ORGAN PROCUREMENT AND TAX POLICY

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INTRODUCTION

Federal tax law has long been employed both as a generator of public revenue and as an instrument of social policy.1 This article suggests that tax law might be used to advance a priority of contemporary American health policy: enhancing the supply of transplantable organs.2

Organ transplantation is an effective means of treating end-stage diseases of the kidney, heart, and liver.3 The supply of organs

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1 See Linda C. Fentiman, Organ Donation as National Service: A Proposed Federal Organ Donation Law, 27 SUPREME U. L. REV. 1993, 1993-94 (1993) (describing the importance of transplantation to individuals for whom this is the only chance of survival or for a good quality of life). The current system for organ transplantation is often perceived as unfair and much less effective than it should be, prompting pressure on lawmakers and politicians to reform the system. Id. at 1993. See also Daniel Callahan, What is the Reasonable Demand on Health Resources? Designing a Basic Package of Benefits, 8 J. CONTEMP. HEALTH L. & POL’Y 1, 8-9 (1992) (arguing that organ transplant technology should be a high priority in finding a health care benefit decisions standard when making health care benefic decisons and policies). Other priorities in health care benefit decisions would include promoting public health, primary care, and advanced medical technology. Id. at 9.

2 Bruno Goldith & Giuseppe Deleu, Strategies for Making More Organs Available, for Transplantation, 517 NEW ENG. J. MED. 404 (2000) (discussing the profound need for more transplantable organs and the reasons that many donated organs are not used). Some of the reasons that donated organs are not used include abnormal biopsy readings, problems with the size of the organ, and the donor’s age.
available for transplantation, however, falls far short of a growing demand. In fact, approximately 3,000 people die in the United States every year while awaiting a transplant, and it has been estimated that another 100,000 possible transplant candidates die each year before being accepted to a waiting list.

Despite widespread public approval of organ transplantation — around seventy-five percent in Gallup opinion polls in 1985 — only seventeen percent of eligible persons enroll as potential donors. One possible explanation for this discrepancy is that people favor organ transplantation when they imagine themselves as transplant recipients but are nevertheless reluctant to be donors. Reluctance to donate may stem from squeamishness, lack of public education, distrust in the medical establishment, religious considerations, or other factors. But we believe that a major reason why organ donation falls far behind both public approval and medical demand is that it depends so heavily upon pure altruism. Although altruism is morally praiseworthy, it is neither deeply entrenched nor widely practiced in American culture. We encourage philanthropy and charitable giving in America, but we also offer tax incentives to those who make donations. When it comes to organ donation, we rely almost exclusively on pure altruism; yet it has failed. Recently,

4 Id.
5 Id.
6 Theodore Silver, *The Case for a Post-Mortem Organ Draft and a Proposed Model Organ Draft Act*, 68 B.U. L. REV. 681, 697 (1988) (noting that although the post-mortem organ donation process has been adopted in a number of states, only forty percent of the population has actually agreed to donate organs). But the reason for this discrepancy is that people favor organ transplantation when they imagine themselves as transplant recipients but are nevertheless reluctant to be donors. Reluctance to donate may stem from squeamishness, lack of public education, distrust in the medical establishment, religious considerations, or other factors. But we believe that a major reason why organ donation falls far behind both public approval and medical demand is that it depends so heavily upon pure altruism. Although altruism is morally praiseworthy, it is neither deeply entrenched nor widely practiced in American culture. We encourage philanthropy and charitable giving in America, but we also offer tax incentives to those who make donations. When it comes to organ donation, we rely almost exclusively on pure altruism; yet it has failed. Recently,

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public officials have proposed increased public education, recognition for donors, and legal facilitation for organ donation. While we endorse these efforts, to the extent that they rely on altruism alone, we believe that the demand for organs will continue to greatly exceed the supply. To meet the increasing demand for transplantable organs, we suggest tax incentives as a way to reinforce inclinations toward altruism or at least provide prospective donors with sufficient economic motivation to enroll.

We propose two ways of using the tax law to enhance the organ supply. First, we propose that taxpayers be given a refundable income tax credit in lieu of a tax deduction for their contribution to form the organ bank, which then becomes responsible for the organ donation process. Second, we propose that the tax law be clarified to remove any potential tax disincentives to organ donation.

I. PROVIDING AN INCOME TAX CREDIT TO TAXPAYERS WHO AGREE TO BECOME ORGAN DONORS

A recent study regarding the relationship between the availability of a financial incentive and a person’s willingness to “donate” his or her organs at death suggests that the offering of a fairly modest cash payment would yield a sufficient number of donors to completely eliminate the shortage in the market for kidneys. We propose that the government offer a variation of such an incentive by issuing a

refundable income tax credit in exchange for a taxpayer’s agreement to donate his organs when he dies (a refundable credit is applied first to reduce or eliminate one’s tax liability, with any unused amount being paid out to the taxpayer in cash; the amount of any credit in excess of the recipient’s tax liability would, in effect, represent a government subsidy to him).

Although we do not specifically quantify the tax credit we propose here, it likely would be nominal in amount, at least when measured against the Medicare procurement cost for organs or the range of values found in the black market. A variety of factors might bear on the sum. In general, it should be great enough to encourage participation by a statistically sufficient group of taxpayers. At the same time, however, it should not be so generous as to amass an overabundance of organs and thereby encourage health care providers to engage in transplant procedures under marginal circumstances. Finally, because evidence suggests that the suitability of organs for the recipient’s age at the time the agreement is made. For the same reason, logic would suggest that the credit itself be made available only to taxpayers who fall within a specified age range at the time they agree to become donors.

Our proposal, which would entail a certain payment today in exchange for an uncertain return in the future, acknowledges the significance that exists in the current milieu between the actual number who ultimately donate. We do not believe, however, that this statistical trend casts doubt on the economic viability of our suggestion. To the contrary, the model we propose would eliminate altogether the most significant risks that can impede the retrieval of organs from otherwise willing donors in order to become donors.

The current scheme, thereby inevitably enhancing the organ supply and reducing the cost of providing maintenance care for patients pending transplant. Among the various reasons posited for the current gap between the number of willing and actual donors, two stand out as significant impediments to the harvesting of organs from cadavers. First, notwithstanding the fact that a person may have consented to an anatomical gift while living, physicians generally will retrieve a decedent’s organs only after obtaining the family’s approval, which is often denied. The second source of the disparity is more simple: the physician’s mere failure to inquire about the decedent’s status as an organ donor. These problems under the existing scheme highlight the importance of ensuring that the donor’s intentions are not ultimately foiled by others who have inconsistent priorities or desires. Our model incorporates two specific safeguards designed to eliminate this risk.

First, our proposal would make the “donation” of organs mandatory upon the death of every taxpayer who accepts a tax credit during life, and it would establish a mechanism whereby they could be identified as donors in a timely manner. The method we propose for doing so would employ an electronic data bank that would operate in essentially the same manner as the National Prac-
tioner Data Bank. All donor agreements might initially be maintained in a free-standing electronic library. As medical records complete their evolution into a uniform electronic format, however, the donors’ medical records ultimately would present the most logistical repository for these agreements. Under either method, a permanent notation would be made in the record based on the donor’s income tax return in which the credit was claimed, thereby maintaining the necessary information in a reliable and universally accessible format.

This record would serve as a resource to which hospitals and physicians would be required to submit queries under certain circumstances (such as a patient’s imminent death) to determine if a potential donor has taken advantage of the credit. Providers who fail to inquire would be imputed with knowledge of any donor agreement, and those who do not take reasonable efforts to ensure the timely retrieval of organs where a notation exists would be subject to a significant financial penalty. These measures would encourage providers not only to ascertain whether a patient had agreed to be a donor, but also to harvest the organs of every patient who has done so.

We also propose measures designed both to eliminate the economic risks posed to providers by litigation concerning the retrieval of organs from dead donors and to reduce the threat of such litigation that is without merit. First, any provider who relies on good faith on a notation in the medical record or data bank would be immunized from liability arising out of the retrieval of a decedent’s organs as long as he otherwise acted in a manner consistent with professional norms. In addition, any litigant who challenges a provider under those circumstances would be liable for the provider’s legal fees.

II. PROVIDING A CHARITABLE DEDUCTION FOR ORGAN DONATIONS

The Internal Revenue Code currently provides a charitable deduction for taxpayers who donate “property” to certain qualified organizations. The second part of our proposal would clarify the availability of a charitable deduction for individuals who actually donate an organ either during life or upon death.

Neither the courts nor the Internal Revenue Service have yet been called upon to address the tax treatment to be accorded living or cadaveric organ donations. However, the cases and IRS administrative rulings that deal with the issue in the context of sales and donations of blood and breast milk present a valid contextual reference for the tax consequences that one might anticipate from a transaction that involves a solid organ. The IRS, for example, has denied a charitable deduction for the donation of blood, which it found more akin to the rendering of a non-deductible “service” than the contribution of property as required by the statute. This ruling has not since been modified or revoked. It is interesting to note, however, that there exists an apparent difference of opinion concerning the question within the Internal Revenue Service itself. For example, the IRS General Counsel has taken the position that a taxpayer who donates breast milk should be treated as having contributed property rather than services. Moreover, the Tax Court appears to have rejected the “service” metaphor. The court in Green v. Commissioner, for example, found that a taxpayer who derived her income primarily from the sale of blood plasma was engaged in the sale of a tangible product.

Except for the unusual nature of the product involved, the contract between petitioner and the lab was the usual sale of a product by a manufacturer to a distributor or of raw materials by a producer to a

20 See Sarah Hoffman Jurand, Managed Care Companies Don’t Report Bad Doctors, Federal Study Finds, 37 J. Torts, 80 (Aug. 2003) (revealing that the National Practitioner Data Bank was created to alert states to physicians who have lost their license to practice medicine in one state and attempted to move to another state to continue practicing without revealing the fact of the lost license).

21 See Jonathan Zittrain, What the Publisher Can Teach the Patient: Intellectual Property and Privacy in an Era of Trusted Purification, 52 Stan. L. Rev. 1201, 1225-36 (2000) (discussing the increasing privacy concerns and the legislative solutions as medical records are converted from paper charts to electronic files).
processor. A tangible product changed hands at a price, paid by the pint. The rarity of petitioner’s blood made the processing and packaging of her blood plasma a profitable undertaking, just as it is profitable for other entrepreneurs to purchase hen’s eggs, bee’s honey, cow’s milk, or sheep’s wool for processing and distribution. Although we recognize the traditional sanctity of the human body, we can find no reason to legally distinguish the sale of these raw products of nature from the sale of petitioner’s blood plasma.\textsuperscript{27}

Although these analogous cases dealing with blood and breast milk appear to be shifting away from the “service” analysis, the issue of whether an organ donor is entitled to a charitable deduction has yet to be resolved in a case that squarely presents the question. Moreover, even if the apparent trend continues and the courts ultimately resolve the issue in favor of the “property” logic, the existing uncertainty would continue in another form.\textsuperscript{28} The law expressly limits the availability of the deduction to contributions made “to or for the use of” a qualified charitable organization.\textsuperscript{29} A living kidney donation made directly to an individual would not likely satisfy this requirement.\textsuperscript{30} nor would a donation ear-marked for a specific person be eligible for the deduction, even if the donation was nominally cast as a favor for a qualified organization.\textsuperscript{31} Yet, these examples would represent the most common forms in which living donations would be made. Most donors, therefore, could not be certain about the availability of a charitable deduction for their altruism under the current tax scheme. We propose that the law be amended to clarify that every person who donates an organ would be entitled to a charitable deduction under any circumstances.

\textbf{III. ELIMINATING POSSIBLE ADVERSE INCOME, ESTATE, AND GIFT TAX CONSEQUENCES}

One might find counter-intuitive the law’s failure to clearly accommodate an organ donation as an act of charity worthy of a tax deduction. Other aspects of the law, however, are even more problematic. In particular, the Tax Court’s recognition of the body as a valuable commodity,\textsuperscript{32} when combined with other well-settled principles of the tax law, carries with it a variety of unsettling implications. More specifically, a literal application of the tax law as it now stands would suggest the absurd possibility that an organ donation, whether during life or upon death, could actually generate an additional income, gift, or estate tax liability.

From the perspective of the income tax, this portent is found in living kidney donations effected through a paired exchange program such as that recently initiated by the Washington Regional Voluntary Living Donor Registry.\textsuperscript{33} These programs match mixed pairs of willing donors and recipients as a means of facilitating the exchange of kidneys between persons who, because of incompatible blood or tissue type, cannot make a donation directly to a relative or friend.\textsuperscript{34}

By definition, these transactions entail a \textit{quid pro quo}: the exchange of one kidney for another. It is this “bargain” element that gives rise to the bizarre prospect that they would implicate the income tax. This possibility derives from the axiom that, in the absence of an express statutory exception, an exchange of one item of property for another is a taxable event.\textsuperscript{35}

When strictly applied, the literal terms of the law would draw no reliable distinction between a taxpayer who engages in the noble and uncommon act of donating a kidney via a paired exchange and one who participates in a routine commercial endeavor involving a more widely-traded commodity. As noted above, for example, the Tax Court has found that income derived from the sale of blood plasma is conceptually the same as that generated by the sale of any other product, without regard to “the traditional sanctity of the human body.”\textsuperscript{36} Thus, without regard to our notion of the body as

\textsuperscript{27} Id.

\textsuperscript{28} See Radhika Rao, \textit{Property, Privacy, and the Human Body}, 80 B.U. L. Rev. 359, 375-76 (2000) (affirming that while most bodily organs cannot be transplanted for the donor’s compensation, they can be given away or even sold for different purposes).

\textsuperscript{29} 26 U.S.C. § 170(a) (1994).

\textsuperscript{30} Id.


\textsuperscript{32} Green v. Commissioner, 74 T.C. 1229, 1234 (1980) (holding that blood plasma is property that can be sold for profit, but also recognizing the traditional reluctance to allow the human body to be classified as property).


\textsuperscript{34} This program, which is a partnership between the Washington Regional Transplant Consortium and seven kidney transplant programs in the Washington, D.C. area, was initiated in May, 2000. See Transplant Programs, Hot Topics at http://www.nebraska transmissions.org/ bennerinfo/hottopics.htm (last visited Mar. 1, 2002).

\textsuperscript{35} Texas Rev. Stat. § 1.1001-1 (2001) (providing that “the gain or loss realized . . . from the exchange of property for other property differing materially either in kind or extent, is treated as income or as loss sustained”)

\textsuperscript{36} Compare Lary v. United States, 797 F.2d 1538, 1540-41 (11th Cir. 1986) (holding that “profit from the sale of blood does constitute income within the meaning of IRC § 61”) with
something of an aberration when employed as the object of commerce, it is arguable that an exchange involving a kidney would be treated the same for tax purposes as any other bargain. Accordingly, gain or loss on the exchange would be measured by the difference between the fair market value of the consideration received by the taxpayer in the exchange and the basis of the property he gave up (generally, the cost incurred when he acquired it). The consideration given in a paired kidney exchange takes the form of a kidney. The taxable income generated by the exchange, therefore, would represent the excess of the fair market value of the kidney received over the cost or other basis of the kidney transferred.

The Treasury regulations describe the question of fair market value as being one of fact, and the courts have construed the concept in the familiar parlance of "the price at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell." Admittedly, the concept of value is perplexing when considered in the specific context of an essential bodily organ. The very idea that a "willing" buyer could act without "compulsion" in a contract involving the exchange of a life-saving thing is an anomaly of thought. Yet, this exchange of a legitimate market in which buyers and sellers may trade in these "goods" does not alone render them without value, as the market in illicit drugs so readily attests. To the contrary, the media regularly broadcasts troubling and bizarre tales of the illegal organ trade. Moreover, Medicare regularly "procures" organs.

United States v. Garber, 589 F.2d 843, 848 (6th Cir. 1979) (leaving the issue ambiguously open as to whether the sale of blood constitutes income under IRC § 61); see also Ethical Issues in Organ Transplantation, at http://www.mbio.princeton.edu/courses/mb427/2001/projects/01/ethics.htm (arguing that the "exploitation, coercion, and violations of the sanctity of human person-hood" becomes an issue when one views the body as property). The main concerns in this context include the removal of prisoners' organs without consent, an international market that encourages obtaining organs in any possible way, and the economically underprivileged being forced to sell their organs for payment.

32 Pub. L. No. 100-90, § 4102 (d)(2). (6), 120 Stat. 4181, 4265 (1988) (revealing that the worldwide value of the illegal drug industry approaches five hundred trillion dollars annually, with the United States' illegal drug trade contributing up to one hundred trillion dollars each year).

such as kidneys, at a cost measured in money. Thus, even though the "value" of a kidney might be a vague abstraction in most minds, it is, for tax purposes, arguably determinable in some manner with reference to these alternative sources of supply.

The concept of basis, or the "cost" element of the gain or loss equation, is equally obscure in the realm of the body and its constituent parts. Because we do not purchase our bodies or otherwise acquire them in a transaction from which we can derive any identifiable cost, it would appear that we have a basis of zero in these, our most physical of assets. Accordingly, a participant in a living kidney exchange would realize income in an amount equal to the full value of the organ received, which could be significant.

The fact that we find these notions foreign to our way of thinking about the human body does not render them irrelevant in the organ donation context. To the contrary, like most concepts of taxation, they are readily adaptable to any transaction that can be quantified in economic terms. A transaction in which a bodily organ represents the medium of exchange is, by this standard, just as susceptible to valuation as any other. Thus, while most observers would instinctively recoil at the thought that an organ donation could give rise to a tax liability, it is difficult to find a reliable alternative in the letter of the law. The groundwork for this result was laid long ago in the pronouncements regarding blood plasma and other such renewable body material. Together with other established principles of the law, the holdings in those cases can be extrapolated to procure an outlandish result when solid organs are the object of an exchange, despite the fact that the "donor" received no economic benefit from the transaction. Quite simply, the tax law, in its present state, does not accommodate living kidney donations in any reasonable manner.

The gift and estate tax provisions of the law, likewise, portend their own surprises for organ donors and their heirs. The IRS General Counsel recognized this potential when considering the income tax consequences of donating excess breast milk:

Publication of a ruling in this case can have undesirable repercussions in related tax areas. If the revenue ruling is published holding

42 See 42 C.F.R. §121.100 (2000); see also 46 Am. Law. Rev. 12, 200 (explaining that placement on a waiting list for an organ requires a person to pay the cost of the transplant procedure "which can approach $250,000.")
44 Green v. Commissioner, 74 T.C. 1229, 1234 (1980).
that the donation of mother’s milk is one of property, [the existing IRS position that treats the donation of blood as a service] should be modified accordingly. Although we think such a modification would be correct, . . . it could have a far-reaching effect in the gift and estate tax areas. If blood is property, then any part of the human body is property. Gift tax is imposed . . . on the transfer of property by gift. If any part of the body is property then a gift tax should be levied on the gift of a kidney for transplant if it is not given through a charitable organization. Likewise, a taxpayer’s estate includes the value of all property in which he had an interest at death. . . . The value of a decedent’s body should therefore be includible in his estate. In today’s world, where transplants take place daily, these issues are not illusory.  

These implications, which the General Counsel raised more than twenty-five years ago, have thus far lain dormant. Today, however, the human body is increasingly being commodified as an object of value for any number of purposes. As the frequency of “trade” in the body increases, and as that trade takes on various novel forms, the taxing authorities and the courts eventually will be called on to deal with the significance of recognizing the human body as property, not only for purposes of the income tax, but also in the context of the gift tax and the estate tax. Those questions should no longer be ignored. Rather, they suggest the need for Congressional action to establish a predictable reference point on which taxpayers, the Internal Revenue Service, and the courts can rely. Accordingly, we propose that the Internal Revenue Code be amended to expressly exclude organ donations from the scope of the income, gift and estate taxes.

**CONCLUSION**

Our proposal to amend the tax law by removing the threat of financial impediments to organ donations and by offering affirmative tax incentives to increase the organ supply offers the possibility of enhancing the supply of organs available to transplant candidates without sacrificing the legitimate ethical concerns that underlie the current prescription against more direct market-based incentives. Our proposal could also help reduce the significance of at least one reason that might drive American involvement on the demand side of the illegal organ trade: the shortage of suitable organs for transplantation.

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85 David B. Resnik, DNA Patent and Human Dignity, 29 J.L. Med. & Ethics 152, 152 (2001) (speculating that because market language is often applied to human DNA, a threat of commodification exists to human beings); see also Koji Yoyama, Owning the Secret of Life: Biotechnology and Property Rights Revisited, 32 Merc. L. Rev. 111, 153 (2000) (referring to the commodification of humans as posing a threat to individual freedom and privacy).