THE CASE AGAINST TAX INCENTIVES FOR ORGAN TRANSFERS

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I. INTRODUCTION

Each year some 6,700 Americans die while awaiting an organ transplant.[1] On its face, this fact seems almost inconsequential, representing less than 3% of American deaths annually.[2] However, for the nearly 100,000 patients on the transplant wait list[3] (and their families), nothing could be more consequential.[4] What is more, the demand for transplantable organs is sure to rise as (1) more diseases become subject to prevention or cure, making organ failure the first sign of medical problems;[5] (2) the success rate for transplants increases, leading to wider use;[6] and (3) barriers to inclusion on the wait list are removed.[7]

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Only about one-half of decedents who are medically eligible have their organs harvested for transplant because of the failure of the others to provide consent to the transfer.[8] While most Americans claim to support organ donation, only approximately twenty-seven percent express a willingness to donate their organs upon death.[9] In addition, while living organ donations are possible in some instances, only one-sixth of American organ transplants annually come from living donors.[10] Thus, there is a net gain of approximately 4,500 new registrations[11] to the organ transplant wait list each year.o

commentators have called for a rethinking of current organ procurement practices to increase the supply of organs available for transplantation.[14]

the value of any such incentives to low income taxpayers (or to deny individuals whose income falls below a certain level the incentive at all) is paternalism and cannot be justified by a reduction in the possible coercive effect of such incentives. Third, I contend that opaque means—tax incentives rather than direct payments—should not be employed where the end is as hotly contested as is the commodification of our bodies.

In Part II of this article, I provide a brief overview of the current system of organ procurement in the United States, the systemic changes proposed to increase permissible harvesting of organs, and proposed financial and non-financial incentives for organ donation. Part III focuses on the broad goals and principles of our tax system and how tax incentives work. Part IV reviews the primary rationales for using tax incentives to encourage organ donations and argues that they undermine the goals and principles of the tax system. In addition, it raises additional questions in an effort to help guide future debate and policy-making in this field.

II. U.S. ORGAN PROCUREMENT: NOW AND MAYBE

A. The Current System

The National Organ Transfer Act ("NOTA") governs the transfer of human organs.[21] Passed in 1984 in response to efforts by a Virginia company to begin trading in organs, NOTA prohibits the transfer of organs in exchange for valuable consideration.[22] Thus, under current law, a gratuitous transfer from a donor is the only permissible form of transfer for an organ. While seventy-five percent of Americans claim to support organ donation,[23] only twenty-seven to twenty-eight percent do consent to allow harvesting of their organs on death,[24] yielding approximately 23,000 deceased donor organs transplanted annually.[25]

Currently, the primary method for obtaining organs for transplant in the United States is by active consent. The default rule

21. 42 U.S.C. § 274e.

22. 42 U.S.C. § 274e(a).

23. *See* Cohen, *supra* note 6.

24. *Id.*

25. *See* OPTN, *supra* note 1 (there were 23,448 deceased donor transplants in 2007 and 23,872 in 2006).

is no transfer; thus, only if an individual specifies that it is permissible for his organs to be harvested[26] or if a decedent's next of kin provides such permission can the donor's organs be removed.[27] Apart from the dearth of individuals consenting to donate organs, many hospitals fail to follow expressed donor preferences unless the decedent's family also consents, even in the thirty-two states with laws that explicitly give the decedent's consent standing alone dispositive effect.[28] Moreover, even where consent is not at issue, hospitals often do not receive the information they need in time to utilize the organs.[29] Thus, under the current system, there is confusion about what consent is adequate for donation and how to implement that consent.

B. Proposed Changes

In an effort to encourage organ donation, many commentators have suggested changes to the current U.S. procurement system. The most common suggestions involve changing from a consent-based system to a presumed consent (or "opt-out"),[30] mandated choice,[31] or

26. In all states except Massachusetts, Mississippi and New York, all that is legally required is a written document of gift, such as a specification on a driver's license. SAM CROWE & ERIC COHEN, PRESIDENT'S COUNCIL ON BIOETHICS, ORGAN DONATION POLICY (2006), http://www.bioethics.gov/background/crowepaper.html#edn6 (staff discussion paper).

27. The exceptions to this rule are very limited. *See infra* note 30 (discussing when it is permissible for organs to be transferred without explicit consent).

28. *See infra*

of these involve providing non-financial benefits[37] to transferors through organ exchanges,[38] reciprocal benefit arrangements,[39] and mutual insurance pooling.[40] On a smaller scale, Ohio, Kentucky, Maine and New York each have passed laws providing for public recognition of donors,[41] and some commentators have proposed medals of honor and reimbursement for the funeral expenses of donors, as well as medical leave and special donor insurance for living donors.[42]

While many commentators favor reliance on such non-financial incentives, others have argued in favor of financial incentives, through the development of open markets such as those that exist today for "donations" of plasma, sperm, and eggs in which either individuals, the government or insurance companies would be the buyers[43] Others have argued specifically for the creation of a

37. *But see* Vanessa Chandis, *Addressing a Dire Situation: A Multi-Faceted Approach to the Kidney Shortage*, 27 U. PA. J. INT'L ECON. L. 205, 248–49 (2006) (summarizing the arguments against such proposals).

38. In this approach, two transplant candidates who are not a match for the organs of potential donors "swap" donors so that each receives an organ from the other's friend or family or other intended donor. *See, e.g.*, Michael T. Morley, *Increasing the Supply of Organs for Transplantation Through Paired Organ Exchanges*, 21 YALE L. & POL'Y REV. 221, 223–24 (2003) (describing process of organ exchanges). Alternatively, a candidate with an incompatible donor has such donor contribute his organ to the general pool, and the candidate receives the next compatible organ from the general pool. Sarah Elizabeth Statz, *Finding the Winning Combination: How Blending Organ Procurement Systems Used Internationally Can Reduce the Organ Shortage*, 39 VAND. J. TRANSNAT'L L. 1677, 1703–04 (2006).

39. In this alternative, individuals pledging to donate their organs upon death would receive priority on wait lists for organs should they need them. *See, e.g.*, Nadel & Nadel, *supra* note 29, at 312–17 (detailing authors' reciprocity proposal).

40. In mutual insurance pooling, individuals would elect to join a pool of individuals, each pledging to donate his organs to the pool on death, in return for the ability to receive an organ as needed from the pool of organs already contributed by the other members. Richard Schwindt & Aidan Vining, *Proposal for a Mutual Insurance Pool for Transplant Organs*, 23 J. HEALTH POL. POL'Y & L. 725, 727 (1998).

41. Ohio partially funds local and statewide programs that publicly recognize families of deceased donors, and "Kentucky, Maine and New York . . . dedicate a day or week to publicly recognize organ donors." CROWE & COHEN, *supra* note 26.

42. *See* Francis L. Delmonico, et al., *Ethical Incentives—Not Payment—for Organ Donation*, 346 NEW ENG. J. MED. 2002, 2003–04 (2002) (advocating congressional legislation to encourage organ donation).

43. *See, e.g.*, Julia D. Mahoney, *The Market for Human Tissue*, 86 Va. L. Rev. 163, 174–75 (2000) (arguing that such markets already exist, but that under current law only the companies that receive and process human tissue may profit, not the people whose bodies the tissue comprised); Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies,*

"futures" market, in which individuals could contract for organ removal upon death.[44] Some states have tried a variety of more modest incentives for donation.[45] However, critics are concerned that a market-based approach to organ transfer is a bad idea. Their concerns focus on fears that a regime of free market trading will unfairly favor rich over poor organ seekers, coerce socially disadvantaged individuals into selling their organs, decrease altruism, cause people to view their bodies as fungible commodities, encourage antisocial behavior (for example, murder and suicide), and encourage violations of medical ethics.[46]

III. TAX POLICY AND INCENTIVES: A BRIEF OVERVIEW

Because financial incentives in the form of direct payments for organs strike many Americans as unseemly,[47] commentators and legislators have proposed providing tax incentives instead.[48] Such incentives may take the form of deductions or credits against income or estate tax liability, and affect taxpayers in disparate ways.[49]

A. Goals and Principles of the U.S. Tax System

The U.S. tax system has three primary goals: raising revenue, redistributing wealth, and (perhaps most controversially) regulating

44. *See, e.g.*, Cohen, *supra* note 6, at 30 (arguing that such system would avoid exploitation of the poor as it would be limited to cadaveric organs, and it would not benefit the wealthy as organ allocation would be done without regard to payment).

45. For example, Georgia has provided a seven dollar discount on driver's license fees in exchange for registration as an organ donor. GA. CODE ANN. § 40-5-25(d)(2) (2003) (amended 2005).

46. *See, e.g.*, Gloria J. Banks, *Legal and Ethical Safeguards: Protection of Society's Most Vulnerable Participants in a Commercialized Organ Transplantation System*, 21 AM. J.L. & MED. 45, 99–100 (1995) (noting concerns with legalized market in human organs); Richard Epstein, *Kidney Beancounters*, WALL ST. J., May 15, 2006, at A15; Chandis, *supra* note 37, at 229 (advocating proposal that elimin

private economic activity.[50] In evaluating whether a particular tax provision advances these goals, analysts often focus on the principles of horizontal equity,[51] efficiency,[52] individual equity,[53] administrability[54] and transparency.[55]

While raising revenue through a tax system is fairly noncontroversial and the primary debate over redistribution currently is the degree that should be achieved,[56] the increasing regulation of private economic activity through the tax code is the subject of much debate. Opponents see such regulation as making the tax system less effective by undermining redistributive goals and making the tax code less administrable.[57] Policymakers, however, have increasingly favored this approach to encourage desired behavior[58] or discourage unwanted behavior.[59]

The incentives provided by the federal tax code for desired behavior are enormous. The Earned Income Tax Credit ("EITC"), for

50. *See, e.g.*, C. EUGENE STEUERLE, CONTEMPORARY U.S. TAX POLICY 10–15 (Jeffrey Butts et al. eds., 2004) (describing goals of tax system); LILY L. BATCHELDER ET AL., BROOKINGS INST., REFORMING TAX INCENTIVES INTO UNIFORM REFUNDABLE TAX CREDITS (2006), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2006/08taxes_orszag/pb156.pdf (summarizing such goals); Parker et al., *supra* note 48, at 173 (noting tax law as instrument of social policy).

51. Horizontal equity refers to whether similarly situation taxpayers are treated equally. STEUERLE, *supra* note 50, at 10.

52. *See* STEUERLE, *supra* note 50, at 12–13. Efficiency is achieved if transaction costs are minimized and externalities, market power and information asymmetries are corrected. Lily L. Batchelder et al., *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*, 59 STAN. L. REV. 23, 42 (2006).

53. Individual equity refers to whether a particular individual is treated fairly. STEUERLE, *supra* note 50, at 13.

54. Administrability refers to the simplicity of the provision and involves minimization of compliance costs to the taxpayer and of monitoring costs to the government. *See id.* at 14; Batchelder et al., *Efficiency and Tax Incentives*, *supra* note 52, at 42 (emphasizing that tax system should minimize administrative compliance costs).

55. A policy is considered transparent if it its purpose is presented in an open manner. STEUERLE, *supra* note 50, at 15.

organ transfers.[68] This proposal was rejected but has continued to receive scholarly support.[69]

A deduction can be either "above the line" or "below the line."[70] "Above the line" deductions, like deductions for retirement savings, are available to all taxpayers, regardless of whether they claim the standard deduction or itemize their deductions on their tax returns.[71] "Below the line" deductions, like those for charitable donations, are TD-0.0009 Tc0.1eAtaxpas8(1

Since income tax deductions and credits benefit middle income taxpayers more highly than lower income taxpayers, such incentives will encourage behavior (here, donating organs) more strongly in middle income taxpayers than in low income ones.[78] Estate tax deductions or credits, as have sometimes been proposed,[79] would do so to a much greater extent. These incentives would benefit only wealthy donors, as taxpayers dying with a taxable estate under $2 million are not subject to this tax,[80] so low or middle income taxpayers would not be eligible.[81]

It is possible to structure credits so that they are worth the same amount to all taxpayers by making them "refundable". Like standard credits, refundable tax credits act first to offset any tax liability. In contrast to standard tax credits, however, refundable tax credits can result in affirmative payments to a taxpayer. For example, a taxpayer eligible for a $12,000 refundable credit who has only $8,000 of pre-credit tax liability would pay no taxes and would receive a $4,000 check from the U.S. Treasury Department. Thus, unlike a regular credit, a refundable tax credit allows a low income taxpayer to walk away with cash above any tax liability, instead of leaving behind the amount otherwise payable after the offset of tax liability.[82] However, refundable tax credits only apply to taxpayers.[83] An individual who does not have positive income for a year and therefore does not file a tax return cannot claim the credit.

The main refundable tax credits in existence today are the EITC, the child care credit, and a small health insurance credit.[84] While small in number, refundable tax credits are large in impact: the growth of tax credits has increased dramatically since 1986.[85] In general, refundable tax credits are used today only when the

78. Jenn, *supra* note 66, at 557.

79. *See* Chandis, supra note 37 (advocating an estate tax credit).

80. The $2 million exclusion applies for 2008; in 2009 the exclusion rises to $3.5 million. I.R.C. § 2010 (2007). Under current law, there will be no estate tax due from individuals dying in 2010, and thus (assuming no changes in the law) an estate tax credit

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In the context of blood donations, Professors Frederick R. Parker, Jr. and William Winslade argue that the current tax law communicates the view that donating is not a top priority, since deductions are afforded for the donation of other items but not for products.[97] They argue for a new approach to signal the value society places on those who donate these items, thereby stimulating donation "by placing blood donors on the same footing as those who donate other forms of property."[98] Charles Paine joined with Professors Parker and Winslade more recently to extend this argument to organ donation, emphasizing that we broadly choose to encourage gift-making in other realms through tax benefits to indicate the value we, as a society, place on certain altruistic acts.[99] They believe we should extend this treatment to the donation of body tissue.[100]

On closer examination, though, the analogy between organ donations and charitable donations proves inapt. Property transferred to a charitable organization for which a deduction is allowed has an underlying economic component—income tax already paid or otherwise due with respect to the item is offset by the deduction, leaving the donor in much the same tax position as if the income had never been earned. However, until the time when organ transfers for payment are allowed, a transfer of one's organs is a non-economic event to the donor. Thus, allowing a tax benefit for organ donation permits a non-economic event to offset income, thereby causing a mismatch.

The key point can be illustrated by comparing the tax effect of a deduction for a contribution to a qualified charitable organization and a hypothetical deduction for donation of an organ.[101] For example,

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payments.[108] The logic here is that if we allow only middle or high income taxpayers to benefit from the incentive, we cannot be accused of economic coercion of underprivileged taxpayers, since such wealthier taxpayers are not as subject to pressure as a minimum wage worker or a family living near the poverty line. Besides, proponents of this logic argue that this disparity in value is consistent with the tax incentives we currently have for items such as charitable donations[109] and home mortgage interest.[110] In such a legal world, they ask, why should it be an issue that this incentive benefits only those who are better off?

The difficulty with these arguments is that they reflect unjustifiable paternalism. While there are contexts in which paternalism may be justified,[111] this is not one of them because it involves adults who are fully competent to enter into contracts. Indeed, financial decisions as to cadaveric donations are significantly less risky and harmful than countless other decisions the law permits competent adults to make each day—for example, to drink alcohol, scuba dive, or work in a coal mine or on construction projects. Put another way, if we are going to commercialize human bodies by providing financial incentives for harvesting organs, those incentives should be available to all who qualify based on relevant factors (like health) and not based on an individual's tax bracket. Our bodies are uniquely ours, and preventing low income persons from profiting because we do not believe they can make as free and as informed of a choice as middle or high income persons is paternalistic and demeaning.

Structuring a payment so that it does not apply to low income taxpayers also undermines the goal of vertical equity. Instead of effecting a redistribution of wealth in favor of low income individuals

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as required under the vertical equity principle, such an incentive works to provide subsidies to higher income taxpayers by providing them greater tax reductions in exchange for their contributions. While this effect may track the effect of other tax incentives currently offered, to include a provision for the express purpose of distributing wealth upwards is directly contrary to the principles currently in place with respect to our tax system and makes less sense in the realm of organ transfers than in the transfer of financial wealth. While viability of organs for transfer is not a product of income or a taxable event, the accumulation of wealth is. Providing greater incentives for wealthier individuals to contribute cash or purchased property to charitable organizations, since they have more disposable wealth to transfer in the first instance, makes more financial sense than providing them greater incentives for the transfer of viable organs.

C. Commodification and Opacity

In addition to voicing concerns about coercion, scholars have argued that allowing transfers of human body parts and products in exchange for money will devalue the human body and, ultimately, human life.[112] They urge that once we assign a dollar value to a

112. *See, e.g.*, Delmonico et al., *supra* note 42, 2004 ("The fundamental truths of our society, of life and liberty, are values that should not have a monetary price. These values are degraded when a poor person feels compelled to risk death for the sole purpose of obtaining monetary payment for a body part."); Jackson, supra note 105 ("Those who oppose the market system argue that it is unethical and immoral to profit from the sale of human organs, claiming that the existence of a market in human body parts cheapens life."); Council on Ethical and Judicial Affairs of the Am. Med. Ass'n, *Financial Incentives for Organ Procurement: Ethical Aspects of Future Contracts for Cadaveric Donors*, 155 ARCHIVES OF INTERNAL MED. 581, 581 (1995) ("Financial incentives to donate . . . dehumanize society by viewing human beings and their parts as mere commodities."); ARTHUR L. CAPLAN, AM I MY BROTHER'S KEEPER?: THE ETHICAL FRONTIERS OF BIOMEDICINE 96 (1997) ("[A]ny form of compensation for cadaver organs and tissues is immoral."); Arthur L. Caplan et al., *Financial Compensation for Cadaver Organ Donation: Good Idea or Anathema?*, *in* THE ETHICS OF ORGAN TRANSPLANTS 219, 220 (Arthur L. Caplan & Daniel H. Coelho, eds., 1998) ("The message conveyed is that it is permissible, even desirable, to treat the body as an object of sale and profit . . . when the dead are treated as things, the dignity and moral standing of the living, and thus, their autonomy, are imperiled."). *Compare* MARGARET RADIN, CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS AND OTHER THINGS 125–126 (1996) (positing that, in the case of sales of human organs, both commodification and non-commodification may fail to respect personhood).

human body part, we become incapable of conceptualizing the body independent from this value.[113]

Tax incentives are not seen as less problematic in this regard than direct payments for body parts because the net practical effect differs; after all, the net effect of both direct payments and tax incentives is to financially encourage organ donations. Tax incentives simply *seem* less commercial and for this reason are more acceptable. In comparing tax expenditures to direct payments, Professors David A. Weisbach and Jacob Nussim explain that, at times,

> [E]ndowment effects [may] make expenditures through the tax

the net effect of the incentive is the same to the taxpayer.[118] Thus, use of the tax system to provide the incentive could prove more effective at obtaining the organs needed for transplant by allowing donors to feel like what they are doing is donating, not selling. This might be desirable where the end result (provision of additional organs) is seen as a societal good, but the means (through compensation) is contested.

Regardless of perception, however, tax benefits are the financial equivalent of a direct transfer. Where the subject of the tax incentives is one as controversial as organ purchases, obscuring the decision being made proves to be bad decision-making and runs counter to the tax principle of transparency.[119]

D. Raising More Questions

If we do believe that it is appropriate and desirable for the government to permit financial incentives of some sort in exchange for organ transfers, we are left with a question of institutional design. Even where there is no independent reason that a tax incentive might be preferable to a direct payment, it might be that the tax code is still the most efficient way to implement the program. Professors Weisbach and Nussim persuasively argue more generally that there is no inherent reason tax expenditures are better or worse than direct subsidies. They posit that the question of whether to implement a "nontax" program through the tax system is not one of tax policy. Instead, it is a matter of institutional design—how projects related to the expenditure are assigned and which grouping of activities will yield the best possible performance.[120] Thus, whether the item in question is properly included in the tax base is not the question to be asking; rather, it is enough to ask whether the tax system is the most efficient institution to provide the payment.[121] This line of reasoning, then, can be extended beyond government subsidies to ask whether

different solutions—for example, shifting the focus from repairing to preventing the damage in the first instance?

Finally, despite the fact that most scholars put aside the allocation portion of the organ transplant equation, healthcare is a zero sum game as insurance funds, hospital space, and surgical time are limited. Is increasing transplants the best allocation of these scarce resources?

V. CONCLUSION

Upon initial consideration, providing tax incentives for organ donations might seem to reflect a sound legislative and ideological approach, consistent with the current tax code. In addition, such an approach avoids economic coercion of individuals who, absent financial incentives, would prefer not to transfer their organs but who may feel that they have no option once financial incentives are possible by taking advantage of the progressive nature of our tax system. Moreover, by routing payments through our tax system and casting transfers as donations, concerns about commodification of our bodies are allayed.

On closer analysis it becomes evident that such incentives conflict with the goals of maintaining vertical equity, transparency, and administrability/simplicity within our tax system. Such incentives would convert what is otherwise currently a non-tax event into a tax item, increasing complexity without providing an unequivocal reason for doing so. In addition, use of the tax system to provide financial incentives for organ transfers provides differential returns to taxpayers based upon a completely unrelated event: their tax bracket. Finally, use of tax incentives instead of direct payments obscures the underlying financial reality of the proposals, preventing meaningful reflection on implications for our understanding of ourselves. While we could simply decide to use the tax system this way, any such decision should be carefully considered.