

FOREWORD

ORGANS AND INDUCEMENTS

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The *Organs and Inducements* symposium originated from two developments: (1) the large and growing gap between kidney supply and need for people with end-stage renal disease and (2) the failure of recent policy and medical innovations to reverse that trend. The gap between kidney need and supply became visible after the United Network for Organ Sharing data system first went online in 1995 and has been growing ever since.¹ Over the next decade through 2006, transplants increased but the number of patients in need of kidneys grew faster than the supply of kidneys available for transplantation. Since 2006 the need for kidneys has continued to increase, albeit slowly, but the number of suitable kidneys available for transplantation has plateaued, resulting in a still-further widening of the gap.²

Today, over 7500 patients with end-stage renal disease die each year while awaiting a transplant or become too sick to transplant, while many more languish on the kidney waiting list, which passed 100,000 persons for the first time this year.³ Although recent advances in kidney transplantation, such as kidney paired donation and nonsimultaneous, extended, altruistic donor (NEAD) chains hold great promise, the number of transplants performed using such techniques remains small and has failed to stem the trend of unmet need.⁴ Most of those on the waiting list are on dialysis, a costly and time-consuming procedure that is far less satisfactory than transplantation in sustaining either

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1. Philip J. Cook & Kimberly D. Krawiec, *A Primer on Kidney Transplantation: Anatomy of the Shortage*, 77 LAW. & CONTEMP. PROBS., no. 3, 2014 at 12 (Figure 2).

2. *Id.*

3. *Id.* at 10 (Table 1, showing the number of deaths, too sick to transplant, and other waitlist removals for 2011); *Data*, ORGAN PROCUREMENT AND TRANSPLANTATION NETWORK, <http://optn.transplant.hrsa.gov/converge/latestData/rptData.asp> (last visited Oct. 7, 2014).

4. *Living Donor Transplants By Donor Relation, U.S. Transplants Performed: January 1, 1988-July 31, 2014*, ORGAN PROCUREMENT AND TRANSPLANTATION NETWORK, <http://optn.transplant.hrsa.gov/converge/latestData/rptData.asp> (last visited Nov. 10, 2014) (For Organ = Kidney, choose category “transplant,” choose organ “kidney,” choose report “living donor transplants by donor relation.”).

the quality or duration of life for renal patients.⁵

From one perspective, this great loss of life is tragic in that it is foreseeable but unnecessary. Recent evidence suggests that if kidney donors were offered a reasonable payment, enough of them could be recruited to close the current gap, thereby saving thousands of lives and reducing the overall public expenditures on renal disease.⁶ From another perspective, paying someone to donate a body part is immoral per se, even if the medical consequences to the donor are minimal and the choice to donate is deliberate and carefully administered. This latter view is incorporated in current law in the United States and all but a handful of other nations in the world.⁷

We convened an interdisciplinary discussion at Duke University in the spring of 2013 to discuss these issues, with a particular focus on potential next steps in the long-running debate about methods to increase the supply of transplantable organs. We purposely employed the term “inducements” rather than “incentives,” believing that the term “incentives” had become too closely tied with organ markets in the traditional sense—compensation for organs with money, vouchers, or some close cousin.

In contrast, we viewed the phrase “inducement” as potentially signifying something broader and more inclusive. According to Merriam-Webster, an inducement is simply “a motive or consideration that leads one to action.”⁸ We thus invited discussion and investigation, not only of proposals to increase organ supply that involved offering donors monetary or similar compensation, but also more subtle means to facilitate and encourage organ donation.

From our perspective, then, inducements could range from public-awareness campaigns exhorting people to donate and informing them of the severity of the organ shortage at one end of the spectrum to outright organ-auction markets at the other end of the spectrum. But we largely expected authors to address the many interesting variations on potential inducement schemes in between those two extremes, and that is what our participants did.

The *Kidney Transplantation Primer* by Philip J. Cook and Kimberly D. Krawiec sets the stage for the discussion by quantitatively documenting the growing gap between kidney need and supply. Cook and Krawiec demonstrate that the current system provides only about half as many kidneys as are needed for transplantation. The gap cannot be eliminated through an increase in deceased donation alone, because most kidneys from suitable deceased donors are already procured. Moreover, the prospects for increasing living donations

5. Cook & Krawiec, *supra* note 1, at 3–9.

6. *Id.* at 7–12.

7. Only one country, Iran, permits cash payments for living kidney donation. Other countries, including (in some jurisdictions) the United States, permit other incentives, including tax credits and paid work leaves. Finally, a handful of countries, such as Spain, permit incentives for deceased donation, such as funeral benefits. See generally, T. Randolph Beard & Jim Leitzel, *Designing A Compensated-Kidney Donation System*, 77 LAW & CONTEMP. PROBS., no. 3, 2014 at 253.

8. *Inducement.—Definition and More from the Free Merriam-Webster Dictionary*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/inducement> (last visited Nov. 10, 2014).

under the current system are dim. Donations from living kidney donors have declined from their 2004 peak and nearly all living kidney donations are directed, usually to family members, rendering the current account of living kidney donation as “altruistic” somewhat misleading.

Cook and Krawiec conclude that the time is ripe to reconsider financial incentives for kidney donation. Though such a system could produce unsavory consequences if not carefully designed and managed, the most likely version of the future in its absence is a continuation of unnecessarily high rates of death and disability from kidney failure.

I

THE ETHICAL DILEMMA

Although most of our symposium authors make clear that they are intrigued by or overtly supportive of modifying the current ban on financial inducements to encourage kidney donation, Alexander Capron is the exception. His paper, *Six Decades Of Organ Donation And The Challenges That Shifting The United States To A Market System Would Create Around The World*, provides the historical and international context for the impressive current consensus against paying for organs—of all the nations of the world, only Iran has established a system of payments for organs. The global ban well represents the anticommercialization principles adopted by the World Health Assemblies in 1991 and 2010 and the advocacy of leaders in the field of transplant medicine. Capron makes the case that this consensus should be respected and serve as a brake on calls for reform. His paper also reviews the ethical arguments for the status quo, including the possibility that donations motivated by financial gain would mainly attract poor and financially desperate donors who ultimately would likely be made worse off by the transaction. This judgment rests on a rejection of the liberal belief in free choice by autonomous adults as a reliable guide to self-interest or the public interest. The collective result of introducing financial inducements, Capron suggests, may be to exacerbate existing inequities. And even if there is a case for liberalizing the system in the United States, Capron argues, we should consider the effect such a reform would have on low- and middle-income countries, some of which have struggled to police the underground market for kidneys that has exploited their more impoverished residents and led to many abuses.

In his first of two contributions to the symposium, *Regulating The Organ Market*, I. Glenn Cohen also spells out the arguments against financial inducements, but with a different purpose. His goal is to provide a logical framework for the policy debate, one that relates each concern to a particular sort of regulation. For example, ethicists often express a concern that, even if consensual, organ sales may wrongfully exploit potential donors. This concern, however, can normally be addressed through price floors that ensure the donor is adequately compensated. Cohen presents a typology of concerns, a typology of regulations, and a logical mapping between the two, so that a policy analyst

could conclude that *if* a particular concern is deemed valid and important, the regulatory implication is clear. Cohen admits, however, that such rational analysis does not always carry the day in this contentious area.

The next two papers further develop this ethical terrain by sampling public views on organ transplantation. In the first of these contributions, *Perceptions Of Efficacy, Morality, And Politics Of Potential Cadaveric Organ-Transplantation Reforms*, Christopher T. Robertson, David V. Yokum, and Megan S. Wright report the results of a survey of 730 individuals from an online population who were asked to evaluate six possible regulatory reforms designed to encourage deceased donations of organs. Respondents were asked to judge each alternative on three dimensions: likely effectiveness in encouraging donation (“efficacy”), the morality of that reform, and overall preference. Interestingly the creation of a regulated market in organs was rejected by most respondents, although viewed as effective in securing an increase in organs for transplantation; on the other hand, offering a voucher to cover funeral expenses was viewed as much more acceptable. Other reforms, including an “opt-out” rule in becoming a donor (i.e., people who fail to state whether they wish to donate their organs following death are presumed to be donors), were generally acceptable alone or in combination. The article excerpts written comments provided by several respondents, and these further illuminate the complexity of preferences in this domain.

In a similar vein, the contribution by Muriel Niederle and Alvin E. Roth assesses some dimensions of public opinion about organ donation, but in contrast to Robertson, Yokum, and Wright, focuses on inducements for living kidney donation and, in particular, a donation that is not directed to a particular recipient. Undirected living donations are rare in the current regime, amounting to fewer than 200 per year. The survey provides a brief introduction and then asks respondents to indicate their view (on a ten-point scale) of awarding such donors a \$50,000 “heroism” prize. Different versions of the prize program are described (according to whether the prize is awarded to all donors or just a few, and according to whether it is financed by the federal government or a private foundation). Although all receive majority support from the sample of respondents, there was one strong result—the least popular program was to have the federal government award \$50,000 to each and every donor at the expense of taxpayers.

II

INNOVATIONS FOR EXPANDING SUPPLY

The second half of the symposium focuses on specific proposals for reform, and includes seven papers that consider the forms that inducements might take and with what consequences. The first two papers in this group consider the possibilities of American policy reform in a global context. First, in their paper *Reverse Transplant Tourism*, Kimberly D. Krawiec and Michael A. Rees offer a design for an expanded program of kidney paired donation. They consider the

case of an American with kidney failure with a volunteer American donor who is not compatible in terms of blood type. This pair could conceivably be matched with a foreign patient–donor pair and arrange a swap. The innovation here is that the foreign pair need not be incompatible with each other to make this an attractive proposition for them—if, for example, their agreement were predicated on American funding for the necessary immunosuppressive drugs that would otherwise not be affordable. Krawiec and Rees note that this arrangement could bring in foreign easy-to-match recipients and O–blood type donors, who are compatible with all blood types (and hence are underrepresented in the kidney-swap donor pool). They argue that the payment for the foreign recipient’s drugs would not be a violation of the National Organ Transplant Act (NOTA), and that this arrangement would not be exploitative of the foreign patient’s poverty, since he or she would receive both a kidney and the lifesaving drugs necessary to avoid rejection, while the foreign donor would perhaps benefit by having his kidney removed in an American hospital.

The second paper with a global perspective, I. Glenn Cohen’s *Organs Without Borders?*, focuses on two questions: First, should the United States allow “foreigners” on the transplantation waiting list for kidneys, and second, should the United States participate in a kidney distribution network that includes other countries? Current policy regarding the first issue may come as a surprise—in fact, the Organ Procurement and Transplantation Network (OPTN) does allow foreigners on the waiting list, typically those who are wealthy enough to pay the full cost of the transplantation. Cohen concludes, based on a careful review of the arguments, that OPTN should reconsider this policy—there is no compelling reason why Americans should be deprived of American kidneys that are of suitable quality. On the other hand, Cohen argues that the United States should join multinational organ-allocation systems where there is an expectation of reciprocity.

The next two papers get to the heart of the “inducements” debate by providing carefully considered arguments in support of paying kidney donors. In their paper *State Organ-Donation Incentives Under The National Organ Transplant Act*, Sally Satel, Joshua C. Morrison, and Rick K. Jones begin by dubbing the current kidney transplant regime a “qualified failure” because supply falls so far short of need. They argue that, contrary to the established interpretation, NOTA does not impose a complete ban on benefits to donors by its proscription of “valuable consideration.” In fact, they say, the proper interpretation of this federal law leaves open the development of state programs that provide donors with a financial benefit under rules that would prevent the transaction from appearing “clearly and definitely commercial.” Since their interpretation of the current law is not widely accepted, and the states are unwilling to move forward in this way without greater assurance, the authors advocate clarification of the law through either a Justice Department legal opinion or an amendment to NOTA that specifically authorizes state-benefit programs. One result, they say, is that “the laboratory of the states” could generate much-needed information on how a benefits program of that

sort would function in practice.

In the second paper of this pair, *Designing A Compensated-Kidney Donation System*, economists T. Randolph Beard and Jim Leitzel develop a fairly detailed proposal for a financial incentive system that would stimulate both deceased and living donations. The image they offer is of the kidney donor as “hero,” who like police, firefighters, and military personnel provides a vital public service at some risk to themselves. They note that we honor those who serve in these capacities, despite the fact that they volunteer for this duty and are paid. In the authors’ scheme, there would be no market, but rather a government-funded agency responsible for procuring kidneys from carefully vetted donors. The kidneys would be distributed to transplant recipients according to priority established by medical need, as is in the current regime. The main change would be that that agency would be in a position to offer substantial financial compensation to donors.

The current regime for soliciting kidney donors is often characterized as based on “altruism”—donors do not receive a tangible reward or, for that matter, much public recognition, and are motivated to take on this sacrifice out of concern for others. In particular, the motivation is to provide the gift of better health and longer life to someone suffering from kidney failure. (In the case of living donors, the recipient is almost always designated by the donor and is usually a family member or close friend, so the motivation is personal.) In their paper *Altruism Exchanges And The Kidney Shortage*, Stephen J. Choi, Mitu Gulati, and Eric A. Posner propose a reform that would expand on the charitable impulse that motivates donors. The “exchange” in their plan would provide donors not only with the satisfaction of saving a life, but also with the satisfaction of contributing to some other good cause. That contribution, a contractual *quid pro quo* specified by the donor, could be made by the kidney recipient or friends of the recipient or even by a foundation created for this purpose, and made in kind or in cash. The authors argue that, because in their altruism exchange scheme (like the current regime), the donor’s reward would be in the form of a good deed done, it should not engender ethical concerns associated with a market for kidneys, including the commodification of the body and exploitation of the poor.

In their article *Reciprocal Altruism*, Jacob Lavee and Avraham Stoler tell the interesting story of reforms adopted by Israel in 2008 that were designed to increase organ donation by enhancing the charitable “payoff.” (Dr. Lavee gets much of the credit for leading the reform effort.) Under the new law, Israelis were first effectively blocked from seeking out deceased or living organ donors in any country in which organ donation does not comply with the principles set forward by the Declaration of Istanbul (such as China or the Philippines), through a practice known as “transplant tourism,” thus increasing the perceived (and actual) need for Israeli donations. Further, this reform sought to enhance the perceived fairness of the organ allocation system by providing priority on the waiting list to living donors and those who had agreed to donate following

death. The authors note that this arrangement is a sort of “reciprocal altruism.” At the same time, the reform removed disincentives of living donation by ensuring various life insurance reimbursements as well as forty days of lost wages. Although the reforms have not been in place long, there is some indication of success.

The final article, *Organ Quality As A Complicating Factor In Proposed Systems Of Inducements For Organ Donation* by Michael L. Volk, raises an issue that has been largely ignored in the discussion of inducements. Kidneys that are potentially available for transplantation are not all equal, and in particular differ in the risk that they are infected and, more likely, that they will fail following transplantation. Unsuitable donors are routinely screened out under the current system, of course, but those that are deemed suitable are quite heterogeneous. In effect, even of those that are suitable, some are worth more than others. That fact raises the troubling question of whether a reform that provided financial incentives to donors should adjust the payment to the perceived quality of the kidney. A related problem is that donors may be incentivized to lie about matters relevant to determining whether their kidneys are likely to carry infection (such as HIV). Volk notes that the ultimate goal of any reform is not to increase the number of donors, but to increase the number of successful transplants.

III

CONCLUSION

This October marked thirty years since NOTA’s passage. On the statute’s anniversary, the kidney waiting list stood at over 100,000. Though NOTA’s ban against valuable consideration generated little discussion at the time of passage, that is no longer the case. Today, academics, transplant professionals, patient advocates, living organ donors, and others routinely call for clarifications, reforms, or repeal of the ban against valuable consideration, while others warn that the dire need for transplantable organs should not overshadow the concerns that prompted the kidney market prohibition in the first place. As the contributions to this volume suggest, there is no lack of creative ideas for new mechanisms that would induce donations with little damage to the ethical principles that are embodied in NOTA.