, second, it seems to me that state-sanctioned acts of vandalism typically lack the expressive power of illicit, rebellious defacement.

Alternatively, the state might install the 'counterbalancing' statues that I discussed in Section 2. These installations would be state actions, and so avoid the worry about non-state rejection of wrongdoing that arises in the case of vandalism. But I am sceptical that such counterbalancing is desirable, even if one could construct a display that avoided the 'moral par' objection that I raised with respect to Rhodes and Mandela. The deeper worry here is that, in many cases, the reason why recontextualising a statue might seem preferable to removing it—might best foster relations of respect between citizens, as Schulz puts it—is that some people have objectionable attitudes that make them want to keep the statues of wrongdoers, and we predict that some of those people will act wrongly in the face of attempts to remove them.²⁰ This wrongdoing might manifest in, for example, violent resistance to attempts to remove the statue or, more insidiously, as heightened social tensions that exacerbate the wrongful attitudes that many people already hold.

The fact that some people will engage in wrongful behaviour in the face of attempts at removal is, as I suggested in Section One, morally significant. We should be sensitive to whether our actions will cause others to inflict wrongful harms, and the

20. This is not to say, of course, that all those who oppose removal do so on the basis of objectionable attitudes, or threaten violent opposition to their removal. But it seems plausible that many of those who are willing to resort to violent means in order to keep e.g. a Confederate statue are motivated by more than e.g. a concern about whitewashing the historical record.

threat of sufficiently grave wrongful harm can defeat the duty to remove a statue (for a discussion of our responsibility for harms imposed by others, see Frowe, 2014, ch.5). But such facts should not make their way into our deliberations about whether there is a duty to remove the statue, even if they bear on the all-things-considered permissibility of removing it. Those who require the retaining of statues of wrongdoers as a condition of their not engaging in wrongful behaviour cannot thereby undermine the claims of the victims of serious rights violations.

By way of comparison, consider the British government's policy of compensating slave owners for the 'losses' inflicted upon them by abolition. Compensating someone for taking away their slaves strikes us as objectionable, even if this policy best facilitates certain valuable ends, such as the end of slavery, because it constitutes a failure to properly recognise the wrong done to slaves. Indeed, it serves to *legitimise* slaveowners' claims to own their slaves by legally reinforcing the notion of people as property. Given this, compensating the slaveowners was a *pro tanto* wrong, albeit one that was plausibly justified as the lesser evil. Likewise, even if retaining statues is sometimes justified on lesser-evil grounds, there is still an important sense in which keeping them is wrong. And, in both cases, the choice between evils is forced by wrongdoing.

There is thus a further wrong involved in cases in which a duty cannot be discharged because of the predicted wrongdoing of others, compared to cases in which there is no such predicted wrongdoing. Compare a case in which removing a statue will unavoidably cause some toxic material to be released from its core with a case in which removing a statue will cause those who want to keep it to riot, thereby inflicting harm on innocent people.²¹ In the riot case, there's an important sense in the state's failure to discharge its duty to remove the statue is unnecessary, since harm could also be avoided by everyone's abiding by their moral obligations. This is not true of the toxic material case, in which harm can be avoided only by keeping the statue in place. The rioting case thus involves a wrong that is absent in the toxic material case, since it is wrong for the prospective rioters to gratuitously render the state unable to discharge its duties. Note that this wrong does not arise only in the more extreme cases of rioting or other threats of physical harm. As I mentioned above, more subtle responses, such as holding increasingly hostile attitudes to members of certain groups, are also wrongful. This explains why, for example, African-Americans are entitled be aggrieved by the keeping of Confederate statues even if they grant that

21. Thanks to an anonymous referee for this example.

taking them down would overall worsen race relations in the United States, and that the statues should therefore stay. We should not *have* to keep statues of slaveowners or Confederate soldiers in order to have conditions for relations of respect, just as we shouldn't have to compensate people in order to get them to give up their slaves.

8. CONCLUSIONS

I have argued that the state has a duty to condemn and repudiate serious wrongdoing that is incompatible with retaining public statues of historical figures who perpetrated serious rights violations. Public statues of such figures are typically evaluative: they express a positive attitude about the depicted person that undermines the state's claims to be sincerely condemning or repudiating their wrongdoing. I argued that the duty to remove public statues applies not only to statues honouring people for their wrongdoing, but also to statues that honour people despite their wrongdoing. We cannot weigh morally significant achievements against serious wrongdoing in order to justify public statues of wrongdoers. The duties to condemn and repudiate wrongdoing that underpin the duty to remove persist even when, in light of lesser-evil considerations, it is all-things-considered permissible to keep the statue. These lesser-evil considerations typically arise as a result of threatened wrongdoing; such threats of wrongdoing do not negate the state's duties to condemn and repudiate wrongdoing.

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Kidney Sales and the Burden of Proof

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ABSTRACT

Janet Radcliffe Richards' *The Ethics of Transplants* outlines a novel framework for moral inquiry in practical contexts and applies it to the topic of paid living kidney donation. In doing so, Radcliffe Richards makes two key claims: that opponents of organ markets bear the burden of proof, and that this burden has not yet been satisfied. This paper raises four related objections to Radcliffe Richards' methodological framework, focusing largely on how Radcliffe Richards uses this framework in her discussion of kidney sales. We conclude that Radcliffe Richards' method of inquiry hinders our ability to answer the very question that it ought to help us resolve: What is there best reason to do, all things considered?



INTRODUCTION

Janet Radcliffe Richards is one of the most prolific contributors to the organ market debate, and one of the most incisive critics of the current prohibition of live donor kidney sales. Over a series of publications spanning 20 years of engagement with the topic, Radcliffe Richards has consistently argued that any discussion of paid living kidney donation should begin by recognising that allowing kidneys to be sold could plausibly increase the supply of transplantable kidneys, thereby providing life-saving transplants to those who otherwise might never have received one. Based on this *prima facie* argument, Radcliffe Richards argues that there is a presumption in

favour of allowing organs to be bought and sold—and, conversely, that the burden of proving otherwise falls on opponents of organ markets. According to Radcliffe Richards, none of the objections to organ markets that have been offered to date have met this burden (Radcliffe Richards et al. 1998; Radcliffe Richards 1992; Radcliffe Richards 1996; Radcliffe Richards 2003a; Radcliffe Richards 2005; Radcliffe Richards 2008; Radcliffe Richards 2012).

This article explains and critically evaluates Radcliffe Richards' methodological approach to the topic of paid living kidney donation. We focus in particular on how Radcliffe Richards outlines and applies this approach in *The Ethics of Transplants: Why Careless Thought Costs Lives*, which is both Radcliffe Richards' most detailed and most recent substantial contribution to the debate. We first challenge the idea that a *prima facie* argument in favour of a proposal can establish who (if anyone) bears the burden of proof. We then argue that although Radcliffe Richards' method of inquiry is intended to shape only the form and not the conclusion(s) of ethical analysis, it effectively stacks the odds in favour of her starting presumption. We further argue that applying Radcliffe Richards' methodology to the topic of paid kidney donation may therefore hinder identification of the course of action we have best reason to pursue. We conclude that future ethical analysis of organ markets should abandon the idea that either party to the debate bears the burden of proof, at least in the sense suggested by Radcliffe Richards.

Although this article focuses primarily on Radcliffe Richards' discussion of live donor organ markets, our arguments have broader significance. Notably, Radcliffe Richards' analysis of paid kidney donation is not only intended to contribute to the organ market debate, but also to illustrate a novel strategy for resolving moral problems in practical contexts (Radcliffe Richards 2012, 12). Indeed, Radcliffe Richards has elsewhere outlined how this methodological approach should be applied to other topics in practical ethics, including debates regarding the moral permissibility of markets in gametes and surrogacy services (Radcliffe Richards 2008). The concerns we raise in this paper suggest that Radcliffe Richards' method of inquiry is ill suited to resolving the kinds of moral issues that emerge in practical contexts, not just the specific question of whether we should allow the sale of organs. Our arguments may also have further implications for practical ethics more generally. As we have described elsewhere (Koplin and Selgelid 2015; Koplin and Selgelid 2016), claims about the burden of proof have been made in relation to a wide range of topics in applied ethics. Although not all of our objections to Radcliffe Richards' method of inquiry

apply to all burden of proof arguments, our analysis nonetheless provides reason to be wary of some of the common ways that burden of proof arguments are deployed.

RADCLIFFE RICHARDS' METHOD OF INQUIRY

The Ethics of Transplants begins by noting that one of the most common ways of framing disputes in practical ethics— i.e., as a pro/con debate with two distinct sides—leaves much to be desired. According to Radcliffe Richards, discussions that are structured in this way typically amount to little more than “confused noise”:

Incompatible arguments get heaped up on each side as though they reinforced each other, replies to opponents mix up objections to the conclusion with objections to particular arguments in defence of the conclusion, and both sides slither between arguments about the problem itself and speculation about the other side's motives. The issues get lost in the psychology of warfare. (2012, 13)

The Ethics of Transplants purports to develop a more systematic approach to resolving disputes in practical ethics. Radcliffe Richards intends for this method of inquiry to provide the mechanism necessary to carefully assess the arguments on either side of a debate, identify the roots of any disagreement, and ultimately help us determine what course of action ought to be pursued.

Radcliffe Richards' method of inquiry begins by positing a *prima facie* case in favour of one policy. This *prima facie* case is used to ground a starting presumption (that this policy should be adopted) for the inquiry as a whole. The starting presumption is defeasible: it is not intended to settle the outcome of the debate, but rather to establish who must bear the burden of proof (or, more precisely, the burden of proving that their position is ultimately correct). In relation to organ markets, Radcliffe Richards points out that the current shortage of transplantable kidneys costs lives, and argues that because establishing a market in kidneys could plausibly help alleviate this shortage (and thereby save the lives of renal failure patients), there is a strong *prima facie* case for doing so. On this basis, Radcliffe Richards argues that opponents of paid kidney donation bear the burden of proving that the prohibition of kidney sales is justified, even though people suffer and die as a result of the current shortage (Radcliffe Richards 2012, 16). According to Radcliffe Richards, the inquiry should therefore proceed by considering each potential objection to organ markets

in light of the starting presumption in favour of them. Radcliffe Richards suggests the following template:

There is a presumption against any obstruction to organ procurement.
Prohibition of payment for organs cuts off a supply of kidneys for transplant.
But...

So prohibition should remain. (Radcliffe Richards 2012, 49)

Or more succinctly:

There is a presumption in favour of allowing payment for organs.
But...

So prohibition should remain. (Radcliffe Richards 2012, 70)

Radcliffe Richards distinguishes between two different kinds of objections that can be used in an attempt to meet the burden of proof. “In principle” arguments attempt to show that we should not implement a particular proposal because doing so would “directly contravene some existing, generally accepted principle” (Radcliffe Richards 2012, 94). The claim that kidney sellers are effectively coerced by poverty (and therefore do not give valid consent to the surgery) falls under this category. “In practice” arguments rely on empirical claims. They seek to establish that organ markets would, in practice, have harmful effects overall.¹ Claims that kidney sellers would be harmed by the transaction are central to the most widely discussed examples of “in practice” arguments against organ markets.

According to Radcliffe Richards’ method of inquiry, “in principle” and “in practice” arguments have very different requirements for argumentative success. She holds that “in principle” arguments against kidney sales can succeed only if they show that (allowing) the practice would directly contravene a legitimate, noncontroversial moral principle more powerful than the principle that we should save lives. “In practice” arguments against kidney sales, according to Radcliffe Richards, are

1. Richards (2012, 134–146) later describes these two kinds of arguments in terms of *constraining principles* that rule out certain policy options altogether, and *policy considerations* that help us choose between the remaining options.

able to satisfy the burden of proof only if the following three conditions are met: (1) claims that establishing organ markets would have negative consequences must be supported by positive evidence; (2) it must be shown that such harms would outweigh the benefits of organ markets; and (3) prohibition must be regarded as a last resort, to be enacted only if attempts to sufficiently reduce these harms have failed. Radcliffe Richards further argues that even if the harms of kidney selling can be shown to outweigh the benefits in a particular context, prohibition should always be regarded as provisional. We should continue to recognise that there is a presumption in favour of organ markets, and should therefore make ongoing efforts to find ways of minimising the harms of kidney selling (Radcliffe Richards 2012, 94–101).

The key elements of Radcliffe Richards' method of enquiry are as follows. A *prima facie* case is made in favour of a particular policy, placing the burden of proof on those who believe that this policy should be rejected. Objections to the starting presumption are then considered one by one. Unless the objection under consideration is able to meet specific requirements (with the exact criteria depending on whether the objection holds that the proposed policy would be wrong in principle or harmful in practice) this objection is rejected. The remaining objections are then examined in turn, with the burden of proof remaining on those arguing against the starting presumption (unless or until an objection is shown to be adequate). In applying this framework to the organ market debate, Radcliffe Richards concludes that none of the objections to organ markets that have been offered to date satisfy the burden of proof. The case for organ markets therefore succeeds, according to Radcliffe Richards, pending the development of any new objections that are able to meet the burden of proof.

This paper raises four objections to Radcliffe Richards' method of inquiry. We first argue that Radcliffe Richards' methodology leads to contradictory conclusions regarding who bears the burden of proof, and is therefore incoherent. Second, we argue that even if Radcliffe Richards' method of inquiry could be coherently applied, we cannot conclude that we ought to enact a particular proposal simply because opponents of this proposal have failed to satisfy the burden of proof (i.e. failed to conclusively show that the proposal should be rejected). Third, we point out that Radcliffe Richards' method of inquiry requires a higher standard of evidence from those criticizing the starting presumption than those defending it, and argue that this can unfairly bias the outcome of the inquiry. Fourth, we argue that because Radcliffe Richards' method of inquiry considers each individual objection in isolation from the

others, it can fail to recognise, and therefore fail to address, the cumulative force of distinct objections. We conclude that Radcliffe Richards' method of inquiry hinders our ability to answer the very question that it ought to help us resolve: What is there best reason to do, all things considered?

1. REDUCTIO AD ABSURDUM: RADCLIFFE RICHARDS' METHODOLOGY LEADS TO CONTRADICTORY CONCLUSIONS

As outlined above, Radcliffe Richards' method of inquiry begins by outlining a *prima facie* case in favour of a particular policy, which is used to establish the starting presumption that this policy ought to be adopted. A *prima facie* case for a proposal can be made by showing that there is at least one consideration which, on the face of it, weighs in favour of implementing this proposal. Under Radcliffe Richards' method of inquiry, positing a *prima facie* argument in favour of some proposal is sufficient to establish a policy presumption that this proposal should be adopted (i.e. a presumption that we ought to act to implement this proposal, pending a successful argument being made to the contrary).

In this section, we argue that *prima facie* arguments cannot establish who (if anyone) bears the burden of proof. In policy debates it is almost always possible to posit a *prima facie* case in favour of a range of different proposals. Accordingly, Radcliffe Richards' style of argument can be used to reach contradictory conclusions regarding what the starting presumption should be, and who must therefore bear the burden of proving that their opponents' proposal(s) should be rejected. Paradoxically, under Radcliffe Richards' method of inquiry participants on both sides of many debates—including debates over the moral permissibility of live donor organ markets—can legitimately claim that their argumentative opponents bear the burden of proof.

This contradiction can arise in two related ways. First, proposals which would promote one desirable goal would often also hinder a different desirable goal. It is therefore often possible to posit a *prima facie* case both for and against the same proposal. Second, it is often possible to achieve the same goal in a variety of ways. Accordingly, it will often be possible to posit *prima facie* arguments in favour of a range of proposals aimed at achieving the same goal.

PRIMA FACIE ARGUMENTS APPEALING TO DIFFERENT GOALS CAN OFTEN
BE MADE BOTH FOR AND AGAINST THE SAME PROPOSAL

In practical ethics, *prima facie* arguments appealing to different goals can be (and indeed, often are) advanced both for and against the same proposal. To name just a few examples, opposing claims about the burden of proof, based on appeal to different goals, have been made both for and against practicing capital punishment, genetically modifying crops, allowing human bioenhancement, and implementing policies aimed at reducing international poverty (Koplin and Selgelid 2015; Koplin and Selgelid 2016). The *prima facie* arguments offered in defence of these opposing claims may have nothing at all wrong with them, at least in the sense that they cannot be directly rebutted (qua, merely, *prima facie* arguments). Disagreements are instead often based, at least in part, on whether one moral duty overrides another and/or how much weight discussants believe should be attached to achieving different morally important goals in cases where these goals conflict. In such contexts a *prima facie* argument in favour of one proposal (based on one particular goal) cannot by itself create a presumption in favour of adopting it. We cannot simultaneously presume that we both should and should not adopt a particular proposal when *prima facie* arguments appealing to different goals lead to different conclusions. It is therefore arbitrary to lay the burden of proof on either side of the debate merely on the basis of a particular *prima facie* case (based on a particular goal) for a particular conclusion.

This general problem with burden of proof arguments is directly relevant to Radcliffe Richards' analysis of paid kidney donation. Radcliffe Richards begins from the position that because live donor kidney markets could plausibly alleviate the current kidney shortage, there is a presumption in favour of lifting the current prohibition on organs sales. While the possibility that we could save lives through establishing a market in organs can certainly ground a legitimate *prima facie* case in favour of organ markets, this does not show that there is a *presumption* in favour of establishing such markets, nor—conversely—that opponents of organ markets must bear the burden of proof. The problem is that opponents of organ markets are also able to posit a *prima facie* case for their position—one grounded in goals other than increasing the organ supply. For example, it could be argued that if we allow the sale of organs, people living in poverty might come to face social or legal pressures to sell their kidneys (Rippon 2014), which is *prima facie* undesirable. Alternatively, one could begin from the claim that it is *prima facie* wrong to offer people living in poverty

economic opportunities that they would not accept under just background conditions, as doing so risks normalising—and thereby reinforcing—these background injustices (see e.g. Malmqvist 2013a; Snyder 2013). In fact, a *prima facie* case against organ markets can be developed from most common objections to kidney sales, including, potentially, that kidney sellers are likely to be left worse off as a result of the transaction, that markets would breach Kantian moral constraints on treating others as mere means, that markets in organs wrongfully commodify the body, or that the practice of kidney selling might undermine social solidarity.²

Given that it is possible to establish a *prima facie* case both for and against organ markets, proponents and opponents of organ markets alike could adapt Radcliffe Richards' style of argument to establish a presumption in favour of their position and place the burden of proof on their opponents. Radcliffe Richards' method of inquiry would therefore require us to presume that we both should and should not open a market in organs, and to hold that both sides of the debate bear the burden of proof. But this is obviously absurd.

PRIMA FACIE ARGUMENTS BASED ON THE SAME APPEALED-TO GOAL CAN
OFTEN BE MADE BOTH FOR AND AGAINST THE SAME PROPOSAL

Radcliffe Richards grounds her *prima facie* case for organ markets (and therefore her starting presumption in favour of such markets) in the claim that increasing the organ supply is a morally important goal. We argued above that because prohibiting organ markets could promote other important goals, Radcliffe Richards' method of inquiry leads to contradictory conclusions regarding who bears the burden of proof. In this section we make the related point that Radcliffe Richards' method of inquiry can be used to make contradictory claims about the burden of proof even if the initially-appealed to goal is held constant. Where Radcliffe Richards argues that the moral importance of increasing the organ supply establishes a presumption in favour of organ markets, others could adapt Radcliffe Richards' style of argument to establish a *prima facie* case—and thus starting presumption—in favour of a different proposal aimed at the same goal, placing the burden of proof on those who favour organ markets.

The supply of transplantable organs could be increased in any number of ways,

2. The point being that all of these objections, implicitly if not explicitly, ultimately appeal to one goal or other.

many of which are entirely compatible with existing models of altruistic donation. Martin and White (2015) have recently surveyed a number of potential areas for improvement: reducing the discard rate of deceased donor organs by optimising allocation systems; increasing the use of organs from donors following circulatory death; removing financial *disincentives* to participate in living kidney donation (e.g. by compensating donors for financial expenses related to donation); expanding paired kidney donation programs; and intervening in the modifiable causes of end-stage renal disease (Martin and White 2015). Even if these measures are unable to fully resolve the kidney shortage, more radical proposals might. Following a suggestion from John Harris (1975), we could institute a “survival lottery”: a state policy of forcibly redistributing the organs of some individuals to save the lives of numerous others. If forced organ redistribution seems too extreme, we could pursue gentler alternatives. We could, for example, institute what Samuel Kerstein (2013, n. 192; 2014) has dubbed an “organ draft”: a system where citizens are randomly selected to donate a kidney to an anonymous stranger, but only after they are screened for physical and psychological suitability. More speculatively, technological developments may eventually provide entirely novel ways to meet the current kidney shortage. For example, advances in xenotransplantation and stem cell science may eventually provide ways of generating transplantable organs that eliminate the need for human donors altogether.

In short, there are many potentially promising means of improving the supply of transplantable organs—and *prima facie* cases (based on appeal to the same goal that is appealed to by Radcliffe Richards) could thus be made in favour of any of them. Opponents of organ markets in organs could therefore use Radcliffe Richards’ same style of argument to conclude that there should be a presumption (based on a *prima facie* case) in favour of different proposals aimed at increasing the organ supply, thereby placing the burden of proof on those who (like Radcliffe Richards) defend proposals different from theirs.

The same problem is raised by Radcliffe Richards’ claim that there is not only a presumption against *prohibiting* paid donation, but also a presumption against *restricting* the sale of organs (meaning that a minimally-regulated market in organs should, pending further argument, be presumed the best model of paid donation). Many proponents of organ markets have suggested that the trade should be regulated in various ways—for example, by limiting the market to a single self-governing geopolitical area, or by distributing organs according to need rather than ability to pay. Radcliffe Richards (2012, 146), however, argues that those who defend highly

regulated markets characteristically fail to recognise that “given the direction of the burden of proof, the whole [discussion] should work from the position of having to justify obstructions.” Radcliffe Richards (2003b; 2012) further claims that those who argue in favour of restricting the scope of the market have failed to meet the burden of proof necessary to justify these obstructions. Yet it is far from clear why the burden of proof should be thought to fall on proponents of highly regulated markets rather than proponents of minimally regulated ones. To begin with, it is not obvious that an open market would fulfil the initially appealed-to goal (i.e. to provide organ transplants to those who need them) more effectively than a highly regulated system. To the contrary, insofar as some patients might be unable to afford to buy a kidney, an open market seems less likely to meet the needs of renal failure patients than a monopsonistic market (e.g. a system in which a state agency is the sole purchaser of organs, and continues to distribute them according to existing criteria).³ At the same time, a minimally-regulated open market seems more likely to replicate the documented harms of existing black markets than a heavily regulated monopsonistic market. A *prima facie* argument could be made for any number of different systems of paid kidney donation, again leading to conflicting conclusions regarding who bears the burden of proof.

The upshot is that Radcliffe Richards’ method of inquiry leads to a contradiction even if the initially appealed-to goal is held constant. Radcliffe Richards appeals to the *prima facie* desirability of increasing the organ supply to defend a minimally-regulated market in organs. However, this style of argument cannot be legitimate, for it could be used to defend multiple conflicting proposals aimed at achieving this goal—in which case proponents of each proposal could claim that the burden of proof falls on those who would prefer a different approach.

To put the point in general terms, when there are multiple means of achieving a particular goal, it is not possible to establish who (if anyone) bears the burden of proof on the basis of a *prima facie* argument in favour of one specific proposal. Rather than beginning ethical inquiry with a presumption in favour of one particular strategy for achieving one particular goal, *we should instead ask how we can best achieve our original goal, taking other legitimate goals into account*. As this broader question has no *a priori* answer, it makes little sense to claim at the outset of the inquiry that one proposal is

3. This concern would be especially salient if, as one of us has argued elsewhere, the practice of kidney selling would likely undermine the practice of unpaid kidney donation (Koplin 2015)

presumptively correct, nor that those who would prefer an alternative approach must bear the burden of proof (and thus provide stronger arguments).

OTHER VERSIONS OF RADCLIFFE RICHARDS' STARTING PRESUMPTION

We have challenged the idea that the goal of increasing the organ supply entails a presumption in favour of paying kidney donors. However, it is worth noting that, midway through her discussion of kidney selling, Radcliffe Richards offers an additional reason for beginning with a presumption in favour of paid donation: because kidney sellers stand to gain financially from participating in the market (Radcliffe Richards 2012, pp.48-58). While the alternative means of increasing the organ supply discussed above may help alleviate the current organ shortage, they would not help realise these potential benefits to kidney sellers. Could this stronger argument for Radcliffe Richards' starting presumption—which combines the claims that it is *prima facie* desirable to increase the organ supply and that it is *prima facie* desirable to allow individuals to participate in mutually advantageous transactions—establish a presumption in favour of organ markets?

This second, more detailed, rendering of the starting presumption remains problematic. As we note below, Radcliffe Richards' assumption that sellers would benefit (all things considered) from the opportunity to sell a kidney is controversial; kidney sellers may face risks to their physical, psychosocial and long-term financial wellbeing that diminish or outweigh the benefits, particularly in the kind of minimally-regulated market Radcliffe Richards advocates. But even if we grant that sellers would typically benefit from the transaction, this merely points towards an additional *consideration* in favour of increasing the organ supply by means of organ markets. There may also be a range of considerations that weigh against paid living organ donation, as well as a range of considerations that weigh in favour of alternative solutions to the organ shortage; more than one proposal may have multiple reasons in favour of adopting it. A policy presumption in favour of increasing the organ supply *by means of establishing an organ market* therefore remains problematic even if it is grounded in both the idea that it is *prima facie* desirable to increase the organ supply and the idea that it is *prima facie* desirable to create opportunities for individuals to engage in mutually advantageous transactions.

2. FAILURE TO SATISFY THE BURDEN OF PROOF DOES NOT CONFIRM THE STARTING PRESUMPTION

As described above, Radcliffe Richards holds those who reject the starting presumption responsible for producing and substantiating objections, as well as showing that these objections are sufficiently compelling to satisfy the burden of proof. In relation to kidney selling, Radcliffe Richards claims that:

[T]he burden of proof [original emphasis] lies on anyone who wants to block or impede some particular means of getting organs. They need to show that even though people will suffer and die [original emphasis] as a result of that obstruction, it is nevertheless justified. (2012, 16)

Radcliffe Richards further argues that those who believe that establishing organ markets would have harmful consequences are responsible for demonstrating that such harms would in fact occur:

[A]nyone who wants to produce an argument of this kind needs to make the case positively [original emphasis]—not just presume it stands until the other side has produced a conclusive refutation of it. (2012, 97)

Regarding “in practice” arguments, Radcliffe Richards claims that opponents of organ markets must:

... assess the loss of benefit on the other side, and engage in moral debate about the relative merits of the two. This is an enormous undertaking in large-scale contexts, and anyone producing an argument of this form needs to demonstrate at least having taken the matter seriously. (Radcliffe Richards 2012, 98)

In this way, Radcliffe Richards’ method of inquiry requires those criticising the starting presumption to do more argumentative work than those defending it.⁴ Advocates of organ markets are not required to show that their position is justified, all things considered. Instead, opponents of organ markets bear the burden of proving

4. This is one of the reasons why it is problematic, as shown in the previous section, that both sides of a debate can claim that their opponents bear the burden of proof.

that the prohibition of kidney sales is justified, all things considered. If they fail to do so, then the starting presumption in favour of organ markets wins by default.

Yet if the aim of an inquiry is to determine what course of action we ought to take all things considered, as it presumably should be, it is unclear why the responsibility for generating conclusive arguments should fall exclusively on opponents of the starting presumption. The failure of those who reject a proposal to successfully make a case against it does not imply that there is no such case to be made. Even if opponents of organ markets have failed to make a conclusive case against organ markets, there is no guarantee that those opposed to markets in organs have thought of and/or voiced every relevant objection. Nor can we be sure that opponents of organ markets will successfully demonstrate that their arguments can satisfy the burden of proof, even if their arguments (collectively) are in fact able to do so; many may raise one or more discrete concerns without attempting this larger task. Indeed, much of the philosophical literature on the possible problems with a legal trade in organs explicitly brackets off the question of whether markets are desirable, all things considered (see e.g. Björkman 2006; Hughes 2006; Kerstein 2009; Kass 1992; Malmqvist 2013b; Malmqvist 2014; Phillips 2011; Radin 1996; Rivera-Lopez 2006; Sandel 2012; Satz 2010). We therefore cannot infer that there is no plausible case against markets in organs simply because (in Radcliffe Richards' view) opponents of organ markets have failed to produce one.

This is not to suggest that policymakers should abstain from implementing organ markets just in case someone comes up with a successful objection at a later point. Our claim, instead, is that neither proponents nor opponents of organ markets should bear the sole burden/responsibility of proving their conclusion. If the aim of inquiry is to determine whether a particular policy ought to be implemented, the best possible case in favor of the policy should be weighed against the best possible case against it. Under some circumstances, placing the burden of proof exclusively on one side of the debate (i.e., on opponents of organ markets) or the other (i.e., on proponents of organ markets) may prevent this from happening.

3. EXCESSIVELY HIGH STANDARDS OF EVIDENCE

In addition to placing the burden of proof on opponents of organ markets, Radcliffe Richards stipulates that any empirical objections to kidney selling must be supported by a very high standard of evidence. Radcliffe Richards argues that oppo-

nents of organ markets must provide positive evidence for any empirical claims about the harms of transplant commercialism:

[W]hen there is... a clear burden of proof, there needs to be positive evidence, not the mere possibility, that the predicted harms will occur and be great enough to outweigh the benefits. (2012, 105)

This requirement for positive evidence plays a key role in Radcliffe Richards' rejection of the claim that kidney sellers would experience significant harm. The literature on the experiences of kidney vendors in existing markets indicates that kidney sellers often experience a range of significant physical, mental, social and financial harms (Koplin 2014). One plausible explanation points towards the inherent differences between the practices of altruistic and paid donation: that kidney donors and kidney sellers are drawn from different populations, act on different motivations, and participate in practices with a vastly different social meaning. On this view, organ vendors face greater risks than kidney donors, and may continue to do so under a regulated system of paid kidney donation.

Radcliffe Richards, however, argues that any evidence that is drawn from existing black markets in organs fails to meet the standard of evidence necessary to overturn the presumption in favour of paid donation. Since most of the extant literature is drawn from contexts where the sale of organs occurs on the black market, it cannot (Radcliffe Richards claims) tell us what would happen if organ selling "were not illegal, and were subject to the kinds of standard that we automatically apply in other areas of law-governed life" (Radcliffe Richards 2012, 53–54). On Radcliffe Richards' view, we currently lack sufficient evidence to show that organ selling would necessarily be harmful in practice. Radcliffe Richards further argues that *any* research drawn from existing markets, no matter how carefully assessed, cannot meet the standard of evidence necessary to satisfy the burden of proof. To satisfy the burden of proof, according to Radcliffe Richards, we must first overturn the current prohibition of kidney sales, then track kidney sellers' long-term outcomes, and, if necessary, make attempts to regulate the market in order to minimise any harms that kidney sellers might experience. Radcliffe Richards argues that until such research has been conducted, we should reject any objections to organ markets based on potential harms of kidney selling, and continue to presume that kidney buyers and kidney sellers alike

could benefit from a properly conducted trade in organs (Radcliffe Richards 2012, 53–58).

Radcliffe Richards applies this same principle to *any* empirical claims about the possible harms of organ markets: that people living in poverty might be coerced to sell their kidneys, or face harmful pressures to do so; that paying living kidney donors might erode deceased donation; that markets would reinforce structural injustice or erode social solidarity; or that establishing even well-regulated market in the West might contribute to the growth of poorly regulated markets in the developing world. In discussing such objections, Radcliffe Richards makes the general point that any concerns about the consequences of organ markets need to be supported by “real evidence” drawn from experiments with legal, regulated markets (Radcliffe Richards 2012, 97–98). By setting these standards of evidence, Radcliffe Richards’ method of inquiry makes it impossible for opponents of organ markets to make a successful case against such markets without first overturning the prohibition on kidney sales, and thereby allowing the very thing (and potentially inflicting the very harms) they wish to prevent!

Under Radcliffe Richards’ method of inquiry, those who defend the starting presumption are not required to meet nearly as stringent standards of evidence as those who seek to challenge it. If proponents of organ markets wish to respond to “in practice” objections to organ markets, they need not show that the predicted consequences are unlikely to occur or even engage with the relevant evidence; it is sufficient to show that opponents of organ markets have failed to provide near-conclusive positive evidence for their claims. Those defending the starting presumption are therefore required to do less argumentative work than those who seek to challenge it.

Notably, in arguing that organ markets would increase the supply of transplantable organs (and are therefore presumptively desirable), Radcliffe Richards herself relies on an empirical claim about the effects of establishing a market in organs. The idea that a market would have a net positive effect on the organ supply is not uncontroversial, particularly in light of concerns that financial incentives would displace or erode unpaid donation (Koplin 2015; Sandel 2012). Yet in arguing that the *prima facie* desirability of increasing the organ supply creates a presumption in favour of organ markets, Radcliffe Richards does not offer (and does not appear to think she is required to provide) any evidence for the empirical claim that a market would in fact achieve this goal. Here, too, there is a significant discrepancy between the standards of evidence that proponents and opponents of organ markets are expected to meet.

It is unclear why such a high standard of evidence should be required for empirical claims about the harms of organ markets, particularly given that equally demanding standards of evidence are not required for empirical claims about the benefits of organ markets. While a persuasive rationale for applying strict standards of evidence has been developed for some contexts—most notably, legal decision-making—this rationale does not seem to be applicable to practical ethics generally, or the organ market debate specifically. In law, the requirement that prosecutors of criminal cases meet an especially high standard of evidence, by proving their case beyond a reasonable doubt, has less to do with discovering the truth of the matter than with avoiding a certain kind of error. A legal presumption of innocence does not help determine whether a defendant truly *is* innocent, but rather prioritises the avoidance of false attributions of guilt over the avoidance of false attributions of innocence (Hahn and Oaksford 2007; Dare and Kingsbury 2008; Lippke 2010; Walton 2014).

While the importance of the burden of proof (and the requirement that arguments meet a specific standard of evidence in order to satisfy this burden) may be clear in the context of criminal law, it is not so obvious in the context of applied ethics. In criminal law, the requirement for near-conclusive evidence helps achieve the goal of the inquiry: to uphold a presumption of innocence *unless we are certain* that the defendant is guilty. The same rationale does not seem to apply in practical ethics, a domain where the goal of the inquiry is to determine what course of action one has best reason to take. On the face of it, the most appropriate response to inconclusive evidence would be to acknowledge that the moral force of an “in practice” objection to organ markets depends, in part, on how persuasive the available evidence is. All else being equal, stronger evidence makes for a stronger argument—but unless the relevant empirical claim is wholly implausible, even potential harms can have some weight. Even a small risk that taking a certain action would end in disaster provides an important reason against doing so. If there is reason to believe that establishing a market in organs may plausibly have negative consequences, any uncertainty should presumably weaken, but not completely undercut, the strength of the argument.

There is one way that the rationale behind a strong standard of evidence in criminal law might be thought to be applicable to the organ market debate. In criminal law, a strong standard of evidence is required because it is considered worse to make one kind of error than another—i.e., that it would be worse to punish an innocent person than to let a guilty person go free. By analogy, one might think that it is worse to unnecessarily deny renal failure patients kidney transplants (thus resulting

in death) than to (e.g.) inflict even serious harms (though less serious than death) on kidney sellers. However, the correct allocation of burden of proof evidence standards is less straightforward in the context of public policy than criminal law. As we argue in the following section, when there are several relevant moral considerations, even arguments that are less than decisive can lend some degree of support to the cumulative case for or against a conclusion. In such contexts, it is not clear how (or if) we should define standards of evidence for individual arguments.

4. FAILURE TO CONSIDER CUMULATIVE ARGUMENTS

Radcliffe Richards' method of inquiry begins by building a *prima facie* case in favour of one proposal, then examining potential objections one by one. Each objection is considered in isolation from the others. An objection either succeeds in satisfying the burden of proof, or else is rejected outright. In this section, we argue that structuring moral inquiry in this way can fail to recognise (and therefore address) the *cumulative weight* of distinct objections. Objections that are not sufficiently powerful to overturn the starting presumption on their own may nonetheless have *some* moral force. It is at least possible that a combination of such arguments may be more powerful than the *prima facie* case in favour of the starting presumption, all things considered.

This is frequently true of banal examples of practical reasoning. In practical contexts, reaching a decision will often require us to consider the cumulative force of the various considerations at play. Consider, for example, the way that one might weigh various considerations when purchasing a new car. Radcliffe Richards' method of inquiry could be applied in the following way:

There is a presumption in favour of the safest car.
 The less safe alternative would be more affordable.
 But the lower price does not outweigh the decrease in safety.
 So the presumption in favour of the safest car remains.

There is a presumption in favour of the safest car.
 The less safe alternative would be more reliable.
 But this does not outweigh the decrease in safety.
 So the presumption in favour of the safest car remains.

The problem is that considering each relevant factor in isolation from the others does not tell us which option would be best, all things considered. One might reasonably prefer the safest car over one that is more affordable *or* one that is more reliable, but nonetheless prefer an alternative car that is both cheaper *and* more reliable. In the same way, policies that achieve one worthwhile goal while creating a host of other problems will not always be desirable overall. Radcliffe Richards' method of inquiry, however, is structured in a way that systematically fails to recognise the important possibility that the moral costs of a particular proposal might cumulatively outweigh the benefits, even if no single objection proves decisive.

It is worth noting that this is a general criticism of Radcliffe Richards' methodology as a whole, and that it does not necessarily apply to her analysis of organ markets in particular. If (as Radcliffe Richards claims) the existing objections to organ markets are so obviously flawed that they "could not have begun to persuade anyone who was really trying to work out the rights and wrongs of the issue from scratch" (Radcliffe Richards 2012, 109), there is no cumulative case against organ markets that needs to be considered. Yet even if Radcliffe Richards is correct (which we doubt) that none of the existing objections to organ markets have *any* moral force, it remains possible that some of the familiar objections to organ markets can be refined, and that new ones might be introduced. While we do not defend this claim here, we do not think that it is obviously implausible that the individual and social harms of organ markets could cumulatively outweigh the benefits, especially if they are weighed against alternative strategies for promoting organ donation. However, under Radcliffe Richards' method of inquiry, a cumulative series of arguments against organ markets—no matter how carefully made—may stand little chance of success. If each objection to organ markets is considered in isolation from the others, even a compelling cumulative argument may fail to overturn the starting presumption in favour of markets.⁵

CONCLUSION

In *The Ethics of Transplants*, as well as numerous earlier publications, Radcliffe Richards argues that the concept of the burden of proof should play a central role in the organ market debate specifically, and in practical ethics generally. Radcliffe

5. For an example of the kind of cumulative argumentation we here have in mind, see Selgelid (2008).

Richards claims that proponents of organ markets do not need to prove that such markets would be desirable, all things considered. The burden of proof instead falls on opponents of organ markets, who must show that the prohibition of kidney selling is justified despite the fact that our current policies are failing to provide enough kidneys to meet demand.

We have argued that Radcliffe Richards' method of inquiry is ill-suited to resolving the kinds of questions typical of practical ethics, including the question of whether (and/or under what conditions) we should allow the sale of transplantable organs. We agree that there is a legitimate *prima facie* argument that can be offered in favour of organ markets, and we agree that the possibility of paying kidney donors is therefore worthy of consideration. However, while we agree that this issue gives rise to important empirical and philosophical questions, we do not think that Radcliffe Richards' method of inquiry can help us resolve them. We have argued that Radcliffe Richards' methodological approach is incoherent/inconsistent and/or biases the outcome of the inquiry from the outset. We therefore need a different kind of analysis.

In our view, disputes over who should bear the burden of proof will often be unproductive. Rather than considering who should bear the burden of proving what, it is more important to recognise that policymakers have the responsibility—or the burden—of pursuing courses of action supported by the best reasons, all things considered. In order to meet this responsibility, policymakers (and, arguably, those engaged in practical deliberation more generally) ought to weigh the moral costs and benefits of the various proposals that are on offer, taking into account both the possible consequences of implementing these proposals and the likelihood that these consequences would eventuate. Radcliffe Richards, then, is correct that if policymakers are to maintain the prohibition of kidney sales, they ought to be able to show that this is an acceptable course of action, all things considered. However, this is equally true of proposals to establish a regulated market in organs, or to run pilot studies of the same. Whatever decision policymakers reach, they ought to be able to show that their decision is justified, all things considered.

Admittedly, rejecting the claim that there is a presumption in favour of organ markets does not settle the debate. It does, however, level the playing field. The idea that either side of the debate bears the burden of proof should therefore be abandoned, and the ethics of paid living kidney donation more carefully reconsidered.

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Not a Defence of Organ Markets

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ABSTRACT

Selgelid and Koplin's article 'Kidney Sales and the Burden of Proof' (K&S 2019) presents a series of detailed and persuasive arguments, intended to demolish my own arguments against the prohibition of organ selling. And perhaps they might succeed, if the case described by the authors were the one I actually make. However, notwithstanding the extensive quotations and the detailed explanations of the way I supposedly argue, this account of my position *comprehensively* mistakes both the conclusions I reach and the arguments I give for them.



I know that there are around many misconceptions about my views on this subject, but I have always hoped they could not survive a reading of what I had actually written. I have just—after a gap of many years—looked again at the two most recent of the texts Koplin and Selgelid refer to, and it goes without saying that I can see various things I could now do better; but I do still find these misinterpretations hard to understand. And since anyone with nothing to go on but this article would reasonably conclude that the original texts were not worth reading, I am grateful to the editors for the opportunity to try to set the record straight.

I presume not many readers would be interested in a detailed comparative commentary on the texts, showing where this account gets my intentions wrong. I shall try instead to explain how what I do mean—and what I think I say—diverges from what is said here, and then go on to a brief outline of what my arguments and conclusions really are. I hope this may also give some sense of why, for all the opposition I have encountered since I was first drawn into this debate, I persist in thinking that the work I have been doing is important not only for this topic but for analysis in practical ethics more generally.

1. MARKETS

The first, crucial, misunderstanding, which underpins and vitiates everything that is said in the article, appears in the abstract as well as throughout the text. I emphatically do *not* argue for “markets” in organs, let alone for minimally restricted markets (K&S 2019, p.44). I certainly do not suggest that payment of living donors is an inherently desirable means of acquiring organs, let alone that it is better than other means. In fact, I do not argue for any “policy” whatever. What I do is argue *against* the total prohibition of payment for transplant organs that was put in place pretty well instantaneously when the practice came to light, and has remained, for most people involved in policy making, a fixed principle ever since. That is a totally different matter.

There is more to say about this, and I shall clarify further later, but the idea that opposition to a principle of total prohibition amounts to an advocacy of markets, or any other positive policy, is a straightforward mistake—made, I presume, by the many people who seem to think I am an advocate of markets. To be against the total prohibition of anything—abortion, recreational drugs, homosexual practices or whatever—is not in itself to commit yourself to anything at all about what should happen in the absence of total prohibition. There are indefinitely many possibilities. And in fact I make this explicit (JRR 2012, p.57):

To argue that prohibition is unjustified is to leave wide open the question of what arrangements for regulation there should be if payment were not totally prohibited.

And later (JRR 2012, p.103)

The arguments...do not reach any positive conclusion about what policies and arrangements there should be about payment. The starting point of the enquiry is the absolutely minimal claim that there is a presumption against total prohibition, and the conclusion is the equally minimal one that this presumption still stands. This conclusion merely opens up rather than settles the question of what kinds of restrictions and regulations there should be—including, possibly, in some places and at some times, a total ban.

Opposition to total prohibition is compatible with recommending unregulated

markets, or state monopoly of buying, or sales so stringently controlled that hardly anyone could meet the required conditions, or even, for that matter, allowing transactions only on alternate Tuesdays.

In fact I have no fixed views about policy at all, and for what it is worth I find the idea of the sale of organs from living vendors as horrible as does everyone else. But what I do think is that there have been from the outset deep intellectual, *and therefore moral*, confusions at the root of this issue, and that these have corrupted the debate ever since. My concern is with these confusions. You can identify mistakes without making any claims at all about what should happen if the mistakes were removed, just as a mathematician might expose (crucial) miscalculations in the plans for building a bridge without making any claims about how bridges should be built. I am engaged not in policy making—for which I am totally unqualified—but in what Locke, if he had been writing in this context, might have called sweeping away the rubbish that lies in the way of policy discussions (Locke 2001, p.13). That is far from sufficient for resolving debates about policy, but it is an absolutely necessary contribution to them if they are to be morally serious.

2. BURDENS OF PROOF

This mistake seems to be the root of the second, which is a global misconception of what is going on in the burden of proof argument (JRR 2012, pp. 14-17). I am not sure about the details of where this goes wrong, because I am not entirely sure what the authors think I think. But the idea seems to be that I am engaged in two—way contest between a policy of prohibition and a policy of markets, and that I illegitimately think I can settle the case in favour of markets by arbitrarily claiming that the prohibition side bears the burden of proof, which its proponents cannot meet.

Whether or not I am right in thinking this is what they think I think, it is certainly not what I say. My question is simply whether a global policy of total prohibition, almost universally put in place as soon as the issue came to light, is justified. And the burden of proof argument is essentially that this policy is on the face of it seriously at odds with values and principles normally professed by *most advocates of prohibition themselves*. It is straightforwardly in conflict with the normal liberal principle that competent people should be allowed to judge their own best interests, and make mutually beneficial exchanges that harm no one else. It is also in striking tension with our general presumption that it is an intrinsically good thing to get organs to save

lives, and that it is an intrinsically bad thing to reduce the choices available to people who are already badly off, into which category come most potential vendors.¹

It was striking that when the organ selling issue first arose, these drawbacks of prohibition were not even mentioned. Nobody seemed to consider the matter of sending a would-be organ vendor back to the daughter whose life he could now not afford to save, or the would-be purchaser who would now go back to death or, if lucky, dialysis. Nobody commented on the dissonance of prohibition with our normal principles of liberty and autonomy. But to anyone who holds these values, there is a presumption—a *prima facie* case—against prohibition. This does not mean that prohibition is unjustified, but it does mean that—by the standards of anyone who holds these values, which as far as I know is everyone in the debate—it needs justification.

As I say in the book, this is “*purely* a methodological device for getting the argument into order” (JRR 2012, p.46). All it does is make clear the problem that needs to be addressed: a tension between the immediate impulse to ban organ sales and other values held by people involved in transplant debates, but which was apparently not noticed in the original rush to prohibition. It is certainly not proposed as a means for “resolving” (K&S 2019, p.37) debates about practical ethics in general (I only wish there were such a means), but just for making the structure of this particular problem clear. It does not “stack the odds” (K&S 2019, p.37) against anyone, because it amounts simply to a challenge to people who hold sets of beliefs that seem to be in tension to show that the two can be reconciled, or to give up one of them.

So the burden of proof challenge is essentially this. *If* you accept the general principle that people should be allowed to decide their own best interests, and that it is intrinsically good to save lives and increase the options for the badly off, *and* you want a general principle that curtails all these in the area of organ selling, you need a justification. And unless you are willing to give up the familiar background principles, which no one seems willing to do, the default is, *by your own standards*, that total prohibition is unjustified.

1. K&S write as though the starting point of the argument is only the second of these three: the inherent desirability of getting organs for transplant. This is because, although they mention a series of my articles in this area, the discussion in their article is entirely rooted in the book, and the book as a whole specifically deals with questions about the justifiability of obstacles placed in the way of various kinds of organ procurement. In all the earlier articles—with which K&S seem to be familiar—I mention all three of these issues; and in the earliest most of the stress is on the reduction of options of the would-be vendors. If I had anticipated that the discussion in the book would be treated as a general discussion about prohibition, rather than just as about its limiting organ procurement, I might have done it differently. However, it makes no difference to the substance of the argument.

From then on, the rest of the debate is about whether the proposed justifications work.

3. THE CRITICISMS

The detailed criticisms in the numbered sections of the article form its main substance.

I have nothing to say about the criticisms in the first section and its three subsections (K&S 2019, pp.41-46), since they are all directed at arguments I do not use, to conclusions I do not reach.

Criticism 2 (K&S 2019, pp.47-48) about starting presumptions, I don't follow. My only starting presumptions are the ones mentioned in the previous section. The only one mentioned in the book is the presumption in favour of getting life—saving organs (JRR 2012, p.45).

Criticisms 3 and 4, about excessively high standards of evidence (K&S 2019, pp.48-52) and failure to allow for the cumulative effect of arguments (K&S 2019, pp.52-53), will be addressed in the final section below.

It is however, worth mentioning a couple of points in the second section of criticism 1, (K&S 2019, p.42ff) about appealing to different goals, because these make misleading or false claims about what I say.

First, in asserting that the supply of transplantable organs can be increased in any number of ways, and listing several (K&S 2019, p.43ff), the text seems to imply that in my supposed enthusiasm for markets I somehow overlook these much nicer possibilities for organ procurement.

But I don't overlook them; in fact I specifically mention them (JRR 2012, pp.91-94). It is quite common for people arguing in defence of prohibition to say "there are better ways of getting organs!" as if this provided a justification, and I do discuss this claim. It is true that I don't go into the details of what these better ways might be, but this is not because I have any doubt that they exist. It is because, once again, I am discussing not the general question of what the best policies for organ procurement might be, but the specific claim that the possibility of their existence provides a justification for prohibition. From this point of view the details of better ways are irrelevant because, I argue, the line of argument does not work anyway. If these ways of getting organs could produce enough of them, there would be no point in prohibition because it would have nothing to do: nobody would want to buy, and nobody

would be able to sell. And conversely, if they did not produce enough, prohibition would still be preventing potential buyers and sellers from doing something that might benefit both.² The implication that I have overlooked these things again comes from the idea that the overall topic is how best to get organs, and that I am advocating markets in organs.

Then, very important, is the claim that I defend minimally regulated markets (K&S 2019, p.44). I do no such thing. There is here a reference to p146 of the book, and (looking at it again) I can see how a quick glance, from the standpoint of someone who already presumed that I was engaged in a defence of markets, might suggest that I was objecting to regulations as such. But this interpretation is possible only if the surrounding context is ignored. I do criticize certain proposals that have been put forward for organ markets, and I do claim that the particular restrictions some of them propose are not justified. But the context makes it clear that the criticism is not of restrictions as such; it is that these particular restrictions have not been justified. Criticizing the justifications of particular forms of restricted markets is very different from criticizing restrictions as such.

The section in which this appears is the final section of the chapter “Methodological Morals”, which is crucial for understanding the way the line of argument works as a whole. But apart from this totally mistaken, or at least seriously misleading, claim about what I say about restrictions, the article shows no indication at all of awareness that this chapter even exists. It is perhaps not surprising that it also shows no recognition of what my arguments and conclusions actually are.

I do say at the beginning of this chapter that anyone whose overriding concern is to get on with the practicalities of the problems can (temporarily) omit it and move on to the next. Perhaps I should have said explicitly that this exemption did not apply to anyone who was specifically setting out to discuss the methodology.

4. OVERVIEW

I have never had any interest in promoting organ sales. My interest in this subject has from the outset been the extraordinary state of public debate, and the potential for harm that lies in all the mistakes of reasoning that are habitually made. My purpose

2. A similar sounding, but quite different, argument is that allowing organ sales might in practice reduce procurement by these methods (JRR 2012, p.94ff). These tend to be conflated. The difference is discussed in the book.

in the various iterations of this subject has been not to keep repeating the same point, but to use the persisting interest in it to try to clarify various aspects of methodology of argument in practical ethics. This is a difficult and slow process—or at least I find it so—and it is still ongoing. In the book I made some advances on earlier attempts, especially in the chapter just mentioned. Here I will try to pull together various elements of the book more tightly than I managed there. I shall also explain what my practical conclusions really are—nothing to do with the establishment of markets in organs—and outline how the arguments to those conclusions are supposed to work. In doing so I shall reply to criticisms 3 and 4 in the article.

To do this I will make use of two distinctions made in the book. K&S mention these, but they seem to regard them as the same (K&S 2019, p.39ff, including footnote), and do not discuss the significance of either of them. Perhaps I can make things clearer here.

The distinctions are between:

Arguments in defence of prohibition that appeal to principle, and ones that depend on practicalities (principle vs. practicality defences)

Policies reached as the conclusions of arguments, and principles introduced as constraints at the beginning (constraints vs. policy debates.)

These need explaining. Take the second first.

When we debate policies in practical contexts, there are usually constraints we take for granted from the outset: ranges of possibilities that we refuse even to consider. Debates about policies for organ procurement have always taken place against established principles that were in place long before transplantation was possible: no murder, no kidnapping, a requirement of valid consent (JRR 2012, pp.32-35). But there could in principle be a quite different debate, about whether we should change these background rules. You might argue that since the organs from one person could save the lives of many, surgeons should be allowed to go out and kidnap people when they needed spare parts, we should modify existing rights to allow for it; or, perhaps, that criminals should be deprived of these rights, as has been said to happen in China (JRR 2012, pp.23-25). At the moment nobody seems to suggest that we should change our current background rights, but we can recognize it as a possible subject of debate, *distinct* from current policy debates that take place against the background of those

rights. And if we did change the background rights, subsequent policy debates would be different. This means that the question of what the background framework should be is logically prior to questions of policy within a framework. The two kinds of question are distinct.

What I am arguing is that the organ selling debate must be recognized as falling into two parts in the same way. First, there is the question of whether there should be a *principle* of prohibition, constraining all subsequent debates about organ procurement in practice. If there is a constraining principle, that settles prohibition as a practical conclusion. But if it is decided that there should be no such overriding, constraining principle, that leaves detailed questions of policy wide open. The question of whether prohibition should be established in particular circumstances would remain open, to be determined by whatever other moral and practical considerations did frame the debate. It might still be decided at particular times and in particular places that there should be a policy of prohibition, but not because it was entailed by a general principle. Both these debates are about prohibition, but they are quite different, and it is essential to distinguish them.³

Now the prohibition of organ selling happened as soon as the practice came to light, initially without argument or discussion, as if it should obviously be a constraint on future debates about organ procurement in the way the prohibition of murder and kidnapping are. And so it has remained ever since. The policies of the World Health Organization, and the Declaration of Istanbul (JRR 2012, p.83) are striking illustrations of this. Nearly all practical debates about organ procurement policies still take place against the background of prohibition as an established constraint. So the fundamental question about prohibition is not about details of practical policies, but about whether it is legitimate as a fixed starting position for all detailed debates about procurement policy.

This is where the burden of proof argument comes. Most people who immediately agreed on the principle of prohibition also normally accept our values of autonomy, life—saving and expanding options; but prohibition is in tension with all three, and so calls for justification. And indeed, the point is implicitly conceded by the fact that since the problem was raised in this form, there has been a never—ending stream of proposed justifications. The next stage of the debate is to assess these.

3. In the book (141) I argue that it is a mistake to consider the second kind of question as being about prohibition at all. That is a detail, but important.

And here is the relevance of distinction 1, above, between attempted justifications depending on principle and ones appealing to practice. They are usually not distinguished in the debate, but the difference is important, as will appear.

The first justifications offered for total prohibition were usually ones that appealed to existing principles—ones that are normally, already, accepted as constraints on what can be done. For instance, many took the form of claims that organ vendors could not satisfy the requirement for valid consent. If that had been true, it would have followed that organ selling could be ruled out directly, on the grounds that it could not comply with existing rules for valid consent, in spite of the *prima facie* case against prohibition. Prohibition would be directly entailed by the consent requirement. Many other proposed justifications have worked in similar ways, as appeals to existing standards.

There is obviously no space, here, to go into the details. But in sum, my claim about arguments of this kind (pp 58-94) is that they all fail on grounds of ordinary rationality. The conclusions do not follow from the premises, or the premises are in conflict with what their proponents would accept in other circumstances, or there is no coherent principle at all (105).

Now, to go back to K&S, these are presumably the arguments that their criticism 4 complains that I take separately, without considering their cumulative effect. And indeed I do, but this is because arguments of this kind *must* be discussed separately, simply because they are *arguments*: claims that the principle of prohibition follows directly from some already accepted principle. Each of these arguments is offered individually as a justification for prohibition, and if the argument fails to support the conclusion, it is simply useless. It is not like weak evidence, or small considerations in favour, which may indeed be used cumulatively. Arguments of this kind cannot be used in that way, because if they fail they have no weight at all. The idea that failed arguments have some value if taken together is what Antony Flew called the “ten leaky buckets fallacy” (Flew 1966, pp.62-63). If a bucket won’t hold water, you are not helped by having ten of them.

This is one reason why it is important to recognize the distinction between the arguments for prohibition depending on principle and the ones depending on practicalities. The second kind of argument, claiming that prohibition is best all things considered, does indeed depend on cumulative evidence about how different policies will turn out. And here, I presume, is where K&S would advance their claim that I demand unreasonably high standards of evidence: the ones I describe on pp94-101.

But here again is a point where it is essential to bear in mind the distinction just described between the two possible kinds of debate: about prohibition as a starting constraint, and about prohibition as a particular policy in the absence of such a constraint.

Suppose that there were no general principle against payment and you were considering particular policies for regulating payment for organs, say in a particular country at a particular time. There might be dozens of proposals on the table, including one of outright prohibition. In such a case of course cumulative evidence in favour of different possibilities would be relevant, and the same standards of evidence and argument would apply to them all. This is also a context in which it would be entirely appropriate to consider harms that *might* happen, and how likely they were to happen: the kinds of consideration listed on K&S 2019, p.42ff. These are the sorts of practical issue raised throughout the literature of opposition to prohibition—the kinds of issue I think I am being accused of disregarding—and of course they would all be important to consider in that situation.

But we are not in that situation, and these practical problems are not under current discussion. The question here is that of whether prohibition should be in place as a *matter of constraining principle*, as it is now, ruling out policies involving payment before detailed procurement policy discussions even begin. It is in this context that I claim that if evidence of this cumulative kind is used, an extremely high standard of proof should certainly should be required. A line of argument based on claims about a preponderance of harms over good would need to show that a constraining principle of no payment would do better than any possible arrangement that did allow for payment. Even if that were possible even in principle (which I doubt) it would certainly need overwhelmingly strong evidence to overcome the presumptions against prohibition.

So that is my answer to the challenge, in section 3, that I demand unreasonably high standards of evidence. If I had been defending a particular policy, such as markets, against others, in a situation with no background constraint of prohibition, those evidence requirements would indeed be far too high. But I am discussing the logically prior question of whether there should be a prohibition constraint at all, and that would certainly require exceedingly high standards of evidence. I find it incred-

ible that anyone recognizing the nature of the challenge could regard us as having anything like adequate evidence yet.⁴

Even if someone wants to dispute that, however, another thing is certain, which is that we certainly could have had no such evidence when prohibition was first introduced. If any of the arguments of *principle* had worked, deriving prohibition from existing principles such as the need for consent, that might have justified the immediacy of the prohibition response. We might have seen directly that there was a conflict between allowing organ selling and already entrenched principles. But these other attempts at justification of prohibition as a principle, depending on empirical evidence, could not possibly have provided a justification at the time. This means that the shift from arguments of principle to all—things—considered arguments amounts to an implicit admission that there was no justification when prohibition was originally, instantaneously, adopted.

And this leads to my second practical conclusion, which I will introduce here, as in the book, with a favourite quotation from Mill, anticipating modern moral psychology by 150 years:

So long as opinion is strongly rooted in the feelings, it gains rather than loses in stability by having a preponderating weight of argument against it. For if it were accepted as a result of argument, the refutation of the argument might shake the solidity of the conviction; but when it rests solely on feeling, the worse it fares in argumentative contest, the more persuaded adherents are that their feeling must have some deeper ground, which the arguments do not reach; and while the feeling remains, it is always throwing up fresh intrenchments of argument to repair any breach made in the old (see JRR 2012, p.108).

Everything about the organ selling debate exemplifies this. A strong feeling against organ selling leads to a determination to keep prohibition by one means or another, and when one argument fails another is immediately offered. The determi-

4. I see now that on pp 99-100 I make a concession to the possibility that arguments of a cumulative kind might just work. I think that was wrong. This is an occupational hazard of active work in the disentangling of arguments: I was still struggling with the details of the distinction between arguments within a particular framework and arguments about the framework when I had to hand the text over to the publisher. If I had worked on it a bit longer, and had time to go through the earlier chapter again, I would have seen that those arguments could not justify a principle of prohibition, and would be relevant to questions only of policy making that did not take place against the background of such a principle.

nation to find some way to justify prohibition has continued unabated since the issue first arose.

That being the case, there is the interesting question of what exactly the motivating feeling might be, and I speculate about it in the book. I suspect that it is something in the broad area of disgust, which has been endlessly rationalized in terms of the interests of the interests of the very people—the sick and the badly off—whose interests it potentially overrides. But whatever it is, it is objectively clear that it has systematically corrupted the arguments so far, and unless it is recognized for what it is, it will go on corrupting reasoning about policies – even if the current principled objections to payment for organs are theoretically withdrawn.

5. CONCLUSION

Of course K&S are right to say that we should be trying to find the best policies all things considered. But my contention is that the deep opposition to allowing paid donation systematically obstructs any serious attempt to do this, in two ways.

First, the general prohibition of payment for organ donation rules out of consideration, from the start, indefinitely many possible policies that might be best all things considered. Since prohibition as a principle is unjustified, as long as it remains it positively obstructs any genuine effort to find out what really would be best. It should be abandoned, and we should reopen the whole question from the point of view that should have been taken from the start: recognizing that prohibition prevents competent adults from doing what seems to them to be in their best interests, and concentrating instead on trying to work out how best to prevent the harms that obviously might arise as people try to take advantage of new possibilities open to them, while allowing as far as possible for the good.

Second, even if this were done, the evidence of the arguments so far, showing a determined resistance to allowing payment, means that the problem would still persist in a covert way. Questions about the all—things—considered merits of policies are immensely complicated and full of factual uncertainties, and hardly ever capable of definitive answers. In arguments of this kind people with strong intuitions about some subject will of course pick out elements of evidence that support what they already believe, and still fail to see what they might otherwise recognize as better by their own considered standards. There is probably no way of preventing this com-

pletely, but at least a full awareness of the problem would give us the best possible chance.

The organ selling context is of course not the only one in which issues like this arise, and where deep preconceptions hide flaws in arguments that would never be made in neutral contexts. It happens in other parts of the organ procurement debate, as well as indefinitely many other kinds of context. It is essential to look out for such mistakes. As I say on the cover of the book, if you die from mistakes in moral reasoning, you are as dead as if you die from mistakes in medicine.

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