THURSDAY, APRIL 20, 2006

Session 2: Organ Procurement and Transplantation

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CHAIRMAN PELLEGRINO: I think we will proceed, and let me begin with the first speaker for the next session, Dr. Richard Epstein, who is Director of the Law and Economics Program at the University of Chicago Law School.

DR. EPSTEIN, could you?

DR. EPSTEIN: How long do you want me to talk? How long?

CHAIRMAN PELLEGRINO: Half hour.

DR. EPSTEIN: Whatever you say.

CHAIRMAN PELLEGRINO: Well, I'll make it clear when it's over.

DR. EPSTEIN: Somehow or other I don't believe that we're —

CHAIRMAN PELLEGRINO: Did you jump to that conclusion?

DR. EPSTEIN: No, I think what I did is I understand this is a system with strong property rights in time, and what I will try to do is to respect it.

I should say in one sense I think having listened to many presentations on this subject, I'm proud to be an outsider to the so-called transplant community. I think I was brought here and I think rightly so to express a very deep and abiding skepticism. Everything that UNOS does, my modest policy recommendation is that the organization be forthwith abolished and we try to find some more sensible way in which to deal with organs, but rather than talk about it at that modest level, let me see if I can figure out a general way from an approach which involves a mixture of law, economics, and yes, even moral philosophy to explain what my views are and how one ought to think about this question.

I think the first thing that one ought to do in trying to deal with any normative question is to ask yourself a couple of very simple, descriptive questions, and those are the kinds of questions which ask you how do we explain what the current situation is.

And when we're dealing with the organ situation, there's only one fact that seems to stand out above all others, and that is the chronic and irreducible shortage of available organs, particularly kidneys.

We know what the death rates turn out to be. Everybody is an expert on that. The explanation is why does such a situation come to arise, and I think the simplest way to put the explanation is just take the most naive version of supply and demand, abstract out from every one of the special ethical and moral considerations that are associated with kidneys, have a negative sloping demand curve and a positive sloping supply curve, and then create a situation in which you place artificial restrictions on the price, in this case trying to restrict it to zero.

And the prediction is whether you're dealing with widgets or with organs, there will be systematic and massive shortages that will take place under these circumstances. Quite simply, you get very low supply at zero price and you get an immensely high demand, and the function of a price system in this kind of a universe is to try and figure out how you increase the supply, on the one hand, and reduce the demand, on the other, so that you get yourself into some sort of an equilibrium.

And the way in which people have tried to deal with this in many cases is to ignore this sort of blinding reality and to figure out other kinds of devices in which you could tweak things here or there in an effort to try and boost up the supply without trying to change the price, that is, to work on other kinds of terms. These could either be moral suasion, which easily turns into coercion. You could have public campaigns. You could have other kinds of disguised transactions like barter, which in fact clearly violate the UNOS guidelines, but everybody tolerates them because nobody wants to see more unnecessary deaths that take place.

There is a very elaborate understanding of the way in which when you have regulated prices people try to circumvent the rules, and so the first thing I would urge upon you when you start to think about this particular question is do not get yourselves into the illusion that there is something so unique and distinctive about the questions of organs or body parts or any form of transplantation that the general rules of economics do not apply with respect to this particular situation.

And that, I think, is the descriptive reality. The question then is how do we start doing this from a normative framework, and here the way in which Dr. Veatch put the point last time in the earlier session was, I think, rather misguided, but I think it represents the dominant thinking on this subject, which is to postulate that there is some kind of necessary and inevitable tension between the principles of the maximization of utility, on the one hand, and principles of justice and fairness, on the other, so that what we have to do is to constantly figure out ways in which we square the difference or overcome this thing. We're always working in a world of two values. We never know how much to weight them, and in the end what we do is we produce a giant form of stasis in which it turns out that the shortages cannot be eliminated.

Why is it that I think that this is wrong? Well, I think the deepest mistake that is made in talking about transplant as a conceptual matter is the regrettable confusion with compensation, on the one hand, and coercion, on the other. These two are treated almost as though they are synonymous, whereas in every other state of the world what happens is generally speaking compensation is, in fact, regarded as a way to make social improvements, on the one hand, without having a class of systematic losers, on the other.

If, in fact, you decide that every time you make a system with a compensation component in it that you've engaged in coercive activity, you make it impossible to have situations in which you can address imbalances that are created by natural circumstances through the imposition of this particular kind of transfer mechanism.

So let me, in order to make this a little bit clearer, sort of give one the definition that sort of an economic Kantian, to use that kind of a person, would take in the way in which you're trying to think about social welfare.

There are, in general, two kinds of definitions of social welfare that economists and, to a large extent, lawyers use. Let me mention them both here.

The first of these is something known as Pareto. A pareto efficient solution is essentially one where you cannot make any person better off without making some other person worse off. More importantly, in a world of Pareto thinking, what you're always trying to do is to create a set of situations in which you move all people from one state of the world to a superior state of the world, in which somebody is better off and nobody is worse off, and indeed, ideally for the most part you would actually like the gains to be pro rata across all individuals to the extent that you're using state coercion to achieve that result.

In many cases, the only way in which you can create Pareto improvements is to allow allocative changes to take place and then to give cash compensations to the losers to offset what's going on. Indeed, most people when they start to talk about Pareto improvements as a criterion of social welfare are somewhat uneasy about using it in practical circumstances because what happens is that the condition is so restrictive that if you create a world in which one person is left the tiniest bit worse off and everybody else is made largely better off, you're going to veto the transaction because you have not had a condition of universal improvement.

So what happens is in many cases economists who are worried about this resort to another definition involving not actual but hypothetical compensation, and that's called Calder-Hicks efficiency, and what this means is that you have a situation where you can move from one state of the world to another state of the world, where, in fact, the gains to the winners are so large that you're confident that if compensation could be made, the winners could pay it. The losers would be happy to receive it, and the winners would still be better off than they were before.

So that what you do is you have a large allocative gain measured by subjective satisfactions, and the possibility of transfer payments, which are not realized because of practical impediments which would allow you to get to some kind of a parity.

And what I would suggest to you is in thinking about this subject, the one thing that you have to beware of in this vaunted business of ethics is a definition of coercion which is so large that it swamps up all efforts to use compensation mechanism to allow for allocative improvements, on the one hand, and a fair distribution of gains, on the other.

Let me give you one illustration from what was said earlier today about how it is that you can mess this thing up if you're not careful. We heard about something known as an irresistible offer, and then we were told it's nice to get irresistible offers. They're called recruitments.

Why does it turn out that it is somehow or other a form of coercion in some cases and a form of benefits in the other? I have to say I don't get it, and let me explain to you why it is that when you put this in the context of wealth and poverty, what is often seen as a dangerous and insidious tendency is, in fact, nothing of the sort.

If, in fact, you accept, which is I think commonly the case, that there is diminishing margin of utility of wealth, that is, the richer you get, the less money counts for you, and you hold out a constant sum of money to a rich person and a poor person, the rational response will be if you're worried about your own utility, is that a poor person should be more willing to sell, *ceteris paribus*, than a rich person precisely because the money has a greater change in his life than it does with somebody else.

And so, therefore, what you are calling in effect a kind of coercive situation that one ought to deplore really should be understood as an effort of the state to clamp down on a set of opportunities which should, in fact, be encouraged. Unless you think that these individuals are incapable of making their own judgments, at which point you would not allow them to make donations anymore than you would allow them to make sales, what people are identifying as a problem is, in fact, a benefit, and the reason why they are making the mistake is it turns out that they get themselves into a terrible pickle under these circumstances because they assume that any kind of a transfer payment involved, not as an economist would think of it, as a way of equalizing gains, but rather turns out to be something insidious and to be blocked in itself.

And it's this fundamental moral framework which leads, I think, to the prohibitions that one sees under the UNOS setting and which creates such incredible dangers in the overall operation of the system.

Now, thus far I've been talking about exchanges and talking about this in a sense of trying to figure out how everybody can act in a self-interested fashion in order to improve their lot through a series of voluntary transactions.

There is, however, another problem here which I think is extremely important, and one has to figure out how to model that as well. And quite simply the question is: what does one make of the idea of altruism when it comes to dealing with various kinds of human transactions?

And looking at this, there is a great tendency in the world, I think, to dichotomize the concept, and what I mean by that is we start to divide the world into people who are egotists, on the one hand, and who are altruists, on the other, and what we're constantly worried about is the mixes between these two classes of individuals.

It seems to me that that's a mistake in the way in which we want to think about the world. Generally it's much more accurate not to think about two pure ideal contrasting types. You're usually going to be safer to think about the situation where there is a continuism of egotism amongst individuals. There are some people who will be extraordinarily selfish. There will be some people who will be quite generous. There will be lots of people who will be in between.

And so then the question is once you understand that, how do you try to model altruism in a way that does not make it into a radically discontinuous state from the various sorts of egotistical behavior, and in dealing with this in the particular paper that I wrote especially for this occasion, what I did is I gave a very simple model. For those of you who want it on the papers, I think on page 11, and you can look at the graph to see the way in which one ought to think about it, and here's the way you look at it.

Generally speaking, in a world of egotism, what you will assume is that nobody will make any transaction which results in a net cost to him or to herself. Those things are essentially not going to be acceptable because the theory of rational choice on a radically individualistic model is unless the expected utility after a transaction nettable risk is positive, you don't enter into it.

But what I think, in effect, is that that is clearly wrong. Even if you look at the current lamentable state with the shortages in question, if you use the rational choice model, you would come up with the observation that in a world that exists without any financial compensation, the number of anticipated transactions is zero. You would be basically at the origin. Nothing would start to move.

And yet it is incontrovertible that there is at least some positive response. So how do you try and model that without giving up all of the sensible stuff about equilibrium theory that results when you're talking about the usual equation of supply and demand?

And the simple response, I think, to this, which actually I have not been able to find anywhere in the literature, although I'm not a full-time professional economist, is to simply take the supply curve and make sure that it intercepts the X axis at a positive point, and then in effect have it continue to go down so that the supply will diminish until at the point where the cost to the individual donor is so large that even the altruist will start to give up under the transaction.

At this point, what you can then do with respect to the situation is to figure out what the equilibrium conditions are going to be on price, on the one hand, on quantity, on the other, even if you now make no other deviation from the usual neoclassical solutions.

That is, what you say, in effect, is that when you're dealing with altruists, if you give them a little bit of compensation, there will be a few more altruists who will come in there, and it turns out that when you cross the X axis, it's not as though the world is a discontinuous place. What will happen is that the altruism will continue to show its effect because the supply curve will be systematically lower and to the right than will the curve be if you've got pure egotism.

Once you do that and you assume a constancy with respect to demand and you then look at the equilibrium in the two cases, the following observation takes place. Altruism continues to have desirable social consequences. We don't know its size or its extent because in equilibrium you will find that there will be a larger number of organs or, indeed, any other good that will be transferred, and they will be transferred at a positive price, which is lower than would take place if, in fact, you had the pure egotistical equilibrium involved.

So that what happens is if you look at this, there is no particular reason to think if you have altruism that somehow or other the use of a market mechanism is going to destroy the operation in hand.

And here let me point out, which I think is a very important constant confusion and error which takes place in this literature which states Richard Titmuss, in his arguments, associated with blood supply, and the usual argument in these circumstances that we cannot allow cash transfer payments to take place because what it will do is it will crowd out the altruists.

Now, what you want to do is to look at those two curves and understand what is meant and not meant when you start to deal with the problem of crowding out under these circumstances. And here the same situation is if you just look at the standard conventional curve in which it turns out that the supply at zero is zero and watch that thing go up, every time you raise the price what you will do is increase the consumer surplus for those people who would supply it at a lower price.

So, in other words, in an ordinary market the moment you raise the price to ten, what you do is you eliminate all of those people who would have supplied the good at five, and you can argue that that's some kind of a crowding out because it increases cost, but the central feature in figuring out the social welfare consequences of this kind of rule is not the size of the transfer payment. It's the question of the total consumer and producer surplus that is generated by the transaction.

In other words, if you're thinking about the money going back and forth between parties, the right way to understand it is as follows. First you assume that the increased prices is a loss to the person who pays it, and then you assume that it is a gain to the person who receives it.

As a general matter, the utility of money is as a first approximation about the same in both hands. So you can't figure out that there's any gain or loss from the transfer.

On the other hand, what you do is you push yourself back into equilibrium, and then afterwards if you look at the equilibrium situation and work out the gains to consumers and producers, it will be higher if, in fact, the transfer payments are made than not.

And exactly the same argument applies when you're dealing with the other supply curve, which crosses the X axis at a positive point. You raise the price. The equilibrium will be different by virtue of the altruism, but there's no crowding out that's taking place. There is simply the payment of a transfer which doesn't have social consequences plus or minus one way or another, in exchange for which we get a vast increase in the total supply, which allows us to bring this particular market back into equilibrium.

So I think that the clear lesson that one learns from all of this stuff is as follows. There is, in fact, no particular reason to create any rules that are distinctive to altruists relative to people who are egotists. The same method of voluntary exchange will work whether you're dealing with one class of the population or with the other. It is an empirical question as to how much altruism there is, and the way in which you can understand that by looking at the graph is to just ask yourself: are you somebody who believes that everybody is selfish, at which point that gap is very narrow, or do you think in the general benevolence of humankind that the gap is very large?

Frankly, my dear, for the purposes of social policy, I don't give a damn which way it comes out because the same intellectual solution applies in both cases. You're going to get to equilibrium.

If you're asking me as a philosopher king which I'd rather have, generally speaking, I prefer a world with a little bit of altruism because you will get a lower price and a large supply of organs, and on balance, you will have some degree of reduction with respect to human suffering.

Now, when we take all of this stuff, let's just look in the framework of the current system at several of the problems that we're having to deal with to see how it is that we ought to think about them. Mr. Veatch earlier in the day started to talk about the question of how it is you start to deal with organ swaps and those cases when voluntary donations create the risk of incompatible transfers.

And so what happens is that taking the most dramatic situation, I'm A, my spouse is B, somebody else has got the reverse situation, and what we do is we want to flip them over to get two transactions instead of having none.

I think the first thing that one has to understand is that if anybody is serious about those wretched definitions of what counts as valuable considerations in the statute, this is an illegal transaction. You go back to Roman law. Transformations in barter have always been regarded as exchanges. They've always been treated as such under the law. The thought that this is not valuable consideration is simply a joke to anybody who's serious about what those words mean.

You cannot get a competent lawyer who will look at this stuff who would not say it's anything other

than an outright evasion of the statute, for which I say amen and thank you because it's about time that we started to find some ways to get around it.

The more difficult cases are, it turns out, where you have the O-A kinds of oppositions, where you get one person who, in effect, will make an A donation in exchange for having a spouse receive an O donation off the cadaver list.

And here what I want to say is, in effect, if you're thinking about this in terms of the general economic theory, you've got to understand, first of all, what the gains and the losses were. Mr. Veatch was wrong when he said, in effect, that this is systematically a loss with respect to everybody on the O list.

And the reason why that is incorrect is you cannot simply look at the fact that it pushes people down by virtue of somebody getting up. That is, indeed, a minus. But if you're doing the whole thing systematically, you also have to take into account that everybody regardless of their place on the list has a positive probability of procuring one of these matches, and the right comparison is to ask whether or not that chance minus the delay is better than stasis, and almost invariably if you're going to increase output, it would be very hard to find a set of systematic losers when, in fact, the rules are perfectly general.

In addition, it seems to me that this model is wrong also if you take his view of the Rawlsian veils of ignorance, which is very easy to misapply and was done so in that case. And here I think that there are a couple ways in which you could start to look at this thing, and the simplest of them is this.

Let us suppose, in effect, you're playing risk analysis. Then the first thing you have to do is to say we're doing it before anybody knows whether they're an O or an A donee. You just don't know, or an A or an O donor.

And at that particular circumstances, if you go behind the veil, the big mistake that Rawls made with respect to his own theory is to assume that people behind the veil of ignorance would be extremely risk adverse and would only worry about the condition of the worst off.

In fact, virtually everyone behind the veil of ignorance, even if they had some degree of risk aversion, would certainly think much more in terms of social utility in an expected value sense rather than in terms of this extreme situation.

Indeed, I would argue that the version of Rawlsianism which says that you look only at the guy at the bottom of the list is a highly immoral kind of conception, because what you're saying is that one single individual gets to determine and dictate the social preference for thousands of individuals.

So that what you really want to do from behind the veil of ignorance is that you know if you're an A guy you live, whereas otherwise you die. If you're an O guy, it turns out you've got this complicated set of choices and you're not sure whether you're bad or worse off.

Nobody in their right mind under those circumstances would ever assume that if they didn't know whether they were O or A, that their anticipated social value would be better off by blocking these kinds of transactions.

And the second point, again, that one wants to make about all of this, if you have any moral ambiguity associated with the status on the O list, what you do is you handle that through the payment of direct compensation, and so you try to figure out what the utility loss is, and you give cash, even taxing the As to give it to the Os so as to make it into an ex post Pareto improvement.

Your last thing that you want to do under these circumstances is to result in this freezing, and so it goes right back to the basic intellectual mistake that I talked about at the beginning. If this group is going to endorse a definition of coercion that includes compensation, you are bound to have lots of people meet needless deaths because you will never be able to get yourself into an optimal form of equilibrium.

Now, the last point that I want to make — and I have about five minutes, right? I'm pretty precise on this — is to talk about how we think about directed donations in other situations. If you recall, when I started at the beginning of the session what I said was the moment you get yourself a major imbalance in supply and demand by putting a maximum zero price on anything, you're going to find all sorts of people who are going to engage in various efforts of circumvention.

And so don't think about organs. What I suggest you do is that you just look at the headline on USA Today, and it said that higher gas prices lead to lower demand. I mean, the people do respond to incentives one way or another. It's going to happen here.

And if you block the obvious thing, which is paying price, people are going to go to more costly ways in an effort to bridge for themselves in more egotistical ways that markets would otherwise have in an effort to get to the head, and that gets you to directed donations in one way or another.

And so what happens is people will start to advertise, and they will start to put themselves up on the Web as individuals, and they'll have their children, right, and all of these piteous and horrible things. And I say God bless them. They're doing exactly the right thing, and anyone who wants to stop that is to my mind being quite monstrous from a moral point of view given the enormity of the harm that's

associated with this operation.

It turned out that Dr. Veatch said that this distorts the carefully allocated system that we have under UNOS, and my reaction is the quicker we blow it up the better we are going to be. There is nothing carefully wrought out about the UNOS situation. What they quickly discovered is taking into account subjective elements that mattered to everybody led to such a hopeless degree of disagreement amongst the various members of the committee that they didn't want to talk about those things.

So what they do is they reduce themselves to a series of largely useless formal criteria which would allow them to avoid the moral ambiguity of collective choice.

The great advantage that you get from directed donations is you don't have choices made by committees that are paralyzed by their fundamental moral disagreements. Every individual can look at every piece of subjective information they want and if it's their kidney, they can decide who gets it and why.

In fact, one of the odd things about this entire discussion on morality is the very clear standard natural law tradition on giving was a theory of imperfect obligation, which says that people can — under a duty to give it's not enforced by law, but they could pick whomever they want and for whatever reasons and give them whatever they want. Nobody else could ask the kind of question, and that's exactly what's going on with these directed donations.

What's the result going to be? Well, it turns out it's going to improve things in my mind fairly powerfully on the recipient's side. One of the things that you get with these wretched UNOS criteria is that you can't take the subjective stuff into account. You wait until people are so long in the tooth and so injured that the useful lives that you get when people get to the top of the queue are much shorter than they would have been if you could have gotten people in the middle.

When people are making individual judgments with their own organ and they take this stuff seriously, what you're going to do is substitute recipients which will have a longer life and a more useful life for people who have managed to endure to the top of the queue.

And if you then allow this thing to work, it will shorten the queues so even those people who remain on it will do somewhat better than before.

So it seems to me that what we really ought to do under these circumstances is to engage in a systematic effort to try and figure out how it is that we continue to use the Internet and similar devices to engage in a way in which we continue to expand the matching capability.

Or to put it in another way, what we have done, in effect, through the Internet is to figure out how it is that we reduce the cost of matching, which means, in effect, that we have a greater probability that the altruists will find themselves and to work in that direction.

And I'm going to be in favor of the situation with respect to anonymous donations, which become less anonymous when people got to know one another, and I think that perhaps the single most appalling, mindless, senseless, gratuitously cruel proposal that has been made is the one by Zink and her colleagues who said, "Well, we've got to ban all of this stuff because we want to force people back on the queue."

This poor woman does not know that it's not going to be a one-to-one ratio. In fact, probably if you knock out direct donations, 95 percent of the people will simply disappear at a guess.

And so what you're saying is that somebody's aesthetic view of a queue which has no particular moral validity, is so strong that you're willing to risk .95 lives every time you chase a donor away.

So let me, in effect, say and end in the following words. I think the organ debate has been utterly marred by a series of false forms of intellectual sophistication, ethical niceties, aesthetic reservations, moral intuitions. There are too many dead people out there.

I'm not quite sure whether you can solve it, but here is the last sort of example. I co-authored an article in which we were talking about this, which was rejected by JAMA. There were two referees' reports which showed the stupidity of that operation.

The first one says, you know, you start putting in all of these cash incentives. They're not going to make the slightest bit of difference. Elasticity turns out to be zero.

And the other referee's report said, God, if you put in these cash incentives, everybody will jump to supply these all.

It's what happens in this world. The problem about ethicists is either demand is perfectly elastic or perfectly inelastic. If you just think of things going up on a an angle, you will be so much more educated than beforehand, and the moment you do that, those graphs make sense and the referee's reports basically are the very strong recommendation for shutting down JAMA on all matters of social policy.

(Laughter.)

DR. EPSTEIN: The level of ignorance that is encapsulated in that operation is a public scandal, and frankly, my dear, I don't care.

Who wants to repeat this? It is a public disgrace that a journal of that eminence should be able to operate in that particular way.

Thank you.

(Applause.)

CHAIRMAN PELLEGRINO: Thank you very much, Professor Epstein. Very much grateful to you for observing the time limit as well as your provocative remarks.

Next we will hear from Dr. Delmonico. He is a Professor of Surgery at Harvard and someone who has to walk the walk and talk the talk every day, and we'll, therefore, hear from the bedside or I guess I would say the operating room bedside.

Dr. Delmonico.

DR. DELMONICO: Thank you, sir.

I think whatever slides that we're going to have, I think we'll have to just abandon all of that so that I can respond to what we've heard here this morning, and I'll be pleased to have those comments withheld until we're all finished.

I'm here to represent not just myself, but a number of organizations.

Can you hear that all right?

And those organizations would take umbrage and concern about what Mr. Epstein has just said. I'm the president of the United Network for Organ Sharing, and over the course of the last 20 years thousands and thousands of hours of volunteer effort by professional colleagues that Mr. Epstein associates with today and who are, in fact, leaders within that organization have given their time to make what can be an imperfect, but the best of what can be done at the moment in terms of organ distribution and allocation and public policy.

That public policy is not ignorant, and just because his paper from JAMA was rejected doesn't make all of that work in disrepute. Mr. Epstein wants to serve those who could have a longer and more useful life. That's, in fact, what his comment was just now. I would suggest that he analyze the list.

The list is growing by an overage population that have been inadequately served by preventive medical care, and it is not a matter of limitless organs, but it is a matter of what might have been care as it pertains to obesity and hypertension and atherosclerotic disease and Type II diabetes. It has not been administered, that is, fueling this list.

The question about what is the average age of the person dying on the list is apt because it's not the young person dying on the list. We're talking about, as he put the main issue here, about kidneys. More than half of the list now is the older age population, and the sector of that list that is less than 50 years of age is, in fact, stable and could be resolved by the unprecedented increases of organ donors that we've had in the country since 2003.

That list is growing because of inadequate medical care, and it's not just solvable by buying organs, and the organizations that we're here today to represent, and I'm going to read their statements as we get to that, we'll make that amply clear.

And Mr. Epstein is going to have a big obligation. He's going to have to overturn the National Organ Transplant Act, and why I'm here as well is to say I wish him best wishes to do all of that, but we have an expectation and we'll have a fight. We'll have a fight at Congress that has already been visited to say that that won't occur.

We're also here to ask of this august group not to overturn the NOTA, not to bring a regulated market of organ sales to this country and do so on behalf of international organizations and their testimony is before you this morning.

Now, we'll return to the regulated market in just a moment. I do wish to address some of the comments that Bob Veatch made. He would have us reconsider the definition of death. That is particularly disturbing to me as a transplant surgeon of 35 years, and mentioned that the current definition of brain death is incoherent and that a large group rejects the whole brain death definition.

I'm concerned about the representation of a large group because I know of no such large group, and I don't find the definition incoherent in this whole brain concept.

Whole brain means, for everyone in this room, not only the cerebrum, but the brain stem, and the brain stem controls our spontaneous respiration. What Professor Veatch was suggesting is that somebody could be dead and breathing spontaneously.

I don't think our society is going to accept that. They just plainly won't. Whether he's got maybe

1,000 individuals to speculate about this in Ohio or not, up to now the legal definition is such that if you're breathing spontaneously, you're still alive. There's something about breathing that is sort of indicative of life.

Now, let's just take that scenario of extending the whole brain death definition or making exceptions about that and then paying for organs. I would ask this Council to think about that scenario so that there's a 23 year old minority individual in the intensive care unit, and now the intensive care physician comes to the family and says there is an irreversible brain injury, but your family member, this 23 year old, is not brain dead. Any further treatment will be futile.

The current situation is that care can be withdrawn and it does occur, but think of where Professor Veatch was taking us. We're going to make an exception in this case. We're going to consider this an extended kind of death even though your family member is still breathing, and by the way we'll be pleased to pay you for this individual's organs.

Think of the skepticism of our society about the care of the individual to begin with. Now, just think about that.

I don't see that coming about as standard medical practice. I just don't, and I would hope that you would reject it.

Professor Veatch suggested theallocation problem is solved. It isn't, and what is the dilemma? The dilemma is the list that I talked to you about earlier and the expansion of that list from the older age population.

Now, the government is telling us, that is, the Division of Transplantation has brought before UNOS a prescription that we have to be contending with the net benefit of life achieved by a transplant. This utility factor now is very central in what our considerations are all about, and the life span of a kidney may far exceed what the life span of the individual that gets a kidney at 65 or 68 or 75 years of age.

So the allocation of kidneys now has to consider what net lifetime survival benefit might be realized by any given transplant.

The question that was raised about a young live person giving to an older age person is also apt because these ethical considerations when you're having donor and recipients before you are very much on one's mind as to what might be realized. How long will this older age individual live and what risk are we placing the younger person in giving such a kidney or part of their liver or a lobe of their lung?

So I would say to you that allocation isn't solved; that the net lifetime survival benefit is a priority before us; and we will have to consider that as we reckon with this expanding list of older age patients.

I want to make a comment about a solicitation. Professor Veatch said, well, this is a distortion of the allocation system. I don't think there was clear thinking there.

Solicitation for deceased donors, solicitation for deceased donors is fundamentally different than a solicitation that happens with matchingdonors.com for live donors. For deceased donors we, indeed, have an allocation system, and so if someone puts up a billboard in Texas as they did and overcomes what might be the most next medically urgent patient, that is a problem that I have with solicitation as from the UNOS system of allocation. And we can't allow that to occur.

And so last summer there were flyers, for example, in the New England area, New York area, from individuals soliciting for livers, and the conundrum we had was that this individual might be receiving a liver ahead of other individuals in the same intensive care unit who were of different gender, different ethnicity, and were ahead on the list. We had to sustain the list of allocation and not overcome that.

Solicitation for live donors is a different matter because it does not involve allocation. It becomes a directed donation, and there I can't regulate how relationships are formed. So the UNOS position on matchingdonors.com is a concern because of the finances that are entailed with it, but it is not something that UNOS is prepared to prohibit because I can't tell people how they may come to know of possibilities of live donors and regulate how they develop relationships.

The transplant centers bear an additional burden, however, of these donor recipient pairs that come along because they have to assess the motivation of the individual and the expectation of what will be derived as a result of their donation and what imposition that might be on the individual, the recipient's life thereafter.

And I hope soon to have a conference on this very topic to address those issues because there's an added burden of responsibility that comes along when these donor-recipient pairs come forward to a transplant center.

On the solicitation piece, however, the UNOS position is that we can be of help. We will not object or prohibit a solicitation, but at the same time, it isn't for UNOS or the government to say, "Uncle Sam wants you." This is, indeed, to be the vehicle of the solicitation because there are risks, and those

risks have to be accepted in an altruistic way.

The risks of live donation for kidney are, yes, unusual, perhaps less than three percent of some kind of complication occurring, but as it pertains to other organs, the liver and the lung and now there are live donor pancreas and intestinal transplants. They carry a higher complication rate. The liver transplants, the death is one in 300. The complication rate is anywhere from 35 to 60 percent.

If you're going to pay for one organ, why is it that you wouldn't be paying for another?

Now, on a pair donation where Mr. Epstein feels that it is, indeed, valuable consideration, there are other attorneys in the country who don't think so. So it becomes a legal dispute, and the basis of that is to say that a paired donation remains a gift.

And it is a gift if it's done altruistically and simultaneously.

The valuable consideration clause was put in the 1984 National Organ Transplant Act principally to prohibit the sale of organs, and that is what has been sustained. Pair donations that are done with the acceptance of transplant centers, now many, New England and a variety of places, Baltimore, et cetera, they're done in the context that this is not a violation of the National Organ Transplant Act. No one has some notion that that's what is occurring here.

And the concept about valuable consideration is not taken that this kidney is anything else but a gift. I have some trouble with the way that Professor Veatch presented his proposal about voluntary paired donation because I think it's flawed by the premises of suggesting that one could have the better HLA match as an incentive to enter into the system that he proposes.

If you don't have an HLA identical match, any other HLA match today is not consequential to successful outcome, and so that, in fact, is what has propelled living unrelated donation in this country, about 30 percent of them. About 30 percent of them are, indeed unrelated genetically, that is, they're either spouses or friends or anonymous.

I personally am very supportive of the paired donation system. I hope that UNOS will develop such a system, and there are these existing already as I mentioned in certain locations of the country. But I don't anticipate that the strategy that Professor Veatch proposed to you where an O donor having the knowledge of a recipient before them would enter into a system in which there is a lack of awareness about how the transplants would be occurring, et cetera, and that they would go into that system.

Just from a transplant surgeon perspective, the logistics of these paired donations are complicated. They're like a space shot, and when they're done, we even have to call the corresponding hospitals to know that the anesthesia is being administered simultaneously.

And the work-up, well, all right. Thank you, Mr. Epstein. I was very reserved in holding any remarks. So if you would be kind enough to do the same, sir.

It is, indeed, altruistic because they're giving simultaneously, but what I'm suggesting to you is it's complex, and it is not something to be taken, well, with an expectation that an O donor knowing the recipient will be readily available to come into such a system and have the expectation that they'll be happy to do so, I would suggest to you not.

Now, in my remaining time I wish to deal with what Mr. Epstein said: let's not have any illusion that economics don't apply to body parts. Well, he's just flat wrong. I don't think it's an illusion, and I'm going to suggest to him by the statements of the following organizations that he'll have to contend with as Congress takes up this matter and as you do as well.

The United Network for Organ Sharing is opposed to a regulated market for organ sales, and the first, if I may bring to your attention of statements that is before you is from UNOS, and there is a series of them now before you as well.

And so that it is not Francis Delmonico per se who is before you, but all of these organizations knew of this presentation before this Commission and wanted to officially register its concern about any concept of a regulated market in this country and the impact that that would have on this country and transplantation practice and the practice of transplantation around the world.

So I would ask that you take these statements with some consequence because they've been derived for bringing to your attention the profound opposition of these organizations to a regulated market of organ sales.

So UNOS rejects it as a means of increasing the supply for organs for transplantation as not being ethically justifiable. It would diminish the respect of persons resulting from making body parts a commodity. That's no illusion.

And the concern is captured in the ethical principle of respect for persons. There would be a diminished voluntariness of consent. This concern is expressed by the principle of autonomy. There would be a diminished emotional support for families. This concern is expressed by the principle of visits (phonetic).

Now, I want you to also know that we're not opposed for removing financial disincentives from an individual to be an organ donor. So to the extent of a reimbursement of expenses, I don't see that as a problem, and I think it is something that could be certainly considered as proper, and so it says so.

The American Society of Transplant Surgeons is opposed to a regulated market of organ sales. That's not an illusion. That's a reality that Congress and I would hope that this Commission would contend with. The surgeons are opposed to a regulated market of organ sales.

And Dr. Cosimi wrote to me to bring to your attention this opposition, and it was restated recently. "The ASTS believes that living and deceased organ donation represent altruistic acts. The ASTS has consistently been strongly opposed to the buying, selling, and brokering of organs for transplantation in agreement with the NOTA, which makes it illegal to exchange organs for valuable consideration. The ASTS reaffirms that position."

The next is a statement from the National Catholic Bioethics Center and Jon Haas. "Pope John Paul has stated acts of selfless love are most solemn celebrations of the gospel of life and a particularly praiseworthy example of such love is the donation of organs performed in an ethically acceptable manner with a view to offering a chance of health and even life itself to the sick who sometimes have no other hope.

"The National Catholic Bioethics Center strongly opposes any regulated market of organ sales. Such a scheme would harm the charitable nature of organ donation and substitute in its place a market for buying and selling of human body parts. It is not a matter of just economics. We can't equate widgets with organs just from an economic perspective.

"The human body is not a commodity, but a gift which God has given us limited stewardship." Now, I'm quoting this. "Furthermore, to turn the body and its organs into commodities places at great risk those who are poor and vulnerable by making them susceptible to the allure of monetary gain from a surgical procedure which in no way benefits them medically."

If we had a regulated market in this country, what would be to stop immigrants from wanting to come to this country to sell their organs? How would that be justified?

And what impact would that have on the rest of the world in which illegal black market practices are occurring? The World Health Organization is very concerned about that, and they have a statement as well here. I've been with them in Manila and Karachi and South Africa. One of the slides that I would have put up, but I can show you if you would just refer to page 1, it talks about kidney trafficking.

A woman in Brooklyn who goes to South Africa and the vendor comes from Brazil and it is brokered by an individual from the Middle East.

A regulated market in this country would set that kind of practice into acceptability.

The National Kidney Foundation opposes a regulated market for organ sales, and the statement is there before you. Congress has appropriately refused to revise, nor to initiate demonstration projects for payment of organs. Many Americans are not inclined to be organ donors because of their distrust of health care system, including the concern that the care of a potential donor might be compromised if their donor status were know. Financial incentives would intensify this mistrust.

Think about altering the definition of death and saying, "Well, no, we'll pay you for some organs." What of that mistrust of the medical system? And the National Kidney Foundation calls attention to that.

My good friend Dan Brock at the Harvard Medical School, Department of Ethics, there's a statement there before you as well, and he concludes by saying that if a system would unavoidably lead to a serious exploitation of such donors either here or abroad, that would be a strong reason against implementing a regulated market.

The Transplantation Society internationally is opposed to a regulated market of organ sales. An endorsement — now, I'm reading verbatim, and the statement is there before you sent by Katherine Wood to me just a few weeks ago, again, in preparation for this presentation, to bring all of these testimonies to this Commission's attention about its opposition to such a regulated market.

"An endorsement of such a plan by the President's Council on Bioethics would send a profound and troubling message to the United States Congress and the transplant community worldwide. As you are aware, the transplant community is now confronted by transplantation tourism that has an international dimension. The transplant tourist often obtains a kidney in countries in which poor individuals are exploited for their body parts."

And parenthetically, there is a picture very well depicting what this is all about. If you go to the second slide set, you'll see a picture of vendors in Karachi and the other one, that from the Philippines.

"It is the exploitation of the poor that makes the practice unethical. Regulating the practice by a government program does not make the practice ethical. If the United States were to adopt a

regulated market by the United States government, many challenging issues would emerge. Could the U.S. government justify limiting the sale of such kidneys by its citizenry? Would not such a regulated market for the sale of organs drive individuals from other countries to come to the United States to sell his or her kidney?

"The Transplantation Society urges the President's Council on Bioethics to affirm an unequivocal opposition of transplant tourism and a regulated market of organ sales."

With that I'll conclude, and I thank you for your attention and that I might be here. Thank you very much.

(Applause.)

CHAIRMAN PELLEGRINO: Thank you very much, Dr. Delmonico, and thank both of the speakers for being very respectful of the time of the council.

You have now an opportunity to ask questions of either of the speakers, and I might ask that you direct your questions to a specific speaker if possible.

Dr. Foster, I have you first on the list.

DR. FOSTER: Thank you.

Dr. Delmonico, it seems to me that it's a curious thing from you and all of the societies that you just quoted, that you simply want to stay in the status quo. That is to say, why is there no concern for the fact that the poor cannot get transplants?

There are other things I don't even want to talk about. In Dallas, let's say with a kidney it takes five years, and you go 20 miles across the way to Fort Worth. The UNOS system gives you a kidney. You can get a kidney, you know, in two years, or you can go to Jacksonville, Florida, and you can do things.

But I'm very concerned about your unconcern for the poor, that they cannot get transplantation done. Why is that?

I mean I've got people dying right now in Parkland Hospital that nobody will transplant because they don't have any insurance or money. Why? Why do you want to keep a system intact that doesn't work?

I mean, it works for the people who have money or have insurance, but it doesn't work, and it seems to me all I heard you say is that this is a good and wonderful system that we should not in any way change.

DR. DELMONICO: Dr. Foster, may I respond to that?

DR. FOSTER: Sure. That's really what I want. What I want to know is why today in the United States — at least I don't know how it is in Boston, and so forth — but certainly in Dallas —

DR. DELMONICO: I'm very familiar with what's happening in Dallas, Dr. Foster.

DR. FOSTER: Well, please. I mean, I'd just like to hear why we want to stay with a system, and my transplant surgeons don't feel like you have cited. I don't know.

DR. DELMONICO: I know them very well. I know (Dr. Goran B. G.) Klintmalml at Baylor very well. I haven't suggested that all of these organizations are opposed to regulated market, that that justifies the system as it currently exists. There are disparities about access to the list that are unequivocally there, and I don't accept that at all.

So I don't want you to make a conclusion, Dr. Foster, that opposition to regulated market is to say that the system as it currently exists as to the disparities in getting on the list or the disparities once on the list about transplant is to be solved by a regulated market or that the regulated market is then a conclusion that an opposition to that is a sanction of the current system.

It isn't. So I'm concerned just as you are about the poor that might be in any location of this country and their insurance issues that don't get them to the list or that they're identified as having renal failure, don't get them through the system that enables them to have the proper medical care that someone else might have.

Those inequities do exist. The opposition that you just heard from all these organizations is not about that at all, and UNOS is very much concerned about these disparities. That's why the meld system was introduced. That's why the changes in lung allocation were introduced. That's why we are trying to change the allocation system of kidneys in this country.

So please, if I can say to you, the opposition about a regulated market is not justifying or saying that the current system is perfect or that what we want to stay with.

DR. EPSTEIN: Can I answer?

DR. FOSTER: Well, let me just say one. I would presume as a transplant surgeon that you would like to have enough organs, whether it's young or old or poor or so, that there would be an opportunity for this treatment which has been wonderful to be available, but you still haven't answered the question to me, how you want to solve that.

You say, well, we're concerned about that. Where does this concern go? I mean it doesn't help me for you to say that you're concerned about it. What I want to know is what are we going to do about it. Are we going to — I mean, what's your answer to this?

DR. DELMONICO: My answer is that it doesn't resolve by a regulated market, number one.

Number two, okay, so what positively? We can increase deceased donation as we're doing. We can increase live donation as has occurred. We can do the types of paired donations, et cetera, but I think what you're as well going to have to wrestle with is that the reason why the list is expanding as it is is because of poor preventive medical care, and it, in fact, is the case, and it's the poor person that doesn't get that care that is becoming a major aspect of that list.

So I would ask you, sir, what are you going to do about heading it off at the pass, as it were, instead of just coming down to the very end of it and say, "Well, un-huh, now we need organs."

Why is it that you wouldn't be considering better preventive medical care as a component of obviating the need for the organ to begin with?

CHAIRMAN PELLEGRINO: I want to point out I have —

DR. FOSTER: I can answer that, and I spent my life as a diabetologist, and if you want to read some of the stuff, you know, that's know. I mean, New York City, somebody facetiously said that uncontrolled diabetes is causing more deaths than 9/11 or anything else. So I mean, I don't want to get into that.

But if we've got a curable form of diabetes right now, but obesity is not curable, I mean, practically.

It sounds like we're getting in an argument. I don't want to do that, but I also don't want to give the answer that we can do better preventive medicine is the problem. I mean, that's not going to get more organs to transplant if we live longer and solve those problems.

DR. EPSTEIN: We have spent how much on Medicare and Medicaid? Most of what we do by way of incremental expenditure is badly managed. More money in that direction may have some good, but that doesn't mean that you don't move on every front simultaneously.

And Dr. Delmonico's proposal is to the extent that he maintains the ban on regulated markets a proposal to rearrange deck chairs on the Titanic. The shortage is ignored, and the only viable method to stop it is shut off.

The arguments from black markets and overseas prove exactly what one says with every other commodity. You make something into a black market commodity, and you get shady operators and corrupt transactions. You bring it above board and much of that coercion and intrigue disappears.

So what you're seeing is an artifact of restrictions. It's just why the slum lords of New York are miserable and skuzzy, because of rent control, and in Chicago it's just not an issue because you've got the market clearing prices.

Nobody says a widget is the same as an organ. What you're saying is the same forces of supply and demand work, but the individual transactions in market will obviously take place in different ways, just the way all other commodities are sold in different ways.

You don't sell jewelry in the same fashion that you sell pears, even though both of them are widgets. So it's just a complete misconception.

And the other point is all of the recitations, I have never read a more pathetic document than what Mr. Graham submitted to you as justifications for endless numbers of lives. I urge everybody to read it and ask whether or not they could think of 1,000 counter-examples.

If this is the best you can do, it's politics and muscle. It is ethically barren.

CHAIRMAN PELLEGRINO: Dr. Delmonico, a brief reply because we have seven members of the Council who wish to comment.

DR. DELMONICO: Well, I'll only say this. It isn't me speaking here. It's all of these organizations, and you'll have to reckon with it.

DR. EPSTEIN: Well, no. If you want to play tough guy, you're winning.

CHAIRMAN PELLEGRINO: I would ask that each person ask a question and you will have the opportunity to respond, and then we'll try to keep the debate down for the moment. I want to get the Council members in. The meeting is for their information first.

The next question I have is from Dr. Meilaender.

DR. MEILAENDER: Professor Epstein, I would like to think about ethics a little bit with you if we could. You said a couple of things right at the very start of your presentation. You said there's only one fact, sort of the chronic and irreducible shortage of organs, and you said, and then it has been sort of involved in the ongoing conversation — I don't have the exact quote — but something like there's nothing so unusual about organs that the laws of economics don't apply.

And I am so benighted as to doubt that in a way and would just like to think about it a little bit with you, and one way of thinking about the world is that — and I mean, I think there was a time when lots of people thought this way — is that there are human beings and there are resources, and you have to think about how to distribute resources to human beings. And we can get into ethical arguments about what the best way to do that is.

Another way is to think about human beings or at least parts of human beings as themselves resources to be distributed, but that's a fundamental shift. That's a different way of thinking about the world, and it raises all sorts of troubling questions about where exactly we locate the person whose body is a resource now to be distributed.

And if we're going to make that shift and think about the person as a collection of resources that are commodities to be distributed, we might want to worry about those things.

So what it seems to me we need, I mean, there is a starting point presupposed in what you said, and the starting point is that it's better to think about the world in such a way that human beings or at least the parts of them become resources that some other human being kind of floating around above the body distributes. And I don't find that a terribly persuasive way myself to think about human beings, but I'd just like to hear what you would say about that.

And I'd just like to see if you think more my way, then you'd never say that the only fact is that there's a chronic and irreducible shortage. That might be one fact, but there would be some other facts about how to think about human beings that would be important.

How would you take that up?

DR. EPSTEIN: Look. I mean, there is a very long tradition which starts to argue that the life of a human being shall not be treated as a commodity. My favorite example of that is Section 6 of the Clayton Act in which they announced that provision, and the net effect of that was to organize labor cartels and agricultural cartels.

That is, lots of times when people start using the theories that commodification is terrible, they don't mean that they can't sell it. It means that they can monopolize it.

And so you have to be aware of the fact that there's a lot of abuse that is associated with that section, and then even in its proper sense, virtually every serious economist when they talk about resources divides them into two halves, human, on the one hand, and natural, on the other. And —

DR. MEILAENDER: But you wanted to talk ethics.

DR. EPSTEIN: I am talking — yeah, I'll talk ethics.

DR. MEILAENDER: For the moment I don't care what every serious economist says.

DR. EPSTEIN: Because I mean what happens is these are resources, the human beings, and in fact, an ethicist is committed to treating them as resources when they're willing to allow a donation to take place. That is a transfer of resources from one individual.

It may well be something which is done without consideration in the technical sense of the word, but it is certainly a transfer, and the justification for it is that the gain to the recipient translates into overall social welfare.

The problem about ethics is it is basically an empty set unless it can transform itself into some kind of a social welfare function. To give you an illustration, the Kantian proposition that every individual shall always be treated as an end and never be treated as a means, right? If you take it —

DR. MEILAENDER: That's not the proposition.

DR. EPSTEIN: Well, that's —

DR. MEILAENDER: It's that every individual shall be treated not as a means only

DR. EPSTEIN: Not as a means only. Okay, but I mean, if they're not, then if they can be treated as a means partially, it has got to be in the service of some end. And what the purpose of ethics is to figure out how you allocate these resources in which to get the greatest maximum of good for all people inside the system.

Given scarcity, that translates back into an economic problem, and if you start looking at the Kantian propositions, it begins the prohibition against exchange because of the fear of exploitation, and that

becomes so utterly restrictive because you can't have labor contracts at that point for so-called ethical reasons.

Well, once you allow voluntary exchange of labor, then you are always worried about the specter of whether it's slavery, and you're going to ban those.

I mean, one of the things that was wrong with Dr. Veatch's presentation is he somehow assumed that the organ problem was worse because we don't have a strong minimum wage law. But I can't think of a single ethical argument in favor of a minimum wage law, and I wonder what would it be.

CHAIRMAN PELLEGRINO: May I intervene for a moment? We do have a limited time, and I realize the problems between you are difficult to resolve in a brief time, and I understand you. We have a question of civility and courtesy for the rest of the members of the Council.

This is no reflection on anybody's involvement in the discussion. I understand that, but I would like to call on Peter Lawler and we might come back if there's time to pick up your discussion.

Peter.

DR. LAWLER: I first want to congratulate both presenters for very effective and illuminating presentations.

I'm against the trafficking in live organs and even somewhat creeped out, as I said before, by the donation of live vital organs, and so I guess I generally agree with Dr. Delmonico, but I also as usual am very moved by Dr. Foster.

And so let me give you the two hardest questions I would have. Number one, given that there should be no market in live organs, what do you think about the market he suggested in dead organs or some payment for dead organs?

And number two, this transplant tourism thing from the point of view of justice. Now, let's say the U.N. can't stop it, which is likely since they can't stop anything.

(Laughter.)

DR. LAWLER: Then prosperous Americans will avail themselves with increasing frequency with transplant tourism. It will be shady, but not that shady, and they'll generally get good results, and so the only people who don't have access to live organs unjustly procured will be people who can't afford to engage in transplant tourism.

And I don't think we'll ever be tough enough to say to the transplant tourist, "If you come back here we're not giving you any medical treatment because your kidney was unjustly acquired."

So from the Rawlsian, left wing justice point of view, aren't we entering into a very unjust phase insofar as kidneys will be available to everyone except people who can't afford to engage in transplant tourism?

CHAIRMAN PELLEGRINO: Dr. Delmonico, Dr. Epstein.

DR. DELMONICO: Transplant tourism, the WHO is going to do something about it. The South African situation was shut down, and the physicians there were arrested. I think that's the fact. Whether you agree with it or not, the premise was that the U.N. can't stop it, sir.

Americans are going to China currently and buying organs from executed prisoners. Six thousand or so organs last year were derived from executed prisoners in China. The President of China is in town here today. The Vice Minister of China within the last ten days said that they will have a legal ban on transplant tourism.

The WHO plans to go to the variety of markets that exist, black market that exists, and try at least within the legal framework to exercise what is the illegality and make that practice stop. I have no illusions about that. However, the fact that the poor might not be able to avail themselves of transplant tourism in my view is not a reason to sustain transplant tourism. The fundamental problem is the transplant tourist situation, and that's what we have to address to try and prohibit.

No marketing for dead organs. If you finance marketing for dead organs, how can you then justifiably say we won't finance marketing for live organs? I don't know how to reconcile it.

Where there is no risk and you finance marketing for dead organs, why wouldn't we then want to finance marketing for live organs? And the problem is we don't wish to commodify life organs just as another economic tool. That's the fundamental difference.

You either accept that or you don't, and once you say then that you're going to provide that kind of a market, why would we stop at a kidney? Why can't we sell a lobe of the lung? Why can't we sell a part of the liver? And why is it then that the same justifications that are applied apply to other kinds of social behaviors that are not accepted, for example, prostitution?

CHAIRMAN PELLEGRINO: Professor Epstein.

DR. EPSTEIN: Globalization is an effort at circumvention. World trade is, in general, a good thing. The problem with the circumvention in these cases is that if you're starting to take organs off of dead people, these are not voluntary markets when they're sold by the Chinese government.

And what one wants to do is to open up legitimate sources of supply so that these perversions don't take place, and let me be very clear. I did not agree with Dr. Veatch when he wants to kill people off prematurely in order to increase the supply of organs. I think it's a market of desperation and sadness that people actually think you're going to have to sell diseased organs under these circumstances or give them away.

I would rather sell a healthy organ than give away a terrible organ. So I think what you're doing is you're looking at the cure and treating it as part of the disease, which only in the organ transplant community is compensation coercion.

And if you keep with that equivalence you will basically think that coercion has to be avoided, and it's worth paying the price of 20 deaths a day to avoid it.

I think it's crazy. I mean, to somebody who is in the outside looking at this community I can't even understand it, and just to go back to the ethical point, I do not know of a coherent nonconsequentialist ethics in a identical form. This is the answer to the earlier question, which essentially is sustainable, and that's why in the end you can't do ethics unless you know some economics.

DR. DELMONICO: Dr. Foster, I just want to say this. I have the same sense of the problem of the death on the list. Trust me. I can only want to assure you in a personal way that I do. I'm just unable to solve it by regulated market. I can't go there.

CHAIRMAN PELLEGRINO: Professor Eberstadt.

DR. EBERSTADT: I have two questions for you, Dr. Delmonico, and one question for you, Professor Epstein.

DR. EPSTEIN: I'll wait my turn.

DR. EBERSTADT: Okay. Dr. Delmonico, you've associated yourself with the ASTS statement here. The first one says that payments would exploit the most vulnerable members of our society.

Well, I note the phraseology "most vulnerable" is an ordinal rather than a cardinal ranking of people. There would presumably be a most vulnerable member of the Forbes 400 list. Is there any level of general affluence and education at which the concerns about the most vulnerable member of society would abate or reduce?

Secondly, the statement here talks about arbitrarily assigning a market value to body parts. With enough technological innovation, I can imagine, and already science fiction writes have imagined, the notion of manufactured body parts and body replacements.

What if, obviously a hypothetical, science fiction-like future world; what if Microsoft were able to manufacture body parts and the richest man in the world, Bill Gates, were to sell them? Would the reservations about the sales of human-like bioparts still obtain that you mention here?

Professor Epstein, you've made the economic argument about the benefits of a national market for exchange of organs. Would you extend that argument to an international sale, international commerce in body parts?

DR. DELMONICO: In the regulated market in Iran, it's the poor person that sells himself, and when Bob said that, well, they've cleared out the list, we have no idea about the list. I actually know the data, the prevalence about renal failure in Iran, we never know who might have gotten to the list.

The vulnerable is that it's the poor person. It's the expectation that it will be the poor person that wants to sell the kidney and/or other organs because of their need to do so to generate those funds.

I don't have an expectation that it will be other than a poor person because that's what the experience has been internationally.

The arbitrary market piece, when the Pennsylvania folks had the $300, you know, that they were going to assign for funeral expenses, et cetera, you could imagine that every state might take up such legislation. The problem of all of that was, and we wrestled with this in the American Society of Transplant Surgeons. What money would you assign in Pennsylvania or in Texas?

Once you start seeing that we're going to provide some funding for this, where is it that you declare Uncle Joe in Texas is worth 5,000, but you may not be able to get that in Pennsylvania?

And by every state it becomes somewhat arbitrary as to what those monies might be. Within those legislatures, I don't believe that we would be able to make a consistent determination of that monetary amount, and it becomes arbitrarily applied. What is the value of Uncle Joe in Texas for his liver, and does that differ because Uncle Joe is 65 or 25?

That's, in fact, what goes on in these market situations. There's a difference in gender and in ethnicity and by age as to what the market brings for those organs.

DR. EPSTEIN: As well there should be. I find it remarkable. The problem of valuation and multiple prices exist in any market which is regulated. If you want to find out how to do it, you just simply remove all of the state mandates for stipulated sums, and you will get an equilibrium because you'll eliminate the arbitrage.

So what you're talking about is the value problem that comes under regulation, not the value problem that comes under markets. The question is how do you determine values in markets. Remember what Hobbes says. It's the appetite of the contracting parties that do it. There is not a single commodity or non-commodity that works in any difference.

Even in such delicate barter relationship as marriage, it is ultimately subjective and joint, and all we can do is observe the manifestations of consent and infer from that mutual gain.

And what we can also observe is when there is no compensation possible, we will get chronic shortages, and all of the talk and all of the "trust me's" in the world will not change that simple brute fact.

CHAIRMAN PELLEGRINO: Dr. Kass.

DR. KASS: I have two questions, one to lean on each of you from the side of the other having listened to the presentation.

Professor Epstein starts preoccupied with the fact that people are dying because of shortages, and that's the only fact that is relevant at least for this argument to start with.

But Dr. Delmonico in the written paper and also here is concerned about the deformations of medical practice if the vendor relation enters, referring to just a sentence or two in the article, repeatedly speaking about the indignity of the commodification or trading of body parts, quite apart from the question of the coercion of the poor, which is a separate matter.

And he raises the question of whether or not this push for an ever more expensive and ever more morally challenging technical solution isn't in a way the wrong system error, that there's another system error having to do with prevention of the disease.

I want to know from Professor Epstein whether any of these concerns matter and, in particular, the question of whether or not there really is something different about the human body and its parts such that there really is a loss when you begin to trade it around, and that's made even worse when you begin to trade it around for money.

On the other side, to Dr. Delmonico, Professor Epstein's one brute fact that he harps on at least in our present situation, and Dr. Foster has underlined it, demands some kind of response. Let's say for the sake of the argument that all of these little partial solutions of Robert Veatch amount to nothing and don't give us the additional organs that you need.

Are you in a way prepared to say for the time being those concerns for the change in medical practice, those concerns for human dignity and its violation are sufficient so that I'm willing to say as a transplant surgeon it's a sad necessity in the situation. These people are going to die.

Let's assume that he's right, that the only way really to produce the kind of equilibrium of supply and demand is through markets, and that we face that fact. Are we then prepared to say that's just tough?

DR. EPSTEIN: Well, I'll answer my question first. I always think dignitary stuff is nice, but it's the kind of thing which you could handle in 1,000 subsidiary ways after you open up the set of markets.

You know, you watch funeral homes, right? They're markets. They manage to work for exchange, and yet it's strange. In a funeral parlor nobody treats the dead body as though it's a piece of meat to be thrown down by a hook,right? Because it turns out the conditions and the demands and the empathetic situations of the suppliers and the buyers in these markets require a different kind of delicacy and tact.

My own view is that if you allowed this thing to come up, the way you will handle the dignity thing is by the development of customs and trade and exchange and cooperation and by a selection of people who will be part of that particular community who have the greatest level of empathy.

So I think all sorts of forms of selection in there will do it, but to say that the diminished respect for organs resulting from making body parts a commodity, if that is a cost, and I don't think it is particular, it's trivial compared to the value of a life.

What would you monetize it at, $1,000 and a life at six million? I mean, maybe you're right that there's something there, but it's a cost, and it's certainly not a cost that gets near enough to amount to the prohibition.

You yourself said, and I think it's right, if you really thought this (made the poor more vulnerable),

put a minimum taxable figure of $5,000 or $50,000 in income before you can sell.

My view about that is I would rather not see the restriction in there because now you're telling the poor there are fewer opportunities than anybody else, abut I'd certainly rather have that than the total thing.

I mean, make it very clear. On a day-to-day basis, anything that loosens this up I will accept, including all of these so-called altruistic bartered exchange that are done simultaneously because, of course, there are sales, on the one hand, between parties, and there are voluntary gifts within the family, and they're both.

CHAIRMAN PELLEGRINO: Dr. Kass?

DR. KASS: I will pose a question and let him not answer.

CHAIRMAN PELLEGRINO: Okay.

DR. KASS: For all of us, what about the Will Gaylin? It was Jonas actually who thought about it first. These lives could be saved, but only really by perfusing corpses and letting them be farms for these parts, by consent with payment, with or without payment.

Do we want to live in a society in which that is the way in which these lives are saved or are those minuscule considerations compared to these lives?

I think there's something in your economistic account here that just is left out, that's missing, that's of great importance.

CHAIRMAN PELLEGRINO: Dr. Delmonico.

DR. DELMONICO: Well, you go ahead.

DR. EPSTEIN: Oh, sure. I mean, Leon, the point is you could always invent a case such that you would allow for voluntary consent that nobody would want to do. The real question is, all right, open up this possibility and see if it's a ghoulish as you say. How many people take advantage of it?

And the answer is you won't find many people taking advantage of it if you could find other forms of exchange that have a higher level of tolerance both for themselves and for others.

There has got to be a selection effect within markets. Just because you make exchanges legal doesn't mean that anyone is going to want to do each and every one of them, and there is a second social filter. The argument here about norms and respect comes in in the way in which markets operate. They're very heavily norm defined, and so forth, and I'm not being economistic and saying that everybody has to be a brute rational choice guy.

I'm saying if you open up exchange, all of these subjective and very important elements can be brought into the occasion as they are right now in delicate human arrangements with psychiatric care, with sexual dysfunction, with funeral arrangements. They do not look to me in exactly the same way as you an A&P, and so as long as we see that these voluntary differentiations take place, I don't think the argument from dignity gets you within 1,000 miles of a ban.

DR. DELMONICO: It's because I don't run an A&P. It's because I don't want to place a monetary value on life that we take this opposition, and it's not me. It's all of these organizations that I just brought before you. And that becomes really the profound difference.

Dr. Foster, I can't do it. I cannot come to myself personally as a surgeon-physician, and I respect the fact that you are as well and that you care about the patients as well, and I do respect that.

But what I can't do, nor can these organizations; I can't be a part of placing some payment, monetary value on somebody's life to say that's what it's worth in some economic terms, and it goes to the core of what this is all about, and it's that difference that separates us.

CHAIRMAN PELLEGRINO: Do you want a point?

DR. FOSTER: I think that, yes, you're answering Leon's question. You say, yes, it's sad that all of these people have to die without organs, but the price is too high. So your answer to him is yes, our societies believe that the cost is too high and that the cost of their lives is not high enough to overcome it.

DR. DELMONICO: Well, it's not a matter of cost that it's too high because if we had an accurate source of organs I'd be the first one on it around the clock to get it done.

DR. EPSTEIN: Well, Dr. Delmonico, there's a big difference between saying I can't do it and no one else in the world can do it because I have these strong instincts. What you're doing is you're coercing other people through these organizations, and if the vote is 99 to one, then 99 surgeons don't do it and the other guy does it. You have to explain not to your aesthetic preference for staying out of the purchase market; you have to explain why you're going to stop other people from doing it. I have —

DR. DELMONICO: It's not me who's stopping anything. It's —

DR. EPSTEIN: What do you mean it's not you? You and your organizations are making transactions illegal because you don't like them.

CHAIRMAN PELLEGRINO: Especially, **DR. EPSTEIN**, as a lawyer I'm sure you're familiar with the role of the judge.

(Laughter.)

CHAIRMAN PELLEGRINO: I must ask for a little more restraint in the responses and a little more brevity. We have five more members of the Council who wish to comment, and so I'm going to take the Chairman's prerogative and extend the time of discussion. I don't mean in any way to restrain anyone's comment, but they can be made with more brevity and perhaps more on the point.

Thank you.

Now I would like to call on Dr. George.

PROF. GEORGE: Thank you, Dr. Pellegrino.

I do have a question for both presenters, but before asking that question, I'd like to ask Professor Epstein just to clarify the sense in which he's using a particular term, and it was the term "consequentialism" in response to Professor Meilaender.

I certainly agree with you that someone who wants to do ethics seriously, at least in quite a wide domain, has to know some economics, and indeed, a good deal of economics.

And I also agree with you that someone who believes that, as I do and you do, has got to reject a purely deontological approach to ethics.

But then you said any coherent sensible ethics will, therefore, have to be consequential. Now, maybe there's a sense in which that's right, and if so, I want to give you an opportunity to clarify the record on that.

When folks like Professor Meilaender and Professor Gomez-Lobo and someone like me hears the term "consequentialism," of course, we think of Elizabeth Anscombe's definition of it when she introduced the term into ethics, which essentially boils down to the view that in situations of morally significant choice, one ought to choose that option which promises overall and in the long run to conduce to the net best proportion of benefit to harm, and there's your master principle of ethics.

Now, I think you can believe all of the things that I said that I share with you in believing, rejecting a purely deontological ethics thinking that economics is something we really have to understand to do ethics right today, and across a wide domain without embracing consequentialism in that sense. All you have to believe is that consequences do matter.

But, of course, that's going to be true for lots of people who reject consequentialism in the sense that Anscombe meant the term in the sense that she rejected it in favor of saying an Aristotelian approach that does take consequences seriously, but doesn't embrace any such master principle of ethics that would involve aggregating goods, commensurating them and making decisions in the way that I described.

DR. EPSTEIN: And that's why the economics is important. The Anscombe definition of consequential is — talks about a family. It ignores the distributional and separation is concerned. If you go back to the Pareto definitions or the Calder-Hicks definitions, each of them in effect treat each individual's occupying unique space and the utility function so that the gains to one can simply not be taken into account, ignoring the losses to another. There is either a question of explicit compensation required or, in effect, a hypothetical compensation so that this is not sort of an aggregate blob utilitarian thought, which often I think leads to immense troubles, utility monsters and so forth.

For example, you get one person who says, "I care so much. Trust me," that the harm to everybody else doesn't matter because I have this over large psyche.

The distributional constraints in a Pareto system, I think, answer the Anscombe situation, and every Kantian proposition is consistent with a preference for Pareto over Calder-Hicks efficiency.

PROF. GEORGE: Well, the point that I'm pressing is that the options aren't the kind of utilitarianism you describe and reject, on the one hand, or Kantianism, on the other hand. But I wonder if the alternative that you've proposed is the only possible alternative.

I mean, how would you view, for example, a straightforward contemporary Aristotelianism?

DR. EPSTEIN: The same problem that you always have with all of these things. There's too much essentialism in it and ideas that there's sort of abstract categories into which people fall from which they cannot go out, too much of a fixed definition of what has to go in or not into the individual subjective utility functions. I would leave that thing completely unbounded. So I would not sort of

limit it to certain kinds of taste as opposed to other forms of taste though that you have.

But even if you want to stay within this Aristotelian framework, the hard problem for political ethics is the question of when we use state coercion to justify the limitation of choice of other individuals, and the Aristotelian position has always been very hard because it's essential to say that certain transactions which have mutual gain for the parties can be trumped because of some kind of philosophical objection.

I regard that class of cases as empty, and since I do that is why the "trust me, I wouldn't do this kind of surgery" is fine for Dr. Delmonico not to take those patients, but it's not fine for him to tell Dr. Foster he can't find another physician to do a paid transplant.

And the fundamental point is the difference between coercion and voluntary participation, and the Aristotelian theory is very weak on policing and working that distinction.

PROF. GEORGE: But you take that view, obviously, based on a set of philosophical assumptions that you make which themselves can't be justified in economic terms, for example.

DR. EPSTEIN: No, I don't think that's right at all. What I do is I assume that each individual is autonomous. I assume that they have well ordered preference functions one way or another. I don't do it from economics. I get that thing justified from knowing if they are bid or trying to —

PROF. GEORGE: Those are straightforwardly philosophical assumptions.

DR. EPSTEIN: Well, and you try to learn them by learning as much as you can about both the moral — not the moral — the emotional and cognitive basis of human behavior, and I actually don't do it —

PROF. GEORGE: Well, you —

DR. EPSTEIN: — you don't do it from the economics. What you do is you derive the economics from the socio-biology, and at that point I think the fundamentalism question that you answer as to where people come is not economic postulates.

In fact, what is very persuasive in the normative discourse, as you well know, is that it turns out that people who have the pure rational choice model are the one set of people who can't trade because they don't have any empathy.

PROF. GEORGE: So your understanding of this thing is that you don't have a philosophical view competing with a philosophical view. You've got a philosophical view competing with a socio-biological account which has no philosophical presuppositions in need of defense?

DR. EPSTEIN: Well, it's an effort to try and solve the condition of what the definition of naturalism is, how it is that we take these people as given. The old philosophical inquiry is take human beings as they are and put institutions as they ought to be, and this is an effort to find out what they are in order to create the institutions.

And the normative criteria is a consequentialist one with a distributional constraint, and I think once you play that framework in there, the only way you get after voluntary exchanges is to prove negative externalities or defects in the transaction, and I think these are both feeble efforts to work into those two categories, and frankly, my dear, they don't amount to very much.

So it's not as though this is anything you want to do by way of contract or individual choice comes out of it. This is a real set of normative constraints on human behavior.

PROF. GEORGE: Well, I got my answer to that one. If I could very quickly, Dr. Pellegrino, can I ask the question I had for both or is there not time?

CHAIRMAN PELLEGRINO: Very quickly, very quickly. This is a fundamental discussion obviously that we aren't going to settle this afternoon.

PROF. GEORGE: It's not clear to me how much of the dispute between our two presenters is a matter of differences about economics and how much is a matter of differences about ethics.

And so I'd be very happy if very quickly, for example, perhaps Dr. Delmonico could say where you think your disagreement with Professor Epstein is on economics or at the end of the day is there not a disagreement about economics? It's really about values. It's about ethics.

DR. DELMONICO: It's about values and his wanting to place a market value on life. I'm not prepared to do that, and that's just from a personal view, but neither are these organizations, and neither was the Congress in 1984.

DR. EPSTEIN: The politic Congress has no normative layer. I think we both agreed on that. The interesting question is you cannot justify a system of voluntary donations unless you have some conception that the gain to the recipient is larger than the loss to the donor.

So you have to be in the valuation game in any world in which there are any transactions. Whether it

has to be a market price system, who knows?

The reason why he likes to barter — I'm going to psychoanalyze him — is that you don't have any cash exchanged in the transaction. So you could have a mutual gain without having a valuation question, and in fact, that is a very powerful insight, particularly in many cases when valuation is difficult to do.

If you could trade commensurables, right, you can have mutual gain without doing the valuation question. Whereas markets always require you to get enough information to set prices.

I'm all in favor of that. I just think it's a joke to call this thing altruistic when you do them simultaneously because of the distrust that takes place between the pairs. There's altruism within the families and there's bargains across families, and I don't care what lawyer he gets, I could get him disbarred if he wrote that kind of an opinion.

CHAIRMAN PELLEGRINO: Dr. Bloom.

DR. BLOOM: You can attribute my remark to the fact that I don't yet understand how the Council does its business and makes it recommendations, but it strikes me that the interchange between Dr. Delmonico and Dr. Foster strikes at the heart of the larger problem that as long as we deal only with the supply side of this issue all of the heroic and intellectual statements that we've heard are not going to solve our problem.

But we can't ignore the fact that we don't know how to do preventive medicine in that way, and to me that's the bigger moral imperative that we have to engage in order to deal with this as a sub-problem of that problem.

CHAIRMAN PELLEGRINO: Thank you very much.

I also have Dr. McHugh.

DR. McHUGH: No, I pass. Having heard various things, I'm not going to comment.

CHAIRMAN PELLEGRINO: All right. We have reached the end of our time, the extended time. We have had a request for the Council members to stay for a few moments before hastening off to lunch for a photograph. Our visitors wish to take a group photograph. I hope you are willing to do so. It won't take very long, will it?

Thank you.

(Whereupon, at 12:28 p.m., the meeting was recessed for lunch, to reconvene at 2:00 p.m.)