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The Case Against Tax Incentives for Organ Transfers

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I. INTRODUCTION

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

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1. Organ Procurement and Transplantation Network ("OPTN"), Data, http://www.optn.org/Data (last visited Oct. 12, 2008) (6,670 patients died while waiting for an organ in 2007, and 6,867 died while waiting in 2006).

2. Nat'l Ctr. for Health Statistics, Fast Stats A to Z: Deaths/Mortality, http://www.cdc.gov/nchs/FASTATS/deaths.htm (last visited Oct. 12, 2008) (reporting that 2,448,017 U.S. citizens died in 2005).

3. *See* OPTN, *supra* note 1 (reporting 100,113 patients on the wait list as of October 12, 2008).

4. *See, e.g.*, Andrew C. MacDonald, *Organ Donation: The Time Has Come to Refocus the Ethical Spotlight*, 8 STAN. L. & POL'Y REV. 177, 177 (1997) (describing his brother's suffering and death from kidney failure while still waiting for a transplantable kidney).

5. *See* Sally L. Satel & Benjamin E. Hippin, *When Altruism Is Not Enough: The Worsening Organ Shortage and What It Means For the Elderly*, 15 ELDER L.J. 153, 162 (2007) (discussing how improved medical treatment caused increased kidney failure).

6. *See* Lloyd R. Cohen, *Increasing the Supply of Transplant Organs: The Virtues of a Futures Market*, 58 GEO. WASH. L. REV. 1, 3 (1990) (commenting on improved life-sustaining

Only about one-half of decedents who are medically eligible have their organs harvested for transplant because of the failure of the others to provide consent to the transfer.[8] While most Americans claim to support organ donation, only approximately twenty-seven percent express a willingness to donate their organs upon death.[9] In addition, while living organ donations are possible in some instances, only one-sixth of American organ transplants annually come from living donors.[10] Thus, there is a net gain of approximately 4,500 new registrations[11] to the organ transplant wait list each year.[12] At least among academics, there is a consensus that the current U.S. approach—relying on altruism alone to provide the organs needed by the persons on the wait lists—is insufficient.[13] As a result,

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medical technology and increased number of transplanted organs); Gina Kolata, *Newest Treatments Create a Quandary On Medicare Costs*, N.Y. TIMES, Aug. 17, 2003, *available at* http://query.nytimes.com/gst/fullpage.html?res=9A04E7D81230F934A2575BC0A9659C8B63.

7. *See, e.g.*, MICHELE GOODWIN, BLACK MARKETS: THE SUPPLY AND DEMAND OF BODY PARTS 85–106 (2006) (describing the process by which individuals are added to the organ wait list and arguing that many otherwise eligible recipients, primarily African Americans, either are not diagnosed in time to become candidates or simply are never referred for organ transplantation).

8. *See* Kelly A. Carroll, *Does How We Ask for Organs Determine Whether People Decide to Donate?*, 7 AM. MED. ASS'N J. OF ETHICS, Sept. 2005, *available at* http://virtualmentor.ama-assn.org/2005/09/pdf/jdsc1-0509.pdf.

9. *See, e.g.*, Cohen, *supra* note 6, at 9 (citing a 1985 Gallup poll for the proposition that "only twenty-seven percent [of Americans] were willing to donate their own organs in the event of their death, and only seventeen percent claimed to have signed organ donor cards."); Kelly A. Carroll, *Does How We Ask for Organs Determine Whether People Decide to Donate?*, 7 AM. MED. ASS'N J. OF ETHICS, Sept. 2005, *available at* http://virtualmentor.ama-assn.org/2005/09/pdf/jdsc1-0509.pdf. Of these potential donors, only two percent die annually under circumstances that allow their organs to be transplanted. *HMS Researchers Address Transplant Organ Shortage*, HARV. GAZETTE, Oct. 2, 2003, *available at* http://www.hno.harvard.edu/gazette/2003/10.02/21-organs.html (stating that only two percent of registered donors "annually suffer brain death and meet the other medical requirements for being a cadaveric donor").

10. *See* OPTN, *supra* note 1 (showing 4,910 living donor organ donations in 2007 and 5,063 in 2006).

11. Registrations count the total number of organs needed by patients on the wait list. Many patients need more than one organ resulting in multiple registrations for the same patient. *See* OPTN, *supra* note 1.

12. *Id.* In 2007, there was a net gain of 4,524 registrations to the wait list: 52,867 new registrations were added while 48,343 registrations were removed for various other reasons, including for successful transplants (28,358) or death (7,231). In 2006, the net gain was 4,448: 53,001 new registrations with 48,553 removals, including 28,935 transplants and 7,508 deaths.

13. *See* Charles C. Dunham IV, *"Body Property": Challenging the Ethical Barriers in Organ Transplantation to Protect Individual Autonomy*, 17 ANNALS HEALTH L. 39, 40 (2008).

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

Of the solutions currently proposed, financial incentives for organ transfers are the most provocative, drawing both the most ardent support and the harshest criticisms.[15] Under current law, such incentives are prohibited.[16] Still, tax incentives encouraging the consensual harvesting of organs upon death or of organs not needed to sustain a donor's life prove alluring to both legislators and academics, who argue that such incentives would address many of the problems with direct payments.[17] These analysts argue that tax incentives would (1) be consistent with the tax treatment of donations to charity;[18] (2) prevent coercion by remunerating low income taxpayers less than higher income ones;[19] and/or (3) be less crassly commercial than direct payments.[20] Each of these arguments has been largely unexamined in the scholarly literature.

In this article, I leave to one side the much-debated question about whether it is ethical to permit individuals to sell and buy organs. Instead, I examine the arguments for creating tax incentives for organ donations in light of the goals, principles and practices of our tax system and conclude that currently tax incentives are an inefficient and inappropriate means to encourage increased donations of organs.

First, I argue that allowing such incentives would be directly contrary to our current tax treatment of donations in that it would allow an item never included in the tax base to offset income included in it. Second, using the progressive nature of our tax system to reduce

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14. *See infra* Part II.B.

15. Financial incentives proposed range from allowing individuals to purchase organs directly from each other to a mediated system in which the government or an insurer acts as the buyer, then transfers the purchased organs to patients on the organ transfer wait list. Other proposed approaches include retaining the altruistic system but changing the rules, *see infra* notes 30–36 and accompanying text, and the provision of non-financial benefits, *see infra* notes 37–42 and accompanying text.

16. *See* National Organ Transplant Act ("NOTA"), 42 U.S.C. § 274e(a) (2008) (no compensation is allowed for providing an organ that is not a "human organ paired donation" if such provision "affects interstate commerce") and discussion *infra* Part II.A.

17. *See infra* Part IV.

18. *See infra* Part IV.A.

19. *See infra* Part IV.B.

20. *See infra* Part IV.C.

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

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

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

A. The Current System

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

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

21. 42 U.S.C. § 274e.

22. 42 U.S.C. § 274e(a).

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

24. *Id.*

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

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

B. *Proposed Changes*

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

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

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

28. *See* Jim Ritter, *Not Nearly Enough To Go Around: The Future of Organ Transplantation*, CHI. SUN-TIMES, Sept. 5, 2004, at 19. *See also* CROWE & COHEN, *supra* note 26 (opining that procurement teams should defer to a family's decision to not donate organs despite a donor's contrary intent). For a critique of this override option, see Leonard H. Bucklin, *Woe Unto Those Who Request Consent: Ethical and Legal Considerations in Rejecting a Deceased's Anatomical Gift Because There is No Consent by the Survivors*, 78 N.D. L. REV. 323, 344–46 (2002) (focusing specifically on legal actions of negligence, tortious interference with a contract, and violation of civil rights upon such override).

29. *See* Carolina A. Nadel & Mark S. Nadel, *Using Reciprocity to Motivate Organ Donations*, 5 YALE J. HEALTH POL'Y L. & ETHICS 293, 297 (2005) (discussing why hospitals do not follow donor preferences); CROWE & COHEN, *supra* note 26 (stating family of donor plays a central role in determining the organs donated).

30. *See, e.g.*, Jesse Dukeminier, Jr. & David Sanders, *Organ Transplantation: A Proposal for Routine Salvaging of Cadaver Organs*, 279 NEW ENG. J. MED. 413 (1968) (arguing from an ethical and historical perspective that the presumption against harvesting cadaveric organs should be reversed); Linda C. Fentiman, *Organ Donation As National Service: A Proposed Federal Organ Donation Law*, 27 SUFFOLK U. L. REV. 1593, 1598 (1993) (proposing presumed consent as alternative to organ procurement and allocation). *See also* CROWE & COHEN, *supra* note 26 (discussing limited form of presumed consent currently employed in the United States).

conscription[32] regime. In addition, broadening the medical criteria for potential donors has been suggested in some cases.[33] Finally, some analysts advocate the reduction or removal of disincentives to donation through legislation allowing paid leave for donations,[34] tax deductions or credits to cover unreimbursed costs of donation,[35] and outright grants to cover such costs.[36]

Beyond these systemic changes, some commentators have proposed affirmative incentives for donation. The less controversial

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31. *See, e.g.*, Denise Spellman, *Encouragement Is Not Enough: The Benefits of Instituting a Mandated Choice Organ Procurement System*, 56 SYRACUSE L. REV. 353, 370 (2006) (describing prospective system requiring donors to make affirmative choice); Andrew C. MacDonald, *Organ Donation: The Time Has Come to Refocus the Ethical Spotlight*, 8 STAN. L. & POL'Y REV. 177, 183 (1997) (proposing requiring that individuals record choice in a central database available to all hospitals).

32. *See, e.g.*, Theodore Silver, *The Case For a Post-Mortem Organ Draft and a Proposed Model Organ Draft Act*, 68 B.U. L. REV. 681, 681 (1988) (allowing only an exemption for religious objections).

33. *See, e.g.*, H.B. 3857, 93d Gen. Assem. H.R. (Ill. 2004) (authorizing organ donations from HIV-positive individuals to other HIV-positive individuals); 20 ILL. COMP. STAT. ANN. 2310/2310-330 (LexisNexis 2008); United Network for Organ Sharing ("UNOS"), Expanded Criteria Donor Kidneys Brochure, http://www.unos.org/SharedContentDocuments/ExpandedCriteriaDonor_KidneysBrochure.pdf (last visited Oct. 12, 2008) (created "ECD" category for higher-risk organ donors, including those from deceased donors over 60 years of age and from those over age 50 with certain medical conditions).

34. For example, Colorado offers state employees two days paid leave for donation; Delaware, Washington, D.C., Maryland, Missouri, Utah, and Virginia provide thirty days of paid leave; and Ohio provides six weeks of paid leave. Arkansas requires that private employees be allowed an unpaid leave of absence for donation. The federal government mandates that any executive branch employee be allowed to take seven days of paid leave for bone marrow donation and thirty days of paid leave to serve as an organ donor, with only one paid leave period in each calendar year. CROWE & COHEN, *supra* note 26. *See also* Jason Feifer, *Paying Big to Be a Donor*, WASH. POST, Mar. 20, 2007, at HE1 (stating federal government employees receive thirty days of paid leave if they donate an organ).

35. At least eleven states offer such tax incentives. CROWE & COHEN, *supra* note 26. On the federal level, the Organ Donation and Recovery Improvement Act was signed into law April 5, 2004, and provides for reimbursement of travel and subsistence expenses and incidental non-medical expenses incurred in living organ donation. 42 U.S.C. § 274f (2008). A later proposed Act, "The Living Organ Donor Tax Credit Act of 2005," was presented in the House on May 19, 2005 (it ultimately failed), and it attempted to provide a credit to living individuals who donated organs up to $5,000 to cover unreimbursed costs and lost wages due to organ donation. H.R. 2474, 109th Cong. (2005).

36. Iowa has a donor awareness fund, fifty percent of which may be used to cover the otherwise unreimbursed costs of living donors, recipients and transplant candidates. CROWE & COHEN, *supra* note 26.

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

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

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

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

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

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

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

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

43. *See, e.g.*, Julia D. Mahoney, *The Market for Human Tissue*, 86 Va. L. Rev. 163, 174–75 (2000) (arguing that such markets already exist, but that under current law only the companies that receive and process human tissue may profit, not the people whose bodies the tissue comprised); Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813, 1816–17 (2007) (arguing for the development of markets on "self-defense" grounds).

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

III. TAX POLICY AND INCENTIVES: A BRIEF OVERVIEW

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

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

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

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

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

46. *See, e.g.*, Gloria J. Banks, *Legal and Ethical Safeguards: Protection of Society's Most Vulnerable Participants in a Commercialized Organ Transplantation System*, 21 AM. J.L. & MED. 45, 99–100 (1995) (noting concerns with legalized market in human organs); Richard Epstein, *Kidney Beancounters*, WALL ST. J., May 15, 2006, at A15; Chandis, *supra* note 37, at 229 (advocating proposal that eliminates exploitation of the poor); 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, 132 (2004) (noting existence of "clear evidence demonstrating economic incentives for donating parts of the human body will lead to exploitation of underprivileged groups").

47. *See, e.g.*, CROWE & COHEN, *supra* note 26.

48. *See* H.R. 2090, 107th Cong. (2001) (proposing up to a $2,500 credit for organ donation); H.R. 1872, 107th Cong. (2001) (proposing up to $10,000 tax credit for deceased-donor organ donations); Frederick R. Parker, Jr. et al., *Organ Procurement and Tax Policy*, 2 HOUS. J. HEALTH L. POL'Y 173, 175–176 (2002).

49. *See* Chandis, *supra* note 37, at 266–67.

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

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

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

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

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

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

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

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

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

56. *See* Batchelder et al., *Efficiency and Tax Incentives*, *supra* note 52, at 42 (noting "great debate" over "degree of progressivity" that should be accomplished).

57. *See* discussion *infra* notes 65–83 and accompanying text for the effect of deductions (and, to a lesser extent, credits) under a progressive tax system.

58. BATCHELDER ET AL., BROOKINGS INST., *supra* note 5050.

59. *See, e.g.*, Joseph J. Cordes et al., *Raising Revenue by Taxing Activities with Social Costs*, 43 NAT'L. Tax J. 343, 343–56 (1990) (citing taxes on cigarettes, alcohol and polluting activities as examples of corrective taxes).

example, operates as the largest welfare program in the country.[60] The value of the tax break for employer-provided health insurance is growing more quickly than that of almost any other domestic program.[61] In addition, there are tax subsidies for alternative energy use and production, saving for retirement, home ownership, education and medical expenses, and the promotion of work, charitable giving and certain investments.[62] The incentives offered by these programs reduce federal revenues by approximately $500 billion per year[63] and account for approximately one-quarter to one-third of the federal subsidies and benefits provided to Americans.[64]

B. Deductions, Credits, and Refundable Credits: How They Fit In

A tax incentive can be provided through use of either a deduction or a credit; which is employed and how it is implemented affects to whom it is available and its value.[65]

A deduction reduces taxable income so that its value depends upon an individual's marginal tax rate.[66] For this reason, an income tax deduction is worth more to a higher income taxpayer than to a low income taxpayer. For example, a deduction of $12,000 yields a $3,000 tax savings for an individual whose marginal tax rate is twenty-five percent, but only $1,200 to an individual in the ten percent tax bracket.[67] In an early effort to spur organ donations, the U.S. House of Representatives in 1981 considered a bill that would have provided a $25,000 tax deduction for certain deceased donor

60. STEUERLE, *supra* note 50, at 1–2.

61. *See id.* at 2.

62. *See* Batchelder et al., *Efficiency and Tax Incentives*, *supra* note 52, at 43.

63. *See id.*; BATCHELDER ET AL., BROOKINGS INST., *supra* note 50.

64. STEUERLE, *supra* note 50, at 2.

65. I am setting aside proposals (and enactments of proposals) in favor of deductions or credits as a means to reimburse individuals for expenses associated with donation; these have been briefly discussed in Part II, *supra*. Incentives to compensate payment of lost wages are in a different category than reimbursement of these other expenses as they involve payment for labor not done, and so should be considered under the principles set forth in Parts III and IV of this article.

66. *See, e.g.*, Brian H. Jenn, *The Case for Tax Credits*, 61 TAX LAW. 549, 557 (2008).

67. *Id.* at 556. *See also* FRANK SAMMARTINO & ERIC TODER, URBAN INST., SOCIAL POLICY AND THE TAX SYSTEM (2002), http://www.urban.org/UploadedPDF/310418_TaxSystem.pdf (explaining differential value of deductions to low income and middle income taxpayers).

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

A deduction can be either "above the line" or "below the line."[70] "Above the line" deductions, like deductions for retirement savings, are available to all taxpayers, regardless of whether they claim the standard deduction or itemize their deductions on their tax returns.[71] "Below the line" deductions, like those for charitable donations, are available only to taxpayers who itemize deductions[72] and are often subject to "phase-outs"[73] at certain income levels.[74] Proposals for tax incentives for organ donations generally focus on "below the line" deductions.

A credit, on the other hand, offsets actual taxes due, providing a one-to-one return to a taxpayer up to the total tax due.[75] Thus, a credit of $12,000 is ostensibly worth $12,000 to a taxpayer regardless of his marginal tax rate or whether he itemizes or claims the standard deduction. However, to the extent a taxpayer's tax liability would otherwise be less than this $12,000, the value of most credits is reduced accordingly: a taxpayer who owes only $8,000 in federal taxes would only be able to use $8,000 of the posited $12,000 credit.[76] Bills have been introduced in Congress to offer this sort of income tax credit for donated organs but have thus far been unsuccessful; commentators have taken up the cause as well.[77]

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68. H.R. 3774, 97th Cong. (1981). *See also Tax Incentives: A Market Solution to the Kidney Shortage?*, 11 HASTINGS CTR. REP., Oct. 1981, at 3.

69. *See, e.g.*, Frederick R. Parker, Jr. & William J. Winslade, *Tax Policy and the Blood Supply*, 42 EXEMPT ORG. TAX. REV. 89, 90–92 (2003) (proposing amendment to Internal Revenue Code to allow such a deduction).

70. DANIEL Q. POSIN, FEDERAL INCOME TAXATION OF INDIVIDUALS WITH DIAGRAMS FOR EASY UNDERSTANDING OF THE LEADING CASES AND CONCEPTS 363 (5th ed. 2000).

71. *Id.* at 503–04.

72. Thus, they are generally not available to lower income taxpayers or taxpayers who are subject to the alternative minimum tax. *Id.*

73. *See* I.R.C. § 1 (2004).

74. *See* POSIN, *supra* note 70, at 363, 467.

75. *See id.* at 581.

76. Refundable tax credits, which return amounts above a taxpayer's tax liability to him, are discussed *infra* in notes 77–87 and accompanying text.

77. *See, e.g.*, H.R. 2090, 107th Cong. (2001), *supra* note 48; H.R. 1872, 107th Cong. (2001), *supra* note 48; Joseph B. Clamon, *Tax Policy as a Lifeline: Encouraging Blood and Organ Donation Through Tax Credits,* 17 ANNALS HEALTH L. 67, 97–99 (2008) (proposing credits in predetermined amounts for donations of body tissue, excluding donations of sperm, eggs, or hair).

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

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

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

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

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

80. The $2 million exclusion applies for 2008; in 2009 the exclusion rises to $3.5 million. I.R.C. § 2010 (2007). Under current law, there will be no estate tax due from individuals dying in 2010, and thus (assuming no changes in the law) an estate tax credit would not provide incentive to any taxpayers that year. *See id.*

81. Or even many high income taxpayers, since the estate tax is assessed against wealth, not income.

82. Batchelder et al., *Efficiency and Tax Incentives*, *supra* note 52.

83. POSIN, *supra* note 70, at 581.

84. I.R.C. §§ 32, 35, 45F (2007).

85. *See* STEUERLE, *supra* note 50 (describing tremendous growth in the value of refundable tax credits).

"government wishes to allocate money to achieve a fundamental societal objective."[86] For some, this includes increasing the supply of transplantable organs.[87]

IV. WHY NOT USE TAX INCENTIVES?

Providing tax incentives for organ donation is more ethically palatable to some academics and legislators than outright payments and is perceived to reinforce the current altruistic focus of organ procurement policy.[88] As a result, even commentators who do not argue that tax incentives are the best way to increase the supply of transplantable organs have flagged this option,[89] and ethics committees of the United Network for Organ Sharing, the American Society of Transplant Surgeons, the World Transplant Congress, and the President's Council on Bioethics have considered the merits of initiatives that would provide tax breaks in exchange for organ donations.[90] In my view, however, the suggested strengths that advocates ascribe to such a system are illusory and in conflict with our tax system.

A. (Dis)Juncture Between Income, Tax Incentives, and Organ Transfers

Some proponents of tax incentives for organ donations argue that such a system would simply bring the tax treatment of organ donations in line with that of other donations and encourage altruistic actions more generally. The current organ procurement system relies

86. Clamon, *supra* note 77, at 67, 95. In contrast, Batchelder et al. argue from an efficiency perspective that, instead, refundable credits should be the default choice for all tax incentives so as to provide the same incentive to engage in the desired behavior in all taxpayers. They propose that deductions or nonrefundable credits be used only where "policymakers have specific knowledge that such households are more responsive to the incentive or that their engaging in the behavior generates larger social benefits." Batchelder et al., *Efficiency and Tax Incentives*, *supra* note 52.

87. *See, e.g.*, Parker et al., *supra* note 48 (arguing that increasing the supply of transplantable organs is a priority of American health policy and thus is an appropriate object of tax legislation and proposing a refundable tax credit for binding organ donation pledges).

88. *See, e.g.*, Clamon, *supra* note 77 (summarizing perceived virtues of tax incentives as means for increasing donations).

89. *See, e.g.*, Steve P. Calandrillo, *Cash For Kidneys? Utilizing Incentives To End America's Organ Shortage*, 13 GEO. MASON L. REV. 69, 111–13 (2004) (examining positive effects of tax incentives for organ donation).

90. *See* Sally Satel, Op-Ed, *Death's Waiting List*, N. Y. TIMES, May 15, 2006, at A21.

solely on altruism in that individuals who allow their organs to be transplanted can receive no compensation. Because altruism is generally accepted to be a societal good, as it is believed to increase social cohesion and our sense of community, many believe it should be encouraged.[91] One way we encourage altruism is to provide tax incentives to individuals who make contributions to qualified charitable organizations.

Currently, no deduction is available for organ donations. The Internal Revenue Service ("IRS") asserts that transferring most human body parts and products is a service, and thus non-deductible.[92] In addition, even if such transfers were considered transfers of property rather than the provision of a service, these items would most likely be considered ordinary income property.[93] Any deduction for ordinary income property is limited to the lesser of the donor's basis[94] and fair market value; in most cases, this would be would be $0.[95] In instances where the deductible amount was established to be greater than $0, the recipient would still need to be a qualified charitable organization.[96] As currently organ donations are made to for-profit companies or to individuals, no deduction would be available even if donation of human body parts was defined as a property transfer (rather than a provision of services) and a value was assigned to the donation. While all of this could easily be changed simply by amending the tax code and/or putting in place charitable organizations like the American Red Cross to act as intermediaries in organ transfers, affording a charitable deduction for organ transfers is currently not in accord with tax policy and practice.

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91. *See, e.g.*, Julia Mahoney, *The Market For Human Tissue*, 86 VA. L. REV. 163, 215–17 (2000) (summarizing the altruism argument for rejecting markets for organs).

92. Only certain transfers of property are eligible for the charitable donation deduction; transfers of services are not. *See* Rev. Rul. 162, 1953-2 C.B. 127-28 (deciding that the value of blood donated to a blood bank was not deductible as it was donation of service); sales of ova are also taxed as personal services. *But see* I.R.S. Gen. Couns. Mem. 36,418 (Sept. 15, 1975) (stating that sales of mother's milk are properly taxed as sales of property).

93. Examples of ordinary income property include items held in inventory, works of art donated by the artist, and capital assets held 1 year or less.

94. Basis is generally equal to an item's acquisition cost. *See* I.R.C. § 1012 (2007).

95. For tissue that qualifying as "long-term capital gain property", the deduction would be equal to the fair market value of the property. However, absent a market on which to value the body part or product, such value would again be $0.

96. I.R.C. § 170(c) (2007).

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

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

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

97. *See* Parker & Winslade, *supra* note 69, at 89, 89–90, 91 (describing tax benefits for charitable contributions other than bodily donations, and advocating tax incentives specifically in the context of donations of blood).

98. Parker & Winslade, *supra* note 69, at 89, 91. *See* M. Lane Molen, Note and Comment, *Recognizing the Larger Sacrifice: Easing the Burdens Borne by Living Organ Donors Through Federal Tax Deductions*, 21 BYU J. PUB. L. 459, 462 (2007) (analogizing charitable deduction allowance for donations of body tissue to the transfer of property, such as a car, to charity).

99. Parker et al., *supra* note 48, at 174–175.

100. *See id.* (endorsing tax incentives as a form of economic motivation to donate organs).

101. For purposes of this article, I am setting aside discussion of taxes other than federal income tax (and, in some cases, federal estate tax), and assuming that the hypothetical taxpayer itemizes deductions on his tax return, is not subject to reductions in the deductions he can claim because of his income level, and is not subject to the alternative minimum tax.

consider three single taxpayers, one with $60,000 in taxable income for 2008, another with $72,000, and the third with $72,000 prior to contributing $12,000 (in cash or property) to charities. Taxpayer 1's tax liability is $11,344; Taxpayer 2's is $14,344.[102] While Taxpayer 3 tentatively owes the same tax as Taxpayer 2 as each starts with $72,000 in taxable income, once Taxpayer 3 contributes $12,000 to qualified charitable organizations, his taxable income is reduced by an equal amount, leaving him with taxable income of $60,000 and a tax liability of $11,344, as though he had never earned the contributed amounts at all.

	Taxpayer 1	Taxpayer 2	Taxpayer 3
Starting Taxable Income	$60,000	$72,000	$72,000
Amount to Charity	$0	$0	$12,000
Taxable Income	$60,000	$72,000	$60,000
Tax Due	$11,344	$14,344	$11,344
Amount to Taxpayer	$48,656	$57,656	$48,656

Taxpayer 3's gifts to the charities, then, are comprised of $9,000 from the taxpayer and the $3,000 that he otherwise would have paid in tax, an amount which is effectively transferred from the federal government to the charities.[103] The deduction acts simply to offset the federal income tax ($3,000) otherwise due on the funds transferred to charity.[104]

However, we do not allow a deduction for contributions of services to charitable organizations because the value of the service is

102. The tax is calculated as follows: income up to $8,025 is taxed at 10%, between $8,025 and $32,550 at 15%, and between $32,550 and $78,850 at 25%. Thus, for each taxpayer in the example, the first $8,025 of income produces a tax of $802.50, the next $24,525 produces a tax of $3,678.75, and income above $32,550 is taxed at 25%, for totals of $11,343.75 for Taxpayer 1 ($802.50+$3,678.75+$6,862.50) and $14,343.75 for Taxpayer 2 ($802.50+$3,678.75+$9,862.50). Tax owed is rounded to the nearest whole dollar.

103. This is shown in the $9,000 difference between what Taxpayer 2 ($57,656) and Taxpayer 3 ($48,656) take home, and the $3,000 difference in their tax due (between $14,344 and $11,344), with the extra $12,000 transferred to charity in the case of Taxpayer 3.

104. Similarly, deductions for donations of property act to offset income tax paid on income used to acquire the property in the first instance and, in some instances, tax that would have been due if the property had been disposed of at market rather than by contribution.

never taken into income in the first place. For example, a lawyer with taxable income of $60,000 who then performs free legal services for which she would normally bill $12,000 is not allowed to then deduct $12,000 from her taxable income. Instead, because she did not charge the charity the $12,000, that amount is simply excluded from her income so that $0 is taken into income, $0 is allowed as a deduction, $0 is owed in taxes on the services, and $12,000 in value is transferred to the charity.

Starting Taxable Income		$60,000
Services performed for charity:		
retail value	$12,000	
amount added to income	$0	
deduction from income allowed	$0	
Effect on income of services:		$0
Taxable Income		$60,000
Tax Due		$11,344
Amount to Taxpayer		$48,656

As it should be, the net effect is the same as with Taxpayer 3 above, who charged for services and then gave $12,000 in cash to the charities. If the lawyer was allowed to take a deduction of the $12,000 without being required to take the services she performed for the charity into income, she would effectively be getting a double deduction: the $12,000 value of the services would, in the first instance, be excluded; then a deduction of $12,000 would offset a portion of non-charitable income, reducing her taxable income to $48,000 (although her actual income would not change); yielding a tax due of $8,344; and leaving her with an after-tax income of $51,656, *which is $3,000 more than that left to Taxpayer 3.*

Donations of organs are analogous to such donation of services. As long as there is no commercial market for organs and no sale, there is no corresponding income tax on the transfer of the organ itself because it is not an economic event: no income is realized by the taxpayer. Thus, the effect of a deduction for the inconvenience, generosity, or lost wages associated with the transfer of a body part would be the same as allowing the $12,000 deduction to the lawyer

described above for the contribution of her legal services to a charity. The deduction would offset amounts never taken into income or taxed in the first place, placing the taxpayer in a better economic position than afforded charitable donors currently under the tax code.

Despite this mismatch, we could of course simply decide that we want the federal government to provide such an economic benefit for organ transfers as we have with the contribution of long-term capital gain property, where we allow a deduction for appreciation never taken into income. Two primary arguments made in favor of using the tax system in this way focus on the effect of tax incentives on low income taxpayers in a progressive tax system, and a reduced appearance of commodification through use of such incentives.

B. Coercion and the Effect of a Progressive Tax System

Many critics of financial incentives for organ transfers express concerns that were such payments legal, underprivileged individuals would feel coerced into selling their organs when, in fact, they might have moral objections to organ transfers or might just prefer not to sell their body tissue, even upon death.[105] Unlike more powerful individuals, they might feel as though they do not have a choice in the matter if the alternative is not providing adequately for their family's needs.[106] These scholars admit that the problem is reduced, though not eliminated, if only cadaveric sales are allowed.[107]

As discussed above, in a progressive tax system like that in the United States today, deductions and nonrefundable credits are worth more to middle income taxpayers than to low income ones. Even a refundable credit is only valuable to those individuals otherwise filing tax returns and, thus, able to claim it. As a result, any compensation provided to low income taxpayers in exchange for their organs in the form of a tax incentive may be minimal or nonexistent.

For some, this differential benefit is one of the strengths of tax incentives, as it would minimize any coercion of low income taxpayers inherent in harvesting organs in comparison to direct

105. *See, e.g.*, John Zen Jackson, *When It Comes To Transplant Organs, Demand Far Exceeds Supply: The American Medical Association Renews the Debate On Financial Incentives To Obtain Organs For Transplant*, 170 N.J. L.J. 910 (2002).

106. *See, e.g., id.*

107. *See, e.g., id.*

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

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

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

108. *See* Parker & Winslade, *supra* note 69, at 91–92 (explaining proposed tax credit system); Jackson, *supra* note 105 (stating that "other ideas to avoid exploiting the poor include offering donors reduced estate tax or other tax incentives, which would benefit only wealthy donors."); Sally Satel, Op-Ed, *Death's Waiting List*, N.Y. TIMES, May 15, 2006, at A21 ("We could even make a donation option that favors the well-off by rewarding donors with a tax credit."); Chandis, supra note 37 (arguing that coercion concerns could be eliminated by allowing only the wealthy, and thus presumably socially powerful, the opportunity to take advantage of the credit).

109. *See* I.R.C. § 170 (2007).

110. *See* I.R.C. § 163(h) (2007).

111. For example, mandatory seat belt and motorcycle helmet use, statutory rape and anti-drug laws might be justified on paternalistic grounds.

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

C. *Commodification and Opacity*

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

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

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

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

> [E]ndowment effects [may] make expenditures through the tax system less visible than direct expenditures. People may perceive a reduction in taxes for engaging in a specified activity differently from an identical direct grant: They may perceive a tax subsidy as merely letting them keep their money, even while they perceive an identical program that taxes them and gives the money back through programs or services to be a subsidy.[114]

Professors Weisbach and Nussim focus on the potential good publicity around enacting a government spending program, and conclude that the difference in visibility "may actually lead to a legislative preference for direct spending over tax programs rather than the other way around."[115] They note that in some cases, however, this "lack of visibility may be a good, rather than a bad, thing."[116] If a program is desirable but individuals tend to resist it, "putting it into the tax system could reduce opposition by making it invisible due to framing effects."[117]

It is this relative invisibility of tax expenditures that makes the approach so attractive to some legislators and scholars when compared to direct payments for organs. To the extent the expenditure can be framed in terms of a reimbursement or can be analogized to the existing deduction for charitable contributions, it avoids the labels of "commodification" and "market," even though

113. *See, e.g.*, Mahoney, *supra* note 43, at 208 (summarizing the anti-commodification argument, while rejecting it).

114. David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 970 (2004). *See also* Parker & Winslade, *supra* note 69.

115. Weisbach & Nussim, *supra* note 114, at 971 (2004).

116. *Id.*

117. *Id.*

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

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

D. Raising More Questions

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

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118. *See, e.g.*, Feifer, *supra* note 34 ("[C]overing funeral costs can seem like a financial incentive [to donate], while tax breaks are generally considered an effort to remove a barrier to donation.").

119. *See* STEUERLE, *supra* note 50 ("Transparency is often the bane of special interests or those who want to hide their special status. Even those who advocate on behalf of particular principles at times prefer to be opaque.").

120. Weisbach & Nussim, *supra* note 114, at 957.

121. *Id.*

Even using this test, however, providing a benefit for organ transfers through the tax system proves inefficient. While such benefits should be equally available to all individuals,[122] the only individuals able to claim the benefit of deductions and most credits are those with sufficient positive tax liability to be offset. Even refundable tax credits are only available to individuals filing tax returns in the first instance.

While it would be an option to have any individual file a tax return in order to claim a refundable credit for organ donation, this would greatly increase the costs of implementing the program through the tax system. The number of returns being filed would be increased, the IRS's jurisdiction would be extended to an area in which it has little or no expertise (organ transfers), and donors who do not already file tax returns would be required to begin to do so. For a first time filer, the start-up costs of filing can be high, and include understanding complex tax provisions and, often, hiring outside experts. Further, such costs would not then be recaptured through savings of time and effort in later years[123] since, for most taxpayers, the credit would be a one-time event. These issues cause a conflict between administering a federal benefit program concerning organ donation through the tax system and the tax principle of administrability.

As we move ahead in exploring the legal, ethical and practical options with respect to organ transfers, there are more questions that remain unanswered. Three I believe are particularly salient concern liability, the very framing of the problem, and the best allocation of scarce resources.

First, the increased availability of organs for transplant raises the specter of increased liability. With a greater supply of transplantable organs, will we feel a correspondingly increased entitlement to receive transplants?

Second, the organ transplant problem is generally framed in terms of an undersupply of transplantable organs. What if, instead, we frame it as an oversupply of damaged bodies? Does this lead us to

122. And setting aside issues of coercion and paternalism that are discussed *supra* in Part IV.B.

123. The social welfare programs underlying the EITC and the child care credit prove administrable, in part, because the start-up filing costs for any individual can be "amortized" over multiple years since, for most taxpayers, they are not a one-time event. *See* Batchelder et al., *Efficiency and Tax Incentives*, *supra* note 52, at 71.

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

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

V. CONCLUSION

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

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