

REVIVING THE KIDNEY-MARKET DEBATE: A PROPOSAL FOR REDISTRIBUTIVE TAXATION

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ABSTRACT

Despite the worsening kidney donation deficit in the United States, state and federal law is resolute in prohibiting a person from paying a donor for a kidney transplant. One of the major objections to allowing a “kidney market” is that it would be inequitable, favoring the rich and exploiting the poor. However, thousands of Americans die annually for want of a willing kidney donor, and thousands more must live on kidney dialysis, a costly and torturous variety of house arrest. Moreover, hundreds of wealthy Americans obtain kidneys on the black market from exploited indigents in Third World countries.

Due to these dire realities, many legal scholars have proposed a regulated market as a way to address both the kidney shortage crisis in America and the black-market exploitation abroad, but no one has suggested a redistributive tax scheme as part of a proposed regulatory system. Toward this end, this Note is the first scholarship to use principles of tax policy to address the equitable and ethical objections to a legalized kidney market, suggesting that a proper system of taxation will strengthen the argument for allowing compensated kidney donations in the United States.¹

INTRODUCTION

Under federal law, it is illegal “for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation.”² The legislative rationale for this law derived from the concern that organ “sales” would be unethical and inequitable, favoring the rich and exposing the poor to undue influence and exploitation.³

But many have begun to question whether this anti-organ-market law, as applied to kidneys, effectively balances the policy concerns. Kidney

1. This Note will focus on kidney donations from living donors. One reason—in addition to other reasons discussed throughout this Note—is that “requests for kidneys comprise over eighty percent of the organ transplant waiting list.” Emily Steeb, *The Gift of Life: Can the Organ Procurement Philosophies from Spain and Iran Help Eliminate the Organ Shortage in the United States?*, 25 IND. INT’L & COMP. L. REV. 311, 317 (2015); see also Sally L. Satel & Benjamin E. Hippen, *When Altruism Is Not Enough: The Worsening Organ Shortage and What It Means for the Elderly*, 15 ELDER L.J. 153, 154 (2007) (“Of all transplantable organs . . . the shortage of kidneys is most acute.”). Additionally, in contrast to other organs, a person can donate a kidney without great risk of negative long-term impact on her health. See T. Randolph Beard & Jim Leitzel, *Designing A Compensated-Kidney Donation System*, 77 LAW & CONTEMP. PROBS. 253, 255 (2014); Jeffrey Prottas, *Human Tissues as Medical Treatment*, 65 S. CAL. L. REV. 445, 446 (1991); see also *infra* notes 107–08 and accompanying text (explaining the specific medical and life impacts on a kidney donor).

2. National Organ Transplant Act, 42 U.S.C. § 274e (2012).

3. See Flynn v. Holder, 684 F.3d 852, 860 (9th Cir. 2012); Andrew Wancata, *No Value for a Pound of Flesh: Extending Market-Inalienability of the Human Body*, 18 J.L. & HEALTH 199, 216 (2004) (“By virtue of lacking money or assets, the poor will not be able to resist the temptation to achieve some ‘quick money’ for one of their organs. As a result, not only would social stratification further polarize, but the general health of the lower class would sharply decline, creating a ‘sub-class’ of human beings. Should human body parts be alienable, as this argument dictates, an inescapable aura of ‘economic coercion’ would dictate the choices of the lower-class.” (footnotes omitted) (citations omitted)).

transplants are unique as a relatively safe transplant procedure, and the number of Americans who die annually from not being able to get a kidney far surpasses the number of deaths resulting from want of all other organs combined.⁴ Further, because of this scarcity, every year hundreds of Americans illegally purchase kidneys from indigent donors in Third World countries.⁵ Accordingly, as the kidney shortage in America has worsened and grown bleak, some legal scholars have turned to compensated kidney donations as a possible solution both to the domestic kidney shortage and to foreign black-market exploitation.⁶

These scholars have offered creative and urgent arguments, which have included answers to ethical and equitable objections underlying the general ban on organ sales.⁷ Many of these authors have proposed tax incentives as a way of encouraging organ donation.⁸ But this Note is the first scholarly

4. See *Organ Donation and Transplantation Statistics*, NAT'L KIDNEY FOUND., <https://www.kidney.org/news/newsroom/factsheets/Organ-Donation-and-Transplantation-Stats> (last visited Oct. 4, 2018); *infra* Part III.A.

5. See Adam Crepelle, *A Market for Human Organs: An Ethical Solution to the Organ Shortage*, 13 IND. HEALTH L. REV. 17, 40, 55 (2016).

6. See, e.g., Crepelle, *supra* note 5, at 78 (“Aside from saving American lives, legalizing the organ market will damper the horrid happenings of the black market.”); Michele Goodwin, *Bio Law: A Few Thoughts About Altruism and Markets*, 18 KAN. J.L. & PUB. POL'Y 208, 209 (2009) (“In an effort to avoid controversy and exploitation, policy makers enacted legislation that in many ways has the opposite effect; transplant tourism, black markets, and even the use of children as donors is on the rise. Thus, it is incumbent upon us to reconsider whether the prescription for organ transplantation needs retooling and tweaking. The answer should be yes.” (footnote omitted)); see also Stephanie Zwerner, *A Small Price to Pay: Incentivizing Cadaveric Organ Donation with Posthumous Payments*, 18 MINN. J.L. SCI. & TECH. 273, 291 (2017) (“[T]here are countless supporters of creating a system that compensates organ donation. Proponents abound in the fields of medicine, law, and economics.” (citations omitted)); *infra* Part I.B. (describing the black market for organs). The term “kidney market” in this Note refers to a “commodity market,” though under current law there exists a sort of non-commodity “market” for kidneys. See Kimberly D. Krawiec et al., *Contract Development in a Matching Market: The Case of Kidney Exchange*, 80 LAW & CONTEMP. PROBS. 11, 11 (2017).

7. Liliana M. Kalogjera, *New Means of Increasing the Transplant Organ Supply: Ethical and Legal Issues*, 34 HUM. RTS. 19, 19 (2007) (“The conflict between the increasing demand for transplant organs on the one hand and the legal restrictions affecting the organ transplant process on the other continues to inspire novel strategies for obtaining access to transplant organs.”); see, e.g., Stephen J. Choi, Mitu Gulati & Eric A. Posner, *Altruism Exchanges and the Kidney Shortage*, 77 LAW & CONTEMP. PROBS. 289, 292 (2014); Jake Linford, *The Kidney Donor Scholarship Act: How College Scholarships Can Provide Financial Incentives for Kidney Donation While Preserving Altruistic Meaning*, 2 ST. LOUIS U. J. HEALTH L. & POL'Y 265, 267 (2009). For a general discussion of the explosion of legal literature on the issue of organ markets, see Jed Adam Gross, *E Pluribus UNOS: The National Organ Transplant Act and Its Postoperative Complications*, 8 YALE J. HEALTH POL'Y, L. & ETHICS 145, 147–48 (2008). Gross conducted a search of American and Canadian journals for the complete phrase *national organ transplant act* and found that such a search culled 232 articles. *Id.* at 148. Now—ten years after Gross published this article—that search within only American journals produces nearly *twice* as many articles. See LexisNexis Journal Search for “National Organ Transplant Act,” LEXIS ADVANCED, <https://advance.lexis.com> (follow “Secondary Materials” hyperlink; then follow “Law Reviews & Journals” hyperlink; then search the exact phrase *national organ transplant act*) (producing 462 articles on October 27, 2017).

8. See Sara Naomi Rodriguez, *No Means No, but Silence Means Yes? The Policy and Constitutionality of the Recent State Proposals for Opt-Out Organ Donation Laws*, 7 FIU L. REV. 149, 176 (2011) (mentioning proposals that suggest tax incentives to those who register as organ donors);

work to propose and examine a redistributive tax system to address some of the equitable and ethical concerns that a kidney market raises.⁹

This Note will proceed as follows. Part I provides a brief background discussion of the ethical and equitable problems that exist under the current system. Part II adopts a hypothetical regulatory proposal that includes a kidney sales tax aimed at addressing the equitable and ethical problems outlined in Part I. Then, to show the viability of the proposed system, Part III sets forth one possible implementation strategy. Part III also attempt to answer potential political objections, focusing on the equitable and moral questions and looking at how the arguments of this Note could affect other legal issues relating to commodification of the body. The Conclusion then seeks to set the stage for future kidney-donation tax proposals and implementation strategies.

I. BACKGROUND

This Part will discuss the federal law prohibiting the sale of organs and the rationales behind it. It will then seek to show why some scholars have questioned the desirability of this law—even under the policy that originally supported it.

A. *The National Organ Transplant Act*

The prohibition against compensated organ donations in the United States started in 1983 when a decertified doctor named H. Barry Jacobs created a business to “broker” kidneys from donors in Third World coun-

Christian Williams, *Combating the Problems of Human Rights Abuses and Inadequate Organ Supply Through Presumed Donative Consent*, 26 CASE W. RES. J. INT'L L. 315, 344 (1994) (discussing how some scholars have suggested an income tax deduction for kidney donations); see, e.g., Joseph B. Clamon, *Tax Policy as a Lifeline: Encouraging Blood and Organ Donation Through Tax Credits*, 17 ANNALS HEALTH L. 67, 90–99 (2008) (proposing that donors be able to get a tax deduction or credit for donating an organ); Cody Corley, *Money as a Motivator: The Cure to Our Nation's Organ Shortage*, 11 HOUS. J. HEALTH L. & POL'Y 93, 100 (2011) (describing a proposed bill that introduced tax credits as an incentive for organ donations); Christopher J. Ryan, *The Anatomical Wealth of Nations: A Free Market Approach to Organ Procurement*, 13 MICH. ST. U. J. MED. & L. 427, 435 (2009) (discussing bill proposals for organ donation tax incentives); Margaret R. Sobota, *The Price of Life: \$50,000 for an Egg, Why Not \$1,500 for A Kidney? An Argument to Establish A Market for Organ Procurement Similar to the Current Market for Human Egg Procurement*, 82 WASH. U. L.Q. 1225, 1239 (2004) (explaining lifetime tax incentives for someone who either agrees to donate during one's life or to designate oneself as an organ donor in the event of death); Zwerner, *supra* note 6, at 280 (arguing to apply tax incentives for family members to consent to donations of deceased family members); see also *id.* at 291 (noting that “seventeen states provide an income tax deduction of up to \$10,000 for living organ donation”).

9. One legal scholar noted in passing that the government could impose a sales tax to offset the administrative costs in a cadaveric organ market, but he did not discuss such a tax in relation to ethical and equitable issues of that market or similar markets. Nor did he suggest redistribution of the sales tax. See Reid Kress Weisbord, *Anatomical Intent*, 124 YALE L.J. F. 117, 123 (2014).

tries to American recipients.¹⁰ The United States government (along with several states) swiftly responded with legislation making it illegal to receive or donate an organ for “valuable consideration.”¹¹

Laws preventing compensated organ donations arise from “policy concerns and philosophical concerns.”¹² The policy concerns relate to “distributive injustice” and protection of the poor from “exploitation.”¹³ “[I]f donors could be paid,” explained the Ninth Circuit Court of Appeals, “rich patients or the medical industry might [unduly] induce poor people to sell their organs, even when the transplant would create excessive medical risk, pain, or disability for the donor.”¹⁴ The result would be an exploited lower class, enlisted for the “use” of the upper class.¹⁵ Accordingly, the equitable concern is not detached from the moral, or philosophical, motive—that is, to prevent the wealthy from being unjustly enriched at the expense and degradation of the poor.¹⁶

10. Robert Steinbuch, *Kidneys, Cash, and Kashrut: A Legal, Economic, and Religious Analysis of Selling Kidneys*, 45 HOUS. L. REV. 1529, 1552 (2009); Note, *Regulating the Sale of Human Organs*, 71 VA. L. REV. 1015, 1015 (1985).

11. *Regulating the Sale of Human Organs*, *supra* note 10, at 1015; see National Organ Transplant Act, 42 U.S.C. § 274e (2012) (“It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce.”); see also *Richards v. Holder*, No. 13-13195-LTS, 2014 WL 2805280, at *1–5 (D. Mass. June 19, 2014) (discussing the constitutionality of this law).

12. *Flynn v. Holder*, 684 F.3d 852, 860 (9th Cir. 2012).

13. Jennifer M. Smith, *Kidney Transplantation: Only for the Well-to-Do?*, 31 CAMPBELL L. REV. 333, 334 (2009); Huma Zarif, *Distributive Injustice and Organ Transplant Waitlists*, 7 HASTINGS SCI. & TECH. L.J. 75, 92 (2015); see also Steve P. Calandrillo, *Cash for Kidneys? Utilizing Incentives to End America’s Organ Shortage*, 13 GEO. MASON L. REV. 69, 93–94, 100 (2004) (discussing “distributive injustice” and advancing “distributive justice” proposals for a free market organ exchange).

14. *Flynn*, 684 F.3d at 860. *But see* Crepelle, *supra* note 5, at 38–39 (“[B]arring an activity is not justified simply because a majority of people participating in the activity are poor. The indigent shine shoes, mine coal, and engage in various other trades that the rich do not because they are poor. Prohibiting opportunities to earn money does not improve the condition of those in poverty.” (footnote omitted)).

15. See Monique C. Gorsline & Rachelle L.K. Johnson, *The United States System of Organ Donation, the International Solution, and the Cadaveric Organ Donor Act: “And the Winner Is . . .”*, 20 J. CORP. L. 5, 26 (1994) (quoting then-Representative Albert Gore, stating that the United States government opposes brokering kidneys for the same reason that it opposes prostitution and slavery). *But see* Michele Goodwin, *The Body Market: Race Politics & Private Ordering*, 49 ARIZ. L. REV. 599, 607 (2007) (“Were African Americans compensated for voluntarily providing their organs to save the lives of fellow citizens, such transactions would be far different from antebellum slavery, which was characterized by forced labor, economic exploitation, physical abuse, and a lack of bargaining power. There is a danger that when anti-commodification scholars lightly compare slavery to organ markets, they trivialize the slave experience and overstate their case.”).

16. Jennifer L. Hurley, *Cashing in on the Transplant List: An Argument Against Offering Valuable Compensation for the Donation of Organs*, 4 J. HIGH TECH. L. 117, 133 (2004). For a free-market argument addressing these concerns, see Peter Aziz, *Establishing a Free Market in Human Organs: Economic Reasoning and the Perfectly Competitive Model*, 31 U. LA VERNE L. REV. 67, 96–98 (2009).

B. The world context: death, dialysis, and the black market

Despite these concerns, there has been a recent surge of American legal scholars arguing that Congress should relax the federal restriction on compensated organ donations for kidneys.¹⁷ There appear to be two primary factors motivating this trend.

First, laws that make it illegal to compensate living “donors”¹⁸ for a kidney proximately cause thousands of deaths every year.¹⁹ This reality arises because the demand for organ transplants—such as kidneys—far exceeds the availability of willing, altruistic donors.²⁰

Despite the fact that more than 14,000 altruistic individuals in the United States are willing to donate their organs each year, more than 121,000 candidates remain on the waiting list. The waiting list, which has experienced constant growth over the years, is expected to continue increasing rapidly in future years, while the number of donors will likely remain relatively constant under current [law].²¹

The “vast majority” of those on the organ waiting list are seeking a kidney.²² As a result, thousands of people die every year because they are

17. See, e.g., I. Glenn Cohen, *Regulating the Organ Market: Normative Foundations for Market Regulation*, 77 LAW & CONTEMP. PROBS. 71, 72 (2014).

18. Legal authorities often use the terms *donation* and *donor* when discussing monetary transactions for kidneys and other organs, see, e.g., *Flynn*, 684 F.3d at 860, though such transactions technically involve a sale, not a donation. A likely reason for the use of these terms to describe any kind of organ transfer is that the English language does not utilize different terms to denote the surgical removal of an organ based on whether the transferee’s motivation for giving up the organ was altruism or self-interest. Thus, this Note will employ this broader concept of “donation” to include transfer for compensation.

19. See Sigrid Fry-Revere & David Donadio, *America’s Organ Transplant Law Is Criminally Unfair to Donors*, NEW REPUBLIC (Oct. 23, 2014), <https://newrepublic.com/article/119963/us-organ-transplant-law-needs-reform-let-donors-get-reimbursed> (“[A government employee’s] fate [to die waiting for a kidney transplant] was sealed . . . when the United States enacted a well-intentioned law that effectively condemned him to death. As a result of the National Organ Transplant Act, more Americans have lost their lives waiting for an organ than died in world wars I and II, Korea, Vietnam, Afghanistan, and Iraq combined.”); Gary Becker, *Should the Purchase and Sale of Organs for Transplant Surgery be Permitted?*, BECKER-POSNER BLOG (Jan. 1, 2006), <http://www.becker-posner-blog.com/2006/01/should-the-purchase-and-sale-of-organs-for-transplant-surgery-be-permitted-becker.html> (“I do not find compelling the arguments against allowing the sale of organs, especially when weighed against the number of lives that would be saved by the increased supply stimulated by financial incentives.”).

20. Choi et al., *supra* note 7, at 289; Kieran Healy & Kimberly D. Krawiec, *Custom, Contract, and Kidney Exchange*, 62 DUKE L.J. 645, 651 (2012) (“As of October 5, 2012, the Organ Procurement and Transplantation Network reported 94,005 candidates on the kidney transplant waiting list, many of whom will die due to lack of available donors. In 2008 alone, 4,573 kidney patients died while waiting for an organ transplant.” (footnote omitted)).

21. Steeb, *supra* note 1, at 315 (footnotes omitted).

22. Beard & Leitzel, *supra* note 1, at 254; Philip J. Cook & Kimberly Krawiec, *A Primer on Kidney Transplantation: Anatomy of the Shortage*, 77 LAW & CONTEMP. PROBS. 1, 1 (2014) (“[T]he waiting list continues to grow and currently stands at about 100,000. It would be far longer were it not for the fact that 5000 people on the waiting list die each year, and thousands of others are removed

not able to get a kidney transplant.²³ Others must go through demoralizing and financially draining kidney dialysis treatment, which proves but a short and arduous reprieve.²⁴ Yet, a legalized and regulated kidney market could eliminate the kidney donation deficit, saving and improving thousands of lives.²⁵

Second, the law prohibiting compensated kidney donations has largely failed to achieve its equitable objectives. Even if the current anti-kidney-market legal regime protects the poor in the United States, many wealthy Americans circumvent these laws through the foreign black markets for organs, leading to exploitation of destitute people in poorer countries like India and Brazil.²⁶ Further, because these black-market transactions are unregulated, black-market brokers subject the donors to duress in virtually every case, if not fraud, theft, or force.²⁷ Moreover, the medical clinics where these brokers “harvest” kidneys fail to meet even minimal standards for safety and cleanliness, and the surgeons at these clinics often employ cheaper—and thus unnecessarily more violent—tools and techniques.²⁸ Despite these injustices and atrocities, American hospitals and the United States federal prosecutorial arm have done nothing to catch and penalize

because they become too sick to receive a transplant.” (footnote omitted)); *see also* Steeb, *supra* note 1, at 317 (noting the percentage of those on the organ donation waiting list who were needing a kidney at that time—in 2015—to be “eighty percent”).

23. Gregory S. Crespi, *Overcoming the Legal Obstacles to the Creation of a Futures Market in Bodily Organs*, 55 OHIO ST. L.J. 1, 2 (1994); Kristy Lynn Williams et al., *Just Say No to NOTA: Why the Prohibition of Compensation for Human Transplant Organs in NOTA Should Be Repealed and a Regulated Market for Cadaver Organs Instituted*, 40 AM. J.L. & MED. 275, 277 (2014).

24. Gary S. Becker & Julio J. Elias, *Cash for Kidneys: The Case for a Market for Organs*, WALL ST. J. 2 (Jan. 17, 2014, 6:45 PM), http://www.lkdn.org/LKDN_WSJ_Cash_for_Kidneys.pdf (noting that most people on dialysis cannot work and that the treatment costs about \$80,000 per year); *see also* Andrew C. MacDonald, *Organ Donation: The Time Has Come to Refocus the Ethical Spotlight*, 8 STAN. L. & POL’Y REV. 177, 177 (1997) (describing the low quality of life for a person on kidney dialysis).

25. *See* Crepelle, *supra* note 5, at 79; Rodriguez, *supra* note 8, at 177–78 (noting that Iran’s legalized kidney market, though far from perfect, has allowed the country to completely eliminate its kidney transplant waiting list).

26. *See* Beard & Leitzel, *supra* note 1, at 253–54; Calandrillo, *supra* note 13, at 90 (“[D]espite the developed world’s noble intention to ensure that organ donations truly represent the gift of life for recipients, severe organ shortages have ensued, leading to thousands of needless deaths as well as a thriving global black marketplace that exploits its participants.”); Goodwin, *supra* note 15, at 608 (“[E]vidence of children being used as donors and of desperate American patients touring China, India, Pakistan, Brazil, and other countries for their organ supply provides compelling reasons to rethink an ‘altruism only’ procurement system.” (footnotes omitted)); Weisbord, *supra* note 9, at 119–20; *see also* Crepelle, *supra* note 5, at 69–81 (describing the horrors through which sellers on the black market typically go in selling an organ, and stating that their average payment is only about \$1,000); *see generally* Mark Pennington, *Why Most Things Should Probably Be for Sale*, 13 GEO. J.L. & PUB. POL’Y 251, 261–62 (2015) (“It is telling that noxious outcomes occur most frequently where markets are illegal or heavily constrained and where often desperate people are forced into black market dealing with minimal publicity and no contract enforcement or due process.”).

27. Crepelle, *supra* note 5, at 53–56.

28. *Id.* at 54.

Americans who receive organs on this black market, apparently not wanting to add insult upon injury to a person who successfully receives such a transplant.²⁹ And thus, in a dark twist of irony, the federal government and the medical field in practice seem to follow a policy rationale opposite of that which underlies the National Organ Transplant Act, favoring preservation of (American) lives over the interests of the poor (in Third World countries).³⁰ These realities have caused some scholars to propose that the United States may even have an ethical imperative to do more to address the black market, which could include legalizing and regulating compensated domestic donations.³¹

In addition to foreign black-market-exploitation, at least one scholar has argued that laws that prevent Americans from contracting to sell a kidney “undermine free choice and private ordering, which can be tools of social justice and equitable redistribution of resources.”³² The corollary is that such laws may ultimately “undercut[] the bargaining power . . . and interests of African Americans.”³³ Yet, “African Americans comprise one-third of the kidney transplant waitlist, they wait longer than any other ethnic population for organs, and they suffer the highest death rate while on the kidney transplant waitlist.”³⁴ Thus, under the current system, the wealthy have better access to kidneys, the poorest of the world are exposed to exploitation from black-market kidney exchanges, and the marginalized in America are the most likely to languish or perish for want of any benefit from these illegal—yet inevitable³⁵—kidney markets.

Because of the added quality and quantity of life for organ transplant recipients and the failure of the current legal system,³⁶ some legal scholars

29. See *id.* at 56–57. A violation of the National Organ Transplant Act could result in as much as a \$50,000 fine and up to five years in prison. 42 U.S.C. § 274e(b) (2012). For an example of a foreigner getting away with coming to the United States and selling one of his kidneys, see Drew Griffin & David Fitzpatrick, *Donor Says He Got Thousands for His Kidney*, CNN (Sept. 2, 2009, 2:45 PM), <http://www.cnn.com/2009/WORLD/meast/09/01/blackmarket.organs/index.html>.

30. See Goodwin, *supra* note 6, at 209.

31. See, e.g., Dean L’hospital, *The Medium-of-Exchange Paradigm: A Fresh Look at Compensated Live-Organ Donation*, 2 HUM. RTS. & GLOBALIZATION L. REV. 1, 2 (2009).

32. Goodwin, *supra* note 15, at 608.

33. *Id.*

34. *Id.* at 600; accord Michele Goodwin, *Altruism’s Limits: Law, Capacity, and Organ Commodification*, 56 RUTGERS L. REV. 305, 395 (2004).

35. See Calandrillo, *supra* note 13, at 105 (“[M]arkets in human body parts and products are, for all practical purposes, unavoidable.”); Michael Shafer & Paige Comstock Cunningham, *Medical Exploitation and Black Market Organs: Profiteering and Disparities in Global Medicine*, CENTER FOR BIOETHICS & HUMAN DIGNITY (June 30, 2010), <https://cbhd.org/content/medical-exploitation-and-black-market-organs-profiteering-and-disparities-global-medicine> (“Black market organ transfer is the consequence of a gross imbalance between supply and demand.”).

36. Sally Satel et al., *State Organ-Donation Incentives Under the National Organ Transplant Act*, 77 LAW & CONTEMP. PROBS. 217, 217 (2014) (calling the current legal system on organ transplants a “qualified failure”).

have proposed overturning the current laws against compensated donations.³⁷ These proposals still suggest significant regulation of organ transactions.³⁸ For example, medical professionals might have to screen kidney donors seeking compensation to ensure that they were healthy and not giving up an organ under economic duress.³⁹ Toward this end, some have even suggested deferred payment, whereby the donor donates at one time but—to prevent rash, momentary financial motivations—does not receive payment for several years.⁴⁰ To some extent, such regulations will help to prevent exploitation of the poor, but these regulations do not alter the seemingly unavoidable reality that, in these proposed organ markets, virtually all donors would be poor, whilst most recipients would be wealthy.⁴¹

For this specific equity issue, redistributive tax regulation seems to provide the most promising model.⁴² This model would have to include (1) monetary incentives to living donors, to increase supply, and (2) taxation tailored to prevent inequitable access. Incentives to *living* donors are important for two reasons.⁴³ First, “[donees] live longer and organ grafts last longer when the organ is transplanted from a living as opposed to a cadaveric donor.”⁴⁴ And secondly, cadaveric organ donation supply is far too limited—even if fully realized—to adequately provide for all those in need of a kidney transplant.⁴⁵ The rest of this Note will explore how and

37. See, e.g., Aziz, *supra* note 16, at 99–107; Corley, *supra* note 8, at 105–12; Crepelle, *supra* note 5, at 69–81; Ahad J. Ghods & Shekoufeh Savaj, *Iranian Model of Paid and Regulated Living-Unrelated Kidney Donation*, 1 CLINICAL J. AM. SOC’Y. NEPHROLOGY 1136, 1137 (2006); Sobota, *supra* note 8, at 1224; Christy M. Watkins, *A Deadly Dilemma: The Failure of Nations’ Organ Procurement Systems and Potential Reform Alternatives*, 5 CHI.-KENT J. INT’L & COMP. L. 1, 41 (2005); Becker & Elias, *supra* note 24, at 3–5.

38. Crepelle, *supra* note 5, at 69–77; Hooman Movassagh, *Human Organ Donations Under the “Iranian Model”: A Rewarding Scheme for U.S. Regulatory Reform?*, 13 IND. HEALTH L. REV. 82, 118 (2016); see Steeb, *supra* note 1, at 342. For a relatively early example of a doctor noting the widening organ transplant gap and calling for new regulatory schemes, see Raja B. Khauli, *Issues and Controversies Surrounding Organ Donation and Transplantation: The Need for Laws that Ensure Equity and Optimal Utility of a Scarce Resource*, 27 SUFFOLK U. L. REV. 1225 (1993).

39. Crepelle, *supra* note 5, at 75.

40. *Id.* at 73.

41. See *id.* at 63–64 (describing this phenomenon in the Iranian system).

42. Cf. Yoram Margalioth, *Tax Policy Analysis of Climate Change*, 64 TAX L. REV. 63, 68 (2010) (“According to (domestic) tax policy analysis, government intervention in the market is justified on two grounds: (1) correcting for market failures and (2) the promotion of justice (equity).”).

43. See Steinbuch, *supra* note 10, at 1549–50.

44. *Id.* at 1549; see also Magda Slabbert, *This Is My Kidney, I Should Be Able to Do with It What I Want: Towards a Legal Framework for Organ Transplants in South Africa*, 31 MED. & L. 617, 625 (2012) (“There are many advantages in using living donors; better planning can be done and the blood supply through the organ can be constant and monitored. Better matching can also take place.” (footnote omitted)).

45. SIGRID FRY-REVERE, *THE KIDNEY SELLERS: A JOURNEY OF DISCOVERY IN IRAN* 6 (2014) (“Today the number of kidneys provided from cadavers could never be enough [to address the kidney shortage], even if every organ from every potential qualified donor could be harvested.”).

why taxation should be used as a tool of argumentation to address equitable and ethical concerns of financial kidney-donation incentives.

II. A REDISTRIBUTIVE KIDNEY TAX PROPOSAL

This Part begins by (in Subpart A) providing an overview of the tax system that this Note proposes, using a hypothetical example to compare a wealthy kidney recipient with a poor kidney recipient under the proposed system. Subparts B, C, and D look at the details of the proposed system. And then Subpart E concludes this Part by showing how the proposed system can address the equitable and ethical concerns that opponents of compensated kidney donations have raised.

A. *Overview of the proposed system*

There are two aspects of a sales tax proposal that this Part addresses from a policy perspective: (1) price regulation and (2) a sales tax.

To understand how these components would work in the proposed system, consider the following two hypothetical transactions, one involving a wealthy kidney-donation recipient and the other a poor kidney-donation recipient. For this hypothetical, the cost of the kidney will be \$50,000 and the sales tax will be 100%. A wealthy person in need of a kidney would contract with a donor (the “seller”) and would pay the donor the set amount, \$50,000. The wealthy recipient would also have to pay a sales tax on the donated organ, here 100%.⁴⁶ Thus, the total payment for the wealthy individual would be \$100,000: \$50,000 would go to the donor and \$50,000 to the government.⁴⁷

In contrast, a poor recipient in this hypothetical system would not have to pay the sales tax *and* would pay significantly less than the wealthy person, or nothing at all. What is not different between a transplant involving a poor recipient and one involving a wealthy recipient, however, is how much the donor will receive: in both cases, the donor will be paid \$50,000. However, at least part of this payment, in the case of the poor recipient, will come from the government. So, for example, if the

46. While it is beyond the scope of this Note to suggest or argue for a specific amount for the sales tax, because of the redistributive goal, *see infra* Part III.B, it should likely be set fairly high. Even a 100% sales tax is not out of the question.

47. The set price would ensure adequate compensation for the donor. While it is beyond the scope of this Note to suggest a number for the set price, evidence suggests that there are many who would pay well over \$100,000, plus medical expenses, for the opportunity to receive a speedy, high-quality organ transplant. *See* Crepelle, *supra* note 5, at 52–53; *see also id.* at 71 (noting that some donors have paid up to \$300,000 for a kidney); L’hospital, *supra* note 31, 8–9 (describing a Florida man who managed to get a bid of \$5.75 million for a kidney donation on eBay before the website ousted the auction as “facilitating [an] illegal transaction[]”).

transaction were subsidized 80%, the government would pay \$40,000 and the donee would pay \$10,000. Or, if the payment were fully subsidized, the donor would receive the full \$50,000 payment from the government and the donee would not pay anything. And for these transactions, the sales taxes that the wealthy kidney recipient paid, such as in the first example, would at least partially fund the government payment. As such, the wealthy and poor individuals would have essentially the same access to donated kidneys.

As this example illustrates, there are two variables that will come into the discussion of the sales tax and price floor: income cutoffs and subsidies. Income cutoffs will determine who will (or will not) pay the tax and at what rate. Subsidies have to do with the amount of aid a lower-class (or perhaps middle-class) person will receive to subsidize the cost of the kidney. Ideal numbers would ensure adequate supply of kidneys and availability to all classes. Thus, subsidies and income cut-offs necessarily inform the discussion of price regulation and the sales tax, which are discussed in turn below.

B. Price regulation

For the sales tax to work—and to prevent undue influence on the poor—a price regulation such as a price floor or a set price would be necessary. While proponents of free market organ exchange are likely to be unconvinced of the need for price regulation,⁴⁸ a kidney is a unique economic good that demands such regulation.⁴⁹ First, a price floor will force a donee to compensate the donor based on the societal perception of the value of the sacrifice, which takes into consideration factors that a financially desperate donor—and sometimes even an altruistic donor⁵⁰—might overlook.⁵¹

Second, if the price is set high enough, it will create higher supply (more people willing to donate) than demand (fewer willing to buy at the set price),⁵² and this situation will provide medical professionals with a

48. *E.g.*, Corley, *supra* note 8, at 115.

49. *See* Cohen, *supra* note 17, at 88; Crepelle, *supra* note 5, at 70.

50. The concern that compensation will reduce altruistic donations is a common objection to a free-market system. *See* Vanessa Chandis, *Addressing A Dire Situation: A Multi-Faceted Approach to the Kidney Shortage*, 27 U. PA. J. INT'L ECON. L. 205, 235 (2006). But the central issue has to be whether a non-compensation system is really better. *See* Steinbuch, *supra* note 10, at 1553. Further, this argument “fails to recognize that transplantable organs are [already] currently bought and sold for large sums of money within the medical community.” Corley, *supra* note 8, at 97. And there is at least one benefit of a reduction in altruistic donations, namely, that people will no longer feel “coerced” to donate a kidney to a close family member if they turn out to be a match. *See* Steinbuch, *supra* note 10, at 1587.

51. *See* Corley, *supra* note 8, at 114.

52. *See* Aziz, *supra* note 16, at 92 (discussing the effects of supply and demand in relation to a free market for organs); Choi et al., *supra* note 7, at 289–90.

pool of possible donors from which to select the best candidates (e.g., based on organ quality, psychological soundness, and chances of survival).⁵³ To understand this point, it is helpful to consider some numbers. Of the 250 million United States citizens who are over the age of eighteen,⁵⁴ about 45% of them would be healthy enough to donate a kidney.⁵⁵ This means that about 112.5 million Americans would have the option of donating a kidney for compensation. Yet, the number of individuals added to the kidney-transplant waiting list each year is 36,000,⁵⁶ so at the most 0.032% of—or 1 out of every 3,125—*eligible* adult donors would be needed to meet the current needs.⁵⁷ On the supply side, one recent study showed that around 36% of eligible donors earned less than \$35,000 per year,⁵⁸ meaning that, in a free market, the price of a kidney would likely be low. More specifically, the price would depend on how low a donor was willing to go,⁵⁹ resulting in a “winning [low] bidder” who was likely the poorest and most desperate in the donor pool (perhaps donating for as low as \$1,000). But, it goes without saying that the lowest bidder would not necessarily be the best candidate medically or psychologically. Conversely, if there were a high price floor (such as \$50,000), there would be a large number of willing donors from a cross-section of society, and this situation would allow medical professionals to selectively choose a donor based on equitable and eligibility-based criteria. These considerations make price regulation in a kidney market more desirable than in normal markets for scarce resources.⁶⁰

53. See Cohen, *supra* note 17, at 87–88; Cecilia M. Tuazon, *Kidneyconomics: The Black Market, Scarcity, and the Need to Realign the System of Incentives and Disincentives in the Laws Governing Kidney Donations*, 84 PHIL. L.J. 505, 531 (2009); see also Michael L. Volk, *Organ Quality As a Complicating Factor in Proposed Systems of Inducements for Organ Donation*, 77 LAW & CONTEMP. PROBS. 337, 342 (2014) (noting “differential value” among organs).

54. *Quick Facts*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045216> (last visited Oct. 7, 2018) (United States population estimated to be 325,719,178; amount of population over the age of eighteen estimated to be 77.4%).

55. Mandy Oaklander, *Why You Probably Can't Donate a Kidney Even If You Want To*, TIME (Nov. 14, 2014), <http://time.com/3585545/kidney-donation-obesity/>.

56. *Organ Donation and Transplant Statistics*, NATIONAL KIDNEY FOUNDATION, <https://www.kidney.org/news/newsroom/factsheets/Organ-Donation-and-Transplantation-Stats> (last visited Oct. 7, 2018) (estimating the average number of people added to the kidney waiting list each month to be 3,000).

57. The 0.032% figure was arrived at by dividing 36,000 by 112,500,000. The 3,125 figure was arrived at by dividing 112,500,000 by 36,000.

58. See Oaklander, *supra* note 55.

59. See William M. Sage & Peter J. Hammer, *Competing on Quality of Care: The Need to Develop a Competition Policy for Health Care Markets*, 32 U. MICH. J.L. REFORM 1069, 1100–01 (1999).

60. See Crepelle, *supra* note 5, at 71–72. A black market concern may still exist due to higher-than-equilibrium prices caused by a price floor, but the answer may simply be better enforcement against United States citizens who participate in black markets. See Chandis, *supra* note 50, at 224–25. Currently, there is little deterrent effect of enforcement since the alternative to using the black market is usually death. *Id.* If, however, a person passes up an opportunity under the system this Note proposes

Such price regulation does leave one concern, however: under normal market conditions, a price floor would make it prohibitively expensive for poor individuals to afford a kidney transplant. To address this issue, the next two Subparts demonstrate how an equitable tax system can ensure that those who need a kidney will be able to procure one (through government payments), even if the regulated price were set higher than market equilibrium.⁶¹

C. Tax brackets: simplicity vs. equity

The next question involves what level of sophistication should exist in a proposed tax system. In general, the more equitable the system in accounting for various factors that go into the donee's "ability to pay," the less administrable—and thus more expensive—it will be for the government to implement.⁶²

The most simple and administrable system would be an all-or-nothing approach. That is, a person seeking a compensated transplant would either receive a government-funded kidney procurement and pay no sales tax (the poor person) or would be on the hook for both the compensation and the sales tax (the wealthier person). Such a system would be progressive between the top and bottom brackets, but it would be "regressive" within the top bracket, since each person who fell in that bracket would have to pay the same amount regardless of relative income (i.e., "ability to pay"⁶³).⁶⁴

Nevertheless, one could argue that even a simple, bright-line rule that required upper- and middle-class donees to pay the full price and the sales tax would be more feasible and would create a more equitable outcome than exists under the current law. First, a more complicated, graded system would take longer to navigate.⁶⁵ Little needs to be said here, except that

and obtains a kidney on the black market, a fine or jail time may serve a future (general) deterrent effect. The issue for the patient in need of a kidney becomes merely financial rather than life-or-death. See *supra* note 29 and accompanying text.

61. See Aziz, *supra* note 16, at 92–93 (discussing the concept of "equilibrium" in relation to organ markets).

62. Steve R. Johnson, *The E.L. Wiegand Lecture: Administrability-Based Tax Simplification*, 4 NEV. L.J. 573, 582–84 (2004) (explaining how simplicity, though less thoroughly equitable, is often necessary for the sake of "administrability").

63. See *Krumpotich v. Franchise Tax Bd.*, 31 Cal. Rptr. 2d 896, 898 (Cal. Ct. App. 1994).

64. Dan Throop Smith, *High Progressive Tax Rates: Inequity and Immorality?*, 20 U. FLA. L. REV. 451, 452–53 (1968) (discussing the regressive effect of a flat-rate tax on individuals with different income levels).

65. See Francine J. Lipman, *The Working Poor Are Paying for Government Benefits: Fixing the Hole in the Anti-Poverty Purse*, 2003 WIS. L. REV. 461, 477 (2003) (noting that greater "simplicity" in the tax system allows for "fast access" to tax benefits).

time is of the essence when one is in need of a kidney transplant.⁶⁶

Second, it would be difficult to truly assess the needs of middle-class individuals. For example, most people in the middle class come from middle- and upper-class families,⁶⁷ meaning that even if the middle-class person could not raise the funds, his extended family possibly could. Further, a middle-class person in need of a kidney could still receive an altruistic donation from a related donor,⁶⁸ which would help ensure that not all altruistic donations would be “crowded out.”⁶⁹ Indeed, to fully solve the kidney shortage, some scholars have argued that a solution that elicits both altruistic and compensated donations is ideal.⁷⁰ At any rate, the sales tax would facilitate redistribution of funds from wealthy families to poor families and help provide opportunities that otherwise would be unavailable to poorer families.⁷¹

In addition, “even for those who would not be able to afford a . . . kidney, their insurers [may] be willing to pay for one because the price of a kidney would likely be less than the cost of medical care for end-stage renal disease, including the expense of dialysis treatments.”⁷² Another reason insurance companies may assist middle-class individuals in receiving a transplant is because, generally, the sooner one receives a transplant,

66. See MacDonald, *supra* note 24, at 177 (“[P]eople are dying while waiting for suitable donor organs.”).

67. Eric M. Zolt, *Inequality in America: Challenges for Tax and Spending Policies*, 66 TAX L. REV. 641, 668 (2013) (“A parent’s income and education level is a very strong predictor of future life chances for their children.”).

68. Of course, the assumption is that a person would be willing to donate a kidney to help a family member without compensation. But as discussed above, many people who would apply to be a donor in the market would not qualify or would otherwise be unneeded. Thus, these individuals could form a pool of potential altruistic donors—though this pool may be marginally smaller than it is currently. Another possibility is that the government could take away the price floor for family member donations, allowing some compensation, while recognizing that sales between family members often come from mixed motives.

69. See Goodwin, *supra* note 34, at 340; see also *supra* note 50 (discussing the common objection that a kidney market would eliminate altruistic donations).

70. See, e.g., Goodwin, *supra* note 34, at 340.

71. See James R. Repetti, *Democracy and Opportunity: A New Paradigm in Tax Equity*, 61 VAND. L. REV. 1129, 1131 (2008) (“[T]he principal equity goal underlying a just government is the creation of equal opportunities for all citizens to achieve self-realization—to make the best life for themselves and their families. . . . A tax should be *designed* to achieve equal opportunity for self-realization as one of its principal goals.”). One of the “Guiding Principles” of organ donation established by the World Health Organization was that, “[i]n light of the principles of distributive justice and equity, donated organs should be made available to patients on the basis of medical need and not on the basis of financial or other considerations.” Jason Altman, *Organ Transplantations: The Need for an International Open Organ Market*, 5 TOURO INT’L L. REV. 161, 174 n.70 (1994) (quoting World Health Organization, *Human Organ Transplantation, A Report on Development Under the Auspices of WHO* (1987–1991)).

72. Choi et al., *supra* note 7, at 289; see also T. Randolph Beard & David L. Kaserman, *On the Ethics of Paying Organ Donors: An Economics Perspective*, 55 DEPAUL L. REV. 827, 841 (2006) (estimating the ban on compensated donations in the United States to be billions of dollars annually).

the better the health outcomes post-transplant.⁷³ While insurance companies cannot discriminate in offering coverage based on income level, they could provide an option for kidney procurement coverage at a reasonable cost. Likely, most of those who would purchase such coverage would be middle-class individuals who would not qualify for a government-funded donation (though wealthy people may want to have this coverage as well). The availability of the procedure would allow middle- and upper-class individuals to bargain with insurance companies for this coverage, while poorer individuals who would qualify for a government-funded donation could opt out.

Despite the benefits of administrability in a simple all-or-nothing system, a more progressive tax system is possible. For example, Congress could implement a structure with a middle ground, requiring full payment but exemption from the sales tax for middle-class donees, subsidies for lower middle-class individuals, or both. While a more nuanced system would be more difficult to administer,⁷⁴ such a system would go further in ensuring that it would not be prohibitively expensive for anyone to receive a kidney transplant.

While each potential system has its positives and negatives, it is enough for the purposes of this Note to demonstrate that, when compared to the current law, any form of a taxed kidney market would lead to more equity for the poor and greater access to lifesaving kidney transplants.

D. Wealth determination

Before highlighting how a sales-tax approach addresses the equitable objections to compensated kidney donations, it is necessary to consider wealth determination—that is, the approach for deciding who qualifies for subsidies or full payment and who must pay the tax. Because a person in need of a kidney donation will likely be too sick to work, wealth determination may be a particularly challenging aspect of a kidney-market tax system.

In order to determine who qualifies for government assistance for a kidney or exemption from the sales tax, and (alternatively) who must pay the whole price plus the sales tax, the IRS—or some government agency tasked with regulating the kidney market⁷⁵—could determine eligibility based on a comparison between the prospective donee's wealth prior to

73. FRY-REVERE, *supra* note 45, at 205–06 (“Statistically, medical costs rise exponentially the longer a patient is on dialysis because of a high rate of general . . . deterioration.”).

74. See Lipman, *supra* note 65, at 477.

75. See David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 958 (2004) (explaining that a taxing system, simply because of its implementation of tax policy, is not necessarily best implemented by the IRS).

becoming sick and her wealth at the time of the transplant. There are two reasons the donee's ability to pay will need to be assessed using a calculation of wealth before the illness. First, most people who will need a kidney will no longer be employed.⁷⁶ Second, those with a wealth level slightly above the cutoff would otherwise have an incentive to reduce or hide assets as soon as it were to become apparent that they would need a transplant.⁷⁷ However, the prospective donee's present wealth will also have to be a consideration. After all, a person who was wealthy before becoming sick may still qualify for a subsidized kidney donation (and no tax) if her reduction in wealth were explicable or otherwise determined to have not been in bad faith.

One way to determine wealth for the purpose of eligibility for a sales-tax exemption and a government-sponsored kidney transaction would be household income. The income for purposes of this assessment could be determined by the higher of gross adjusted income or total income.⁷⁸ Further, the government could assess an individual's income through an audit of the individual's tax returns,⁷⁹ or it could use a more thorough income assessment that would calculate nontaxed income as well, such as that used for calculating the income of a debtor for purposes of filing for bankruptcy.⁸⁰ One possible dividing line for the income cutoff could be the median income for the state,⁸¹ or the government could simply set the number, adjustable for family size and (annually) for inflation.

While income is not the best measure of total wealth, since it merely provides a snapshot of an increase in wealth over a given period,⁸² it may still be the best measure for determining eligibility for a subsidy in a regulated kidney market. First, assiduously calculating total wealth would create a greater administrative burden: it would likely require a filing of schedules similar to bankruptcy⁸³ or something similar to a mortgage

76. Becker & Elias, *supra* note 24, at 2 ("Most of those on dialysis cannot work.").

77. See Jonathan Barry Forman, *Designing A Work-Friendly Tax System*, 2 PIERCE L. REV. 131, 145–46 (2004) (describing how tax cutoffs disincentivize earning income).

78. Eligibility for the Earned Income Tax Credit—a redistributive tax tool—is currently assessed using the higher of gross adjusted income or total income. See 26 U.S.C. § 32(a) (2012).

79. Cf. Tracey M. Roberts, *Mitigating the Distributional Impacts of Climate Change Policy*, 67 WASH. & LEE L. REV. 209, 264–66 (2010) (discussing how a proposed distribution system could utilize the current income tax system to determine eligibility).

80. See 11 U.S.C. § 101(a)(10A) (2012).

81. The Bankruptcy Code again provides an example of a statutory scheme that utilizes a similar approach. See *id.* § 101(a)(39A).

82. See Arthur Cockfield, *Income Taxes and Individual Liberty: A Lockean Perspective on Radical Consumption Tax Reform*, 46 S.D. L. REV. 8, 24–25 (2001).

83. See FED. R. BANKR. P. 1007 (describing the required forms and schedules that must be submitted to initiate a bankruptcy proceeding).

application process.⁸⁴ Second, basing eligibility on wealth would penalize past savings.⁸⁵ Third, this penalty would especially impact those in retirement who rely on their savings for future income⁸⁶—and the retirement age group is the group currently hit the hardest by the organ shortage.⁸⁷ For this age group, retirement payments and income may still provide a better indicator of their true financial situation than total accumulated wealth.

While any effective calculation of wealth is likely to prove burdensome, the number of transactions will be limited and will still likely be easier for the recipient than obtaining a kidney on the black market. Unlike the income tax that requires a yearly assessment of ability to pay⁸⁸ or a consumer sales tax that applies to numerous transactions per week,⁸⁹ the income assessment for a kidney purchase would be necessary only one time for each person seeking to obtain a kidney on the market. One of the reasons consumer sales taxes are assessed at a flat rate is because of the difficulty of assessing ability to pay for each transaction to which the tax applies.⁹⁰ In contrast, a kidney donation would be a comparatively rare transaction.⁹¹ And with some effort, hospitals could serve as the first-line gatekeeper for this proposed system,⁹² communicating with the IRS (or other government agency) to help ensure compliance.

84. See Tony Mariotti, *6 Steps of the Mortgage Loan Process: From Pre-Approval to Closing*, RUBYHOME, <https://www.rubyhome.com/home-loans/mortgage-loan-process/> (last updated Mar. 21, 2018).

85. See Stephanie A. Weber, *Re-Thinking the Estate Tax: Should Farmers Bear the Burden of a Wealth Tax?*, 9 ELDER L.J. 109, 136 (2001) (discussing how the estate tax “penalizes saving and encourages consumption”).

86. See *Converting Retirement Savings to Retirement Income*, COASTAL WEALTH MGMT. (May 1, 2017), <https://www.coastalwealthmanagement24.com/converting-retirement-savings-retirement-income/>.

87. See Satal & Hippen, *supra* note 1, at 154.

88. Herwig J. Schlunk, *A Lifetime Income Tax*, 25 VA. TAX REV. 939, 940 (2006).

89. See Neil H. Jacoby, Book Note, 67 YALE L.J. 516, 518 (1958) (reviewing NICHOLAS KALDOR, *AN EXPENDITURE TAX* (1957)).

90. See Steven A. Bank, *The Progressive Consumption Tax Revisited*, 101 MICH. L. REV. 2238, 2245 (2003) (reviewing EDWARD J. MCCAFFERY, *FAIR NOT FLAT: HOW TO MAKE THE TAX SYSTEM BETTER AND SIMPLER* (2002)).

91. See Cook & Krawiec, *supra* note 22, at 1 (noting that, in the United States, about 35,000 individuals per year seek a kidney transplant). Even though the number would be in the thousands, compared to the number of income tax returns filed each year and the number of consumer transactions that take place on a daily basis, this assessment would be relatively rare.

92. See Robert Ainley, *Organ Transplantation: A Model Law Approach to Combat Human Trafficking and Transplant Tourism*, 13 OR. REV. INT’L L. 427, 437 (2011) (pointing out that, realistically, transplantations have to take place in hospitals); see also Calandrillo, *supra* note 13, at 88 (noting that currently hospitals make little or no effort to determine the circumstances surrounding a kidney donation).

E. How the sales tax addresses equitable concerns

The tax system discussed in this section effectively mitigates or dispels the equitable objection to a kidney market, namely, that compensated kidney donations would benefit only wealthy individuals and degrade the poor.⁹³ The price regulation would ensure adequate compensation,⁹⁴ and a sales tax could help fund a social program to cover the costs of kidney procurement for poorer individuals.⁹⁵ Considering the fact that taxation is one tool for ensuring the equity that economics fails to provide in pursuit of efficiency,⁹⁶ one may well wonder why proponents of the kidney market have not yet considered redistributive taxation as an answer to these anti-organ-market equity arguments.

And a redistributive tax system that permits kidney donations for consideration is arguably more equitable than the antimarket system now in place: currently, wealthy individuals are able to get access to organs (albeit poor-quality ones) on the black market, while poorer individuals do not have the resources to do so.⁹⁷ But the system that this Note proposes could make life-saving kidney transplants available to all classes.⁹⁸

III. VIABILITY OF A TAXED KIDNEY MARKET IN AMERICA

Since the idea of compensating organ donors has been categorically rejected in the West,⁹⁹ it may seem unlikely that the United States will sponsor and regulate a kidney market.¹⁰⁰ Yet, while the prohibition on organ sales has remained a steady feature of Western legal norms, there has been some movement away from the earlier, more rigid approaches. Many developed countries have recently modified their laws to be less stringent than the National Organ Transplant Act.¹⁰¹ For example, in 2008, Israel

93. For a statement of this equitable concern, see, e.g., *Flynn v. Holder*, 684 F.3d 852, 860 (9th Cir. 2012); Michael H. Scarmon, Note, *Brotherton v. Cleveland: Property Rights in the Human Body—Are the Goods Oft Interred with Their Bones?*, 37 S.D. L. REV. 429, 444 (1992).

94. Cohen, *supra* note 17, at 88 (“When *exploitation* is the concern, price floors or high fixed prices are one very pertinent regulatory intervention.”).

95. See Repetti, *supra* note 71, at 1146–47.

96. See Roberts, *supra* note 79, at 213–14 (“Because the goal of economics is to maximize efficiency (enlarge the pie), [economists] leave redistribution issues (division of the pie) to the tax and transfer system.”).

97. See Crepelle, *supra* note 5, at 77.

98. See Chandis, *supra* note 50, at 232 (“[I]n order to effectively and ethically increase the kidney supply without the existence of a black market, a proposal must equitably treat and provide options for both the rich and poor.”).

99. Ingrid Schneider, *The Body, the Law, and the Market: Public Policy Implications in a Liberal State*, 35 IUS GENTIUM 197, 198 (2014). Currently, Iran is the only country that allows consideration-based kidney transplantation contracts. Steeb, *supra* note 1, at 330.

100. Steeb, *supra* note 1, at 330.

101. *Id.* at 326–30.

passed a law that, while still prohibiting compensation for the organ itself, provided for giving donors forty days of lost wages, reimbursement for five years of health and life insurance premiums, priority status for future transplants,¹⁰² and free lifetime access to Israel's national parks.¹⁰³ Further, as the kidney shortage has grown bleaker, many world health authorities are beginning to consider the viability of providing forms of compensation for living-donor kidney donations.¹⁰⁴ And, as has been shown throughout this Note, legal scholars are increasingly becoming convinced of the need for modification of the existing anticompensation laws.

In the 1980s, the United States led the way in the West by prohibiting organ sales;¹⁰⁵ for America to now rule out a regulated organ market on the grounds that no other Western country has one would be to relinquish any claim it might have as a world leader on organ donation laws. To maintain its status as a leader in this area, it would be appropriate to reconsider the ethical and equitable questions under the changing world circumstances, taking into account the existence of the black market, the rising kidney donation deficit, and regulatory proposals like the one advanced by this Note.

The following Subparts seek to answer the remaining concerns a law-making body—such as Congress—is likely to have about changing laws to allow compensated and regulated kidney transplants. Subpart A looks at the potential impact on lower-class donors. The final two Subparts then turn to the ethical issue, looking at (in Subpart B) the moral perspective of allowing compensation for kidney donations and considering (in Subpart C) how the arguments and approaches presented in this Note could apply to transactions involving other body parts.

102. Jacob Lavee & Avraham Stoler, *Reciprocal Altruism—The Impact of Resurrecting an Old Moral Imperative on the National Organ Donation Rate in Israel*, 77 LAW & CONTEMP. PROBS. 323, 326–27 (2014).

103. These provisions are in Note 22 of Israel's Organ Transplantation Act. To see an English language translation of this Act, see *Israel Transplant Law—Organ Transplant Act, 2008*, THE DECLARATION OF ISTANBUL ON ORGAN TRAFFICKING AND TRANSPLANT TOURISM, <http://www.declarationofistanbul.org/resources/legislation/267-israel-transplant-law-organ-transplant-act-2008> (last visited Oct. 7, 2018). See also Steinbuch, *supra* note 10, at 1569–77 (discussing Jewish religious and ethical thought regarding kidney donations and sales).

104. Steinbuch, *supra* note 10, at 1554 (“[A]s a result of the overwhelming number of chronic renal patients lacking reasonable prospects of receiving a cadaveric or donated-living transplant, some organizations, including ones that have long opposed offering compensation to organ donors, have recently begun to at least consider offering some form of compensation.”).

105. Alexander M. Capron, *Six Decades of Organ Donation and the Challenges That Shifting the United States to a Market System Would Create Around the World*, 77 LAW & CONTEMP. PROBS. 25, 29–30 (2014) (relating how the United Kingdom and other Western countries followed the United States in passing their anti-organ-market measures).

A. *The impact on lower-class donors*

Under the tax proposal of this Note, Congress is more likely to view a regulated kidney market as having a positive aggregate impact on low-income donors.¹⁰⁶ First, nowadays the negative impact for a donor is not as harsh as many imagine: kidney donors spend only three days in the hospital, can return to all their normal life activities (including playing sports) in four to six weeks, and on average outlive their nondonor counterparts.¹⁰⁷ And today it is much safer for someone to donate a kidney than it was when the National Organ Transplant Act became law in 1984.¹⁰⁸ But second, under the proposal of this Note, the donation will benefit the donor as well.¹⁰⁹ For example, one can imagine the positive impact the compensated donation might have on someone struggling with student loans.¹¹⁰ Moreover, the compensation could perhaps itself be used to fund lifesaving medical intervention for one of the donor's family members.¹¹¹ "By contrast, the federal prohibition on [organ donation for compensation] undermines private ordering, exacerbates organ demand, increases waiting time, [and] penalizes the poor. . . ."¹¹²

Second, when the system is no longer about the rich using the poor, there is little to find repulsive. For the donor, the sense of being able to help others can reverse potential negative feelings,¹¹³ even if the donor has

106. For a discussion of the general negative view on kidney markets, see Satel & Hippen, *supra* note 1, at 193.

107. See generally Ingela Fehrman-Ekholm et al., *Kidney Donors Live Longer*, 64 *TRANSPLANTATION* 976 (1997); Steinbuch, *supra* note 10, at 1596; *Living Donors*, NAT'L. KIDNEY REGISTRY, https://www.kidneyregistry.org/living_donors.php#donor-protection (last visited August 20, 2017).

108. See S. Gregory Boyd, Comment, *Considering a Market in Human Organs*, 4 *N.C. J.L. & TECH.* 417, 422–28, 457 (2003).

109. See Gorsline & Johnson, *supra* note 15, at 28 (explaining that a common argument for a kidney market is that "a free-market approach benefits both the donor and the recipient because the donor receives a monetary reward and the recipient gets a much-needed organ").

110. See *Educ. Credit Mgmt. Corp. v. Jespersion*, 571 F.3d 775, 783 (8th Cir. 2009) (upholding the bankruptcy court's denial of discharge of \$350,000 in student loans); *Berscheid v. Educ. Credit Mgmt. Corp.* (*In re Berscheid*), 309 B.R. 5, 12 (Bankr. D. Minn. 2002) (discussing the fact that student loans are not dischargeable even in bankruptcy); see also Linford, *supra* note 7, at 266–67, 271–87 (noting the importance of college education for upward mobility and proposing a law that would provide scholarship awards to eligible students who donate a kidney).

111. See Slabbert, *supra* note 44, at 626–27 (recounting the story of a father in Turkey who requested to sell a kidney to get money to provide for a medical treatment for his daughter, but who was forced to watch his daughter die, having been "prevented [by a law against organ sales] from saving two lives—his daughter's and that of the patient who would have bought his kidney").

112. Michele Goodwin, *Private Ordering and Intimate Spaces: Why the Ability to Negotiate Is Non-Negotiable*, 105 *MICH. L. REV.* 1367, 1369 (2007).

113. See Satel & Hippen, *supra* note 1, at 193 (mentioning how one consequence of a kidney market may be that some will donate without fully thinking it through).

mixed altruistic and financial motives.¹¹⁴ For example, in the Iranian kidney market, some donors who approached kidney donation with mixed motives to help others and to help themselves (financially) had a positive experience.¹¹⁵ In fact, many Iranian donors became friends and kept in contact with their donees,¹¹⁶ and a large percentage of donors reported being motivated to participate in the program out of a desire to help others.¹¹⁷ These reports have surfaced in spite of the fact that the Iranian system does not include a redistributive sales tax.¹¹⁸ If a sales tax of a wealthy individual's transplant goes toward procurement of a kidney for a lower income person, the donor would likely be even more motivated and reassured of the importance of her sacrifice.

In sum, recent pro-organ-market proposals—such as this Note—are in a different ethical galaxy from H. Barry Jacobs's idea that triggered the current federal law prohibiting organ sales.¹¹⁹ Looking back, one should perhaps view the anti-organ-market legislation as a referendum on inequity and exploitation in an unregulated organ market, such as the black market, rather than an eternal, inflexible legislative dogma against compensated organ donations.¹²⁰ Moreover, at that time, Congress maintained an idealistic belief that altruistically motivated donations of kidneys would cure the kidney shortage.¹²¹ As the years pass and the shortage grows, that

114. See Choi et al., *supra* note 7, at 295–303 (suggesting that “selling” a kidney in exchange for the donee giving money to charity circumvents—or at least mitigates—the ethical concern related to “commodification” of body parts); Watkins, *supra* note 37, at 31 (“[O]rgan sale may not reduce the amount of altruism in the world.”).

115. FRY-REVERE, *supra* note 45, at 99–101.

116. See *id.* at 93; see also *id.* (“I [heard] of two instances where recipients married their donors.”).

117. *Id.* at 98–102. Along these lines, a few scholars, including Richard Posner, proposed an “altruism exchange” that allows the donor to take compensation for her kidney for the sole purpose of donating it to a charity. Choi et al., *supra* note 7, at 303. Yet, such a proposal does not address the biggest hindrance to kidney donation; namely, this approach does not provide an adequate motivation to donate a kidney. See Satel et al., *supra* note 36, at 218 (“The woeful inadequacy of organ-procurement policy lies in its ideological bedrock: the notion that altruism—that is, sacrifice without expectation of material reciprocation or enrichment—is the only legitimate motive for donating an organ.”).

118. See Crepelle, *supra* note 5, at 57–62 (detailing the Iranian kidney market's regulatory system).

119. Kelly Ann Keller, *The Bed of Life: A Discussion of Organ Donation, Its Legal and Scientific History, and a Recommended “Opt-Out” Solution to Organ Scarcity*, 32 STETSON L. REV. 855, 879 (2003) (discussing how the original legislation banning kidney sales came in response to H. Barry Jacobs's proposal to intentionally exploit indigents in Third World countries to obtain kidney donations from them); see also Satel et al., *supra* note 36, at 225–26 (noting that early drafts Congress considered before Jacobs's proposal included creative, incentive-based organ donation solutions).

120. See Michele Goodwin, *Confronting the Limits of Altruism: A Response to Jake Linford*, 2 ST. LOUIS U. J. HEALTH L. & POL'Y 327, 327 (2009) (referring to Jacobs's proposal as “a sort of reverse Robin Hood effort”); Fry-Revere & Donadio, *supra* note 19 (describing the prohibition against an organ market as a congressional overreaction).

121. See Gross, *supra* note 7, at 183–84.

vision is indubitably fading.¹²² Thus, if, as one legal scholar suggested, the federal ban on organ sales was a “swift” form of “cause legislation” that simply sought to “protect[] poor people’s bodies from the rich and greedy,”¹²³ perhaps—and especially as the kidney shortage widens—Congress could be persuaded by a sensible, equitable proposal for revising the laws against compensated kidney donations.¹²⁴

B. Remaining moral objections

Despite practical arguments for a kidney market, there remains an argument that “commodification” of body parts is inherently immoral.¹²⁵ Worldwide opposition to kidney sales reveals that this concern may be intuitive.¹²⁶ The issue seems to be that allowing a person to sell a body part may change the way people view the human body, seeing it as disposable or profane.¹²⁷ And though no sacred religious text speaks explicitly on the issue of selling body parts, world religious leaders are virtually united in condemning this practice.¹²⁸

Nevertheless, the nature of the moral argument is not likely to withstand careful scrutiny. In essence, what the moral argument holds is that laws must restrict personal autonomy simply because certain personal decisions are “highly offensive to nonparticipants.”¹²⁹ Yet, a purely subjective moral case as a basis for legal rules is notoriously futile.¹³⁰ Many

122. See Goodwin, *supra* note 120, at 336–39.

123. *Id.* at 328.

124. See Ranee Khooshie Lal Panjabi, *The Sum of a Human’s Parts: Global Organ Trafficking in the Twenty-First Century*, 28 PACE ENVTL. L. REV. 1, 48–49 (2010) (“We will have to choose between two sets of moral values: the value we place on preventing death and alleviating suffering, and the value we place on respect for human dignity and our commitment to meeting human needs in a fair and equitable manner.” (quoting Clair Andre & Manuel Velasquez) (citation omitted)).

125. See H. Tristram Engelhardt, Jr., *Giving, Selling, and Having Taken: Conflicting Views of Organ Transfer*, 1 IND. HEALTH L. REV. 31, 35 (2004) (referring to the commodification concern as a moral issue arising to the level of an “intrinsic evil”); see also *Flynn v. Holder*, 684 F.3d 852, 861 (9th Cir. 2012) (referring to the buying and selling organs as “revolting”).

126. See Goodwin, *supra* note 112, at 1368.

127. See generally MIRCEA ELIADE, *THE SACRED AND THE PROFANE: THE NATURE OF RELIGION* (Willard R. Trask, trans., 1957) (showing the sociological forces that create constructs of special, i.e. “sacred,” and common, i.e. “profane”); see also S. REP. NO. 98-382, at 17 (1984) (voicing the concern about the human body being viewed as a commodity).

128. See Steinbuch, *supra* note 10, at 1566–67.

129. Richard Posner, *Organ Sales—Posner’s Comment*, BECKER-POSNER BLOG (Jan. 1, 2006), <http://www.becker-posner-blog.com/2006/01/organ-sales--posners-comment.html>.

130. Engelhardt, *supra* note 125, at 36 (“In the absence of a state-imposed orthodoxy, humans tend not only to engage in open foundational moral disputes, but also lack the intellectual resources to resolve their moral controversies by sound rational argument.”); see also Kevin P. Tobia, *How People Judge What Is Reasonable*, 70 ALA. L. REV. 293, 311–12 (2018) (discussing how societal assessments about the reasonableness of an alternative come both from moral ideals and from perceptions of what is normal).

accepted aspects of modern life were once taboos.¹³¹ But for the thousands of Americans added to the kidney transplant waitlist each year, this debate is a matter of life or death, and so the moral question requires a broad consideration of all the relevant issues, not just the individual sensibilities of the noninvolved.

C. Implications on other human-body-parts markets

A final consideration is how changing the law to allow kidney transactions will impact the law on compensation for other body parts and products, such as other organs, blood and semen,¹³² stem cells, human eggs,¹³³ fetal tissue,¹³⁴ and cadaveric organ donations.¹³⁵ Compensation for a kidney donation from a living donor presents a hybrid legal question: a kidney is more like other body parts and organs that are not legally marketable and less like blood and semen, which are allowed to be sold, to the extent that the body will not resupply a kidney after removal.¹³⁶ But a kidney is more like blood, human eggs, and semen, and less like other body parts and organs, in that removal of one kidney has no clinical effect on the health or appearance of the body.¹³⁷ But perhaps the broader question is whether the legal framework for a kidney market should employ recogniz-

131. See Satel & Hippen, *supra* note 1, at 193–94 (describing how many markets exist and thrive now that once were considered repulsive, such as “commodification of books” and the “commercialization of . . . universities”); Jami L. Zehr, *Using Gestational Surrogacy and Pre-Implantation Genetic Diagnosis: Are Intended Parents Now Manufacturing the Idyllic Infant?*, 20 LOY. CONSUMER L. REV. 294, 316 (2008) (relating how older opponents of surrogacy argued that “[a]llowing commercial surrogacy constitute[d] the sale of children, and [that] surrogate children [would] become commodities”).

132. See Roy Hardiman, Comment, *Toward the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue*, 34 UCLA L. REV. 207, 229 (1986).

133. See generally Kitty L. Cone, Note, *Family Law—Egg Donation and Stem Cell Research—Eggs for Sale: The Scrambled State of Legislation in the Human Egg Market*, 35 U. ARK. LITTLE ROCK L. REV. 189 (2012) (describing the human egg market); see also Wancata, *supra* note 3, at 200–01 (comparing a kidney donation to the donation of human eggs, displaying puzzlement as to why the latter is allowed in the United States but not the former, and ultimately arguing that the sale of human eggs should likewise be prohibited).

134. See generally V. Noah Gimbel, *Fetal Tissue Research & Abortion: Conscriptio, Commodification, and the Future of Choice*, 40 HARV. J.L. & GENDER 229 (2017).

135. See generally Walter Block et al., *Human Organ Transplantation: Economic & Legal Issues*, 3 QUINNIPIAC HEALTH L.J. 87 (2000); David Kaserman, *Markets for Organs: Myths and Misconceptions*, 18 J. CONTEMP. HEALTH L. & POL’Y 567 (2002).

136. Wendy Dullea Bowie, Comment, *Multiplication and Division—New Math for the Courts: New Reproductive Technologies Create Potential Legal Time Bombs*, 95 DICK. L. REV. 155, 168 (1990) (“While individuals may sell their blood or semen, society does not permit the sale of a kidney or a lung. Blood and semen are, in effect, renewable body products; major organs are not. . . .” (footnote omitted)); see also *Lary v. United States*, 787 F.2d 1538, 1540 n.3 (11th Cir. 1986) (“Red blood cells have an average finite life of approximately four months.” (citing 2 ENCYCLOPEDIA BRITANNICA 1117-21 (15th ed. 1984))).

137. See Jeffrey Prottas, *Human Tissues as Medical Treatment*, 65 S. CAL. L. REV. 445, 446 (1991); see also *supra* notes 107–08 and accompanying text.

able legal principles (e.g., rooted in qualified property rights¹³⁸), or—because of the dire need and the uniqueness of a kidney in comparison to other body parts or secretions—treat kidney transplants *sui generis*?

For now, there does not seem to be any value in extending the tax proposal of this Note to other human-body-parts markets. This limited approach arises from the nature of balancing the need for a greater supply of kidneys against the reasons for not allowing kidney sales. Due to the accelerating demand and the dangers of the black-market exchanges that this Note has discussed, one could make the case for the scales having tipped in favor of allowing for compensated kidney donations. Yet, it is unlikely that one could make an equally compelling argument with regard to other human body parts or organs. This observation mitigates any concern that “once market value enters our discourse in regards to a certain object in the primary instance of sale, a slippery slope will result, and market rhetoric will take over and characterize every [future] interaction in terms of market value.”¹³⁹ And the proposal of this Note fits within the limited balancing approach: in an argument that has always been about pros (potential for saved lives and preventing black-market purchases) and cons (inequity, commodification, etc.), a tax proposal that mitigates or eliminates two of the traditional cons of a kidney market—inequity and immorality—will tip the scale, to one degree or another, toward sanctioning the compensation of kidney donors.

CONCLUSION

The scope of this Note is quite limited in that it applies to compensation and taxation of kidney donations from living donors. This focus arises from the fact that (1) it is possible—and even safe—to transplant a kidney from a live donor, and (2) the need for kidney transplants far surpasses the need for any other organ. Whether the tax analysis here employed is useful in regulating sales of other organs or body products remains to be seen.

Further, if and when the government were to move forward with considering a regulated kidney market, greater attention would need to be directed to the specifics of the sales tax and various systems and rates to be

138. See Meredith M. Render, *The Law of the Body*, 62 EMORY L.J. 549 (2013); see also Boyd, *supra* note 108, at 435–50 (giving a detailed history of the development of the law on property rights in relation to the human body). Note, however, that one difficulty of using property rights to provide legal support for the notion that a living donor could contract to donate a kidney for compensation is that it may be hard to find a recognizable property right that would allow a person to sell one of two items (in this case, one kidney), but not both.

139. Wancata, *supra* note 3, at 204 (quoting Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1914 (1987)) (quotation marks omitted).

employed. This Note has stopped short of suggesting specifics for tax brackets, sales tax rates, subsidies, wealth cutoffs, or pricing. While this Note has used numbers at points, these numbers were merely for the purpose of illustrating the basic equitable value of a tax system when applied to the questions at hand. In employing these scenarios, this Note has sought to demonstrate that a redistributive sales tax strengthens the viability of legal compensation for kidney donations by addressing the equitable and ethical concerns raised by proponents of the current non-compensation regime. Thus, any future scholarship that would present proposals detailing more specific approaches and applications of redistributive taxation applied to compensated kidney donations will serve to support the underlying claim that this Note seeks to advance.

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