ALTRUISM, MARKETS, AND ORGAN PROCUREMENT

JULIA D. MAHONEY*

I
INTRODUCTION

For decades, the dominant view among biomedical ethicists, transplantation professionals, and the public at large has been that altruism, not financial considerations, should motivate organ donors. Proposals to compensate sources of transplantable organs or their survivors, although endorsed by a number of economists and legal scholars,[1] have been denounced as unethical and impracticable.[2] Organ transplantation is said to belong to the world of gift, as distinct from the market realm. Paying for organs would inject commerce into a sphere where market values have no place and would transform a system based on generosity and civic spirit into one of antiseptic, bargained-for exchanges.[3]

Today, this long-standing commitment to altruistic procurement is under severe pressure. The growing understanding that organ transplantation is a lucrative business has spurred many to question a system that insists organ providers go unpaid while hospitals, physicians, and others reap financial returns.[4] Moreover, the strict ban on compensation fits uneasily with the notion—widely embraced in the wake of the collapse of communism in Eastern

This Article is also available at http://law.duke.edu/journals/lcp.

* John S. Battle Professor of Law, University of Virginia School of Law. I would like to thank Richard Bonnie, James Childress, Marcia Childress, Marc Cherry, Mitu Gulati, Kim Krawiec, Thomas Murray, Mimi Foster Riley, James Stacey Taylor, and Timothy Pruett for helpful comments and conversations.

1. *See, e.g.*, RICHARD A. EPSTEIN, MORTAL PERIL: OUR INALIENABLE RIGHT TO HEALTH CARE 219–36 (1997); A.H. Barnett et al., *Improving Organ Donation: Compensation Versus Markets*, 29 INQUIRY 372 (1992); James F. Blumstein, *The Case for Commerce in Organ Transplantation*, 24 TRANSPLANTATION PROC. 2190 (1992); Lloyd Cohen, *Increasing the Supply of Organs: The Virtues of a Futures Market*, 58 GEO. WASH. L. REV. 1 (1989).

2. *See, e.g.*, ARTHUR L. CAPLAN, AM I MY BROTHER'S KEEPER? THE ETHICAL FRONTIERS OF BIOMEDICINE 95–96 (1997); NICHOLAS L. TILNEY, TRANSPLANT: FROM MYTH TO REALITY 267–74 (2003).

3. *See, e.g.*, Thomas Murray, *Organ Vendors, Families and the Gift of Life*, *in* ORGAN TRANSPLANTATION: MEANINGS AND REALITIES 120–23 (Stuart J. Youngner et al. eds., 1996); *see also* Gil Siegel & Richard Bonnie, *Closing the Organ Gap: A Reciprocity-Based Social Contract Approach*, 34 J.L. MED. & ETHICS 415, 415–16 (2006).

4. *See* MICHELE GOODWIN, BLACK MARKETS: THE SUPPLY AND DEMAND OF BODY PARTS 6–20 (2006); Julia D. Mahoney, *The Market for Human Tissue*, 86 VA. L. REV. 163, 176–85 (2000).

Europe and the former Soviet Union—that, as a general rule, market exchanges further social welfare.[5] Most important, under the current system the gap between the supply and demand of transplantable organs shows little or no sign of abating.[6] The failures or limited successes of "required request" laws mandating that families of potential organ providers be approached about donation, public-information campaigns, and other policy initiatives designed to remedy the organ shortage militate for aggressive exploration of all options, including financial rewards.

This exploration is starting to take place. In the past five years, leading academic journals and university presses have published a stream of books and articles arguing that—at least in some circumstances—financial incentives for organ sources offer a morally acceptable and potentially effective means of augmenting the organ supply.[7] Opinion pieces critical of the ban on compensation for organ providers now appear regularly in the mainstream press.[8] And in testimony before Congress, a representative of the American Medical Association, an organization once implacably opposed to compensation, advocated further study of financial rewards for deceased donors.[9]

The groundswell of interest in financial incentives brings into sharp relief the question whether the time has come to abandon the societal commitment to uncompensated organ procurement. The answer, I argue, is a tentative "yes."

---

5. *See generally* MICHAEL MANDELBAUM, THE IDEAS THAT CONQUERED THE WORLD: PEACE, DEMOCRACY AND FREE MARKETS IN THE TWENTY-FIRST CENTURY (2004).

6. *See* INST. OF MED. OF THE NAT'L ACADS., ORGAN DONATION: OPPORTUNITIES FOR ACTION 1–3 (2006) [hereinafter INSTITUTE OF MEDICINE REPORT] (demonstrating the "widening gap between the supply of transplantable organs and the number of patients on the waiting list" by examining the number of transplants and number of candidates on the waiting list from 1995 to 2004); Michele Goodwin, *The Body Market: Race Politics and Private Ordering*, 49 ARIZ. L. REV. 599, 600 (2007) ("The evidence, including growing waitlists and thousands of deaths each year, informs us that altruistic organ procurement remains an ineffective approach to meet the growing demand for organs.").

7. *See, e.g.*, MARK J. CHERRY, KIDNEY FOR SALE BY OWNER: HUMAN ORGANS, TRANSPLANTATION, AND THE MARKET (2005); JAMES STACEY TAYLOR, STAKES AND KIDNEYS: WHY MARKETS IN HUMAN BODY PARTS ARE MORALLY IMPERATIVE (2005); Abdallah S. Daar, *The Case for a Regulated System of Living Kidney Sales*, 2 NATURE CLINICAL PRAC. NEPHROLOGY 600 (2006); Amy L. Friedman, *Payments for Living Organ Donation Should Be Legalised*, 33 BRIT. MED. J. 746 (2006); Benjamin E. Hippen, *In Defense of a Regulated Market in Kidneys from Living Vendors*, 30 J. MED. & PHIL. 593 (2005); Arthur J. Matas & Mark Schnitzler, *Payment for Living Donor (Vendor) Kidneys: A Cost-Effectiveness Analysis*, 4 AM. J. TRANSPLANTATION 216 (2004); A.P. Monaco, *Rewards for Organ Donation: The Time Has Come*, 69 KIDNEY INT'L 955 (2006); Robert M. Veatch, *Why Liberals Should Accept Financial Incentives for Organ Procurement*, 13 KENNEDY INST. ETHICS J. 19 (2003).

8. *See, e.g.*, *Consider Incentives to Boost Ranks of Organ Donors*, USA TODAY, Oct. 16, 2003, at 14A; Guy Darst, *Organ of Change: Time to Allow Legal Kidney Sales*, BOSTON HERALD, Nov. 18, 2007, at 023; Russell Korobkin, *Sell an Organ, Save a Life?*, L.A. TIMES, Oct. 30, 2005, at M5; Sally Satel, *Death's Waiting List*, N.Y. TIMES, May 15, 2006, at A21.

9. *Assessing Incentives to Increase Organ Donations: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 108th Cong. 51 (2003) (statement of Robert M. Sade, Professor of Surgery, Medical University of South Carolina and Member, American Medical Association Council on Ethical and Judicial Affairs).

Caution is warranted *not* because the arguments marshaled against compensating organ donors are convincing: they are not. Rather, the need for deliberateness stems from the complex challenges of moving from a procurement system based on appeals to generosity to one that draws on a wider set of motivations. These challenges extend beyond overcoming or moderating the strong feelings of "repugnance" that the prospect of paying organ sources elicits in many.[10] Providing compensation to organ sources would entail a substantial—possibly even a radical—overhaul of our current system of organ procurement, which is rooted in organizations and practices designed to coordinate and facilitate altruism.[11] How easy it will be to graft financial incentives onto the existing system is as yet hard to assess.[12]

I begin this article with a brief history of the restriction on payments to sources of transplantable organs. I then turn to the arguments commonly advanced against compensating organ sources and explain how they are grounded in beliefs that range from the highly contestable to the demonstrably wrong. Next, I address questions of institutional design, examining the most popular compensation proposals, and offering preliminary assessments of their promise and feasibility. I conclude with some thoughts about the relationship between altruism and self-interest.

II

PROHIBITIONS ON PAYMENTS TO ORGAN SOURCES: HISTORY AND BACKGROUND

Although a modern technology, organ transplantation arouses primitive emotions.[13] Incorporating parts of one person into another dissolves physical boundaries in a way that for most of human history was the stuff of myth and that contravenes customs and practices regarding treatment of the human body.[14] Not surprisingly, organ transplantation has elicited complicated

10. *See* Alvin E. Roth, *Repugnance as a Constraint on Markets*, J. ECON. PERSP., Summer 2007, at 37, 54 (detailing how "distaste for certain kinds of transactions can" constrain markets and urging "economists and other proponents of legalizing kidney sales" to pay careful attention to the "sources of repugnance" in crafting solutions to the organ shortage crisis); *see also* Leon Kass, *Organs for Sale? Propriety, Property and the Price of Progress*, PUB. INT., Spring 1992, at 65, 84 (examining "hard-to-articulate intuitions and sensibilities" concerning organ sales).

11. *See* Kieran Healy, *Altruism as an Organizational Problem: The Case of Organ Procurement*, 69 AM. SOC. REV. 387, 393 (2004) (explaining how the altruism associated with organ donation is "highly institutionalized" in that it is "structured, promoted, and made logistically possible by organizations and institutions with a strong interest in producing it").

12. *See id.* at 400 (emphasizing the limits of our knowledge about "the dynamics of procurement over time or the way different parts of the organizational system interact with one another and with individual donors").

13. *See* LESLEY A. SHARP, STRANGE HARVEST: ORGAN TRANSPLANTS, DENATURED BODIES, AND THE TRANSFORMED SELF 1–2 (2006).

14. *See* Kass, *supra* note 10, at 73 (detailing the "presumptions and repugnances *against* treating the human body in the ways that are required for organ transplantation").

reactions.[15] Organ-procurement workers often struggle to convince organ sources and their next of kin to overcome what is for many a strong, instinctive aversion to organ harvest.[16] That transplant professionals have substantially succeeded in recasting as socially acceptable and even laudable what in any other context would constitute desecration—or, in the case of living donors, physical battery—is a testament to their thoughtfulness and sensitivity.[17]

The already fraught emotional climate surrounding organ transplantation is exacerbated by fears that the demand for transplantable organs could lead to the commodification of the human body, as "spare parts" are swapped for cash and other valuable consideration.[18] Anxiety over the prospect of markets in human flesh helps explain Congress's hasty passage in 1984 of the National Organ Transplant Act (NOTA).[19] Enacted soon after a former physician announced plans to set up a company to broker human kidneys,[20] NOTA makes it 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."[21] Before NOTA's passage, the legality of organ purchases from sources or their survivors was unclear, although the near-universal practice was that donors went unpaid.[22] Transplantable organs were often, for all practical purposes, treated not as the property of the original holder or her survivors, but as that of the harvesting surgeons, who enjoyed broad powers to allocate organs based on their clinical and ethical judgments.[23]

NOTA imposes a restriction on "valuable consideration," but it is of limited scope. NOTA excepts "reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and

15. *See* SHARP, *supra* note 13, at 2 ("Organ transplantation indisputably generates an unusual combination of curiosity, celebration, and anxiety.").

16. *See id.* at 56–73.

17. *Cf.* LESLEY A. SHARP, BODIES, COMMODITIES, AND BIOTECHNOLOGIES: DEATH, MOURNING AND SCIENTIFIC DESIRE IN THE REALM OF HUMAN ORGAN TRANSFER 51–52 (2007) (describing the work of procurement specialists).

18. *See* RENÉE C. FOX & JUDITH P. SWAZEY, SPARE PARTS: ORGAN REPLACEMENT IN AMERICAN SOCIETY 64–72 (1992) (discussing the debate in the 1980s between medical societies and health organizations arguing for proscription of organ commodification and public-policy analysts advocating compensation for donors of bodily parts).

19. 42 U.S.C. § 274(e) (2006).

20. *See* Margaret Engel, *Virginia Doctor Plans Company to Arrange Sale of Human Kidneys*, WASH. POST, Sept. 19, 1983, at A9.

21. 42 U.S.C. § 274(e).

22. *See* James F. Childress, *The Body as Property: Some Philosophical Reflections*, 24 TRANSPLANTATION PROC. 2143 (1992); Henry Hansmann, *The Economics and Ethics of Markets for Human Organs*, *in* ORGAN TRANSPLANTATION POLICY: ISSUES AND PROSPECTS 57–86 (James F. Blumstein & Frank A. Sloan eds., 1989).

23. *See* JEFFREY PROTTAS, THE MOST USEFUL GIFT: ALTRUISM AND THE PUBLIC POLICY OF ORGAN TRANSPLANTS 148 (1994) ("[T]he use [of organs] was in the surgeons' hands, and decisions regarding who received a transplant were dependent on the surgeons' understanding of their ethical responsibilities to their patients and their technical views on clinical matters. What consistency there was . . . derived from the similarities of training and values to be found among transplant surgeons.").

storage" of human organs.[24] Moreover, NOTA has never been interpreted to limit the amount a hospital can charge a patient for a comprehensive package of goods and services that includes a new organ.[25] In essence, the effect of NOTA's compensation ban is to prohibit organ sources and their survivors from receiving payment in exchange for consenting to organ harvest, not to prohibit all transfers of organs in exchange for consideration. In short, NOTA prevents only the most-obvious commerce in organs.

Along with restricting organ sales, NOTA effected major changes in organ procurement and allocation. NOTA established the Organ Procurement and Transplantation Network (OPTN) and charged the new organization with developing and administering a fair and equitable system of organ distribution.[26] Under the terms of the statute, this unified, national transplant network must be administered by a private, nonprofit entity under contract to the federal government. Since 1986, the United Network for Organ Sharing (UNOS), a nonprofit organization based in Richmond, Virginia, has served as administrator of the OPTN.[27] Under the system created by NOTA and overseen by UNOS, retrieval and transplantation of organs from deceased donors—who generate approximately seventy-seven percent of transplanted organs[28]—is coordinated by fifty-eight Organ Procurement Organizations (OPOs), each of which ministers to a particular, assigned geographic area.[29] The duties of OPOs include identifying potential organ donors, working with donor families to answer questions about and obtain consent for organ recovery, and overseeing the harvest and transportation of usable organs.[30] OPOs also work to encourage organ donation—including living donation—through public-education campaigns.[31] Through these activities, OPOs play an important role both in fomenting and shaping public perceptions of the meaning of organ donation.[32] The idea that consent to organ harvest constitutes a "gift of life" is a key theme

24. 42 U.S.C. § 274(e).

25. *See* Mahoney, *supra* note 4, at 179–83.

26. *See* INSTITUTE OF MEDICINE REPORT, *supra* note 6, at 19–25.

27. United Network for Organ Sharing, http://www.unos.org (last visited Mar. 22, 2009).

28. Organ Procurement and Transplantation Network, National Data Reports, http://www.optn.org/latestData/step2.asp (last visited Mar. 22, 2009).

29. *Id.*; *see also* David H. Howard, *Producing Organ Donors*, J. ECON. PERSP., Summer 2007, at 25, 26–27.

30. INSTITUTE OF MEDICINE REPORT, *supra* note 6, at 20–23. OPOs have significant financial motivations for maximizing the number of organs harvested in their assigned areas. *See* Joan McGregor, Mohamed Y. Rady & Joseph L. Verheijde, *Recovery of Transplantable Organs After Cardiac or Circulatory Death: Transforming the Paradigm for the Ethics of Organ Donation*, 2 PHIL. ETHICS & HUMAN. MED. 8, 11 (2007).

31. *See* KIERAN HEALY, LAST BEST GIFTS: ALTRUISM AND THE MARKET FOR HUMAN BLOOD AND ORGANS 43–44 (2006).

32. *See id.* at 17 (detailing how blood- and organ-procurement organizations "create and sustain their donor pools by providing opportunities to give and by producing and popularizing accounts of what giving means").

of OPO communications and is credited with helping to overcome public hesitation about organ donation.[33]

III

THE JUSTIFICATIONS FOR PROHIBITING SOURCE COMPENSATION

According to NOTA's legislative history, Congress's decision to restrict organ sales stemmed from a conviction that human body parts must not become commodities used to generate profits.[34] Whether Congress failed to grasp that NOTA's prohibitions would fall short of totally eliminating commerce in organs, or whether it simply made a pragmatic choice based on its judgment that popular opinion equated compensation for sources with commerce in organs, is uncertain. What is clear is that anticommodification rhetoric was front and center in the deliberations over NOTA. The likely consequences of commercial activity in organs, legislators averred, were dire. The Report of the Committee on Energy and Commerce of the House of Representatives concluded, "[T]here is strong evidence to suggest that permitting the sale of human organs might result in the collapse of the nation's system of voluntary organ donation."[35] Noting that congressional investigation of the nation's system of organ procurement had uncovered a "number of instances of individuals promoting the sale of kidneys between unrelated donors," the Report cautioned that, even though "it does not appear that any transactions have taken place[,] . . . the mere existence of such proposals threatens the voluntary donation system."[36] Congress was also influenced by expert testimony that bodily materials purchased from sources posed greater health hazards than ones acquired through gift.[37]

Although support for restrictions on payments to sources has recently begun to wane, such restrictions have been vigorously defended since NOTA's enactment. Foes of financial incentives echo the findings and concerns articulated by Congress in its consideration of NOTA: to pay organ sources would inappropriately convert human body parts into objects of commerce; the availability of compensation could drive out donations, reducing both the level of altruism in society and the supply of organs; and organs obtained by payment are less safe than donated ones. Opponents also express fears that paying sources will increase the already high cost of transplantation and exploit the poor and otherwise vulnerable.[38]

---

33. *See id.* at 25 ("[O]pposition to commodification can be traced in part to successful efforts to convince the public that organ donation is a morally worthwhile act.").

34. S. REP. NO. 98–382, at 2, 4 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3975, 3976, 3978.

35. H.R. REP. NO. 98–575, at 22–23 (1983).

36. *Id.*

37. *National Organ Transplant Act: Hearing on H.R. 4080 Before the Subcomm. on Health and the Environment of H. Comm. on Energy and Commerce*, 98th Cong. 299 (1983) (statement of Bernard Towers, Professor of Anatomy, Pediatrics and Psychiatry, UCLA Medical School).

38. *See infra* III.D–E.

Yet upon examination, none of these arguments justifies a blanket prohibition on financial incentives. Transplantable organs are already valuable commodities, bought and sold for large sums; there is scant evidence that payments to organ sources would crowd out altruistic transfers; and the refusal to compensate sources of human biological materials is a poor proxy for safety. Payments to organ sources, far from being automatically tacked on to recipients' medical charges, might actually reduce transplant costs. Finally, to assume that compensated organ sources are prone to exploitation while uncompensated sources are not is to fail to grasp the complexity of gift and market transactions.

A. The Unsuitability of Commerce

Those who object to financial rewards tend to characterize the existing regime as one of donative transfers and to suggest that compensation for organ sources is inconsistent with the reigning "gift model."[39] But to frame the debate over financial incentives in terms of whether organs will become commodities is to misunderstand how organ transplantation operates. However appealing the idea that generous impulses propel transplantable organs from original possessor to ultimate recipient, the reality is that organs are continually exchanged for valuable consideration. Only the first link in the distribution chain is a gratuitous transfer—when the individual source agrees to make a solid organ available for transplant. Subsequent transfers generally entail the exchange of valuable consideration for rights to possess, use, and exclude others from organs.[40] Thus transplant programs pay organ-procurement organizations for exclusive rights to organs, and then bundle the acquired body parts with medical services for sale to patients, often at the maximum price the market will bear.[41] Although the claim is sometimes advanced that any payments made are for services rendered, not for the actual organs, this distinction makes no sense. No one would pay for organ transportation or transplant services that fail to include an organ, just as there is no market for "dining services" that do not include food.[42]

Refusing to compensate sources means not that organs are not commodities, but that commodification begins after the initial transfer of rights.[43] Put baldly, the mix of both compensated and uncompensated transfers in the organ-distribution chain results in a curious system in which a precious resource that

39. INSTITUTE OF MEDICINE REPORT, *supra* note 6, at 12; *see also* MURRAY, *supra* note 3, at 120–23.

40. *See* Mahoney, *supra* note 4, at 180–84 (arguing that organs become marketable goods after donation and are then sold to patients "as part of an indivisible package" by transplant programs).

41. *See* A.H. BARNETT & DAVID KASERMAN, THE U.S. ORGAN PROCUREMENT SYSTEM: A PRESCRIPTION FOR REFORM 89–98 (2002).

42. *See* Mahoney, *supra* note 4, at 182–83.

43. *Id.*; *see also* SHARP, *supra* note 13, at 50 ("There is a national trade in transplantable human organs in the United States and, once procured, organs are most certainly transformed into precious commodities.").

starts out as a gift becomes an object of exchange. But far from being adjudged illegal or immoral, purchases and sales of organs by procurement organizations, hospitals, and other institutions engaged in transplantation are uncontroversial. On first impression, this placid acceptance is baffling. If commercial activity in human organs is so objectionable, why is the policy debate devoid of discussion about how to stop it? A moment's consideration yields the answer: To end commerce in organs would require a complete transformation of the distribution network so that nothing of value is exchanged for rights to possess or use organs. Simply put, the distribution system could be comprised of nothing but gratuitous transfers. Not even the most fervent opponent of commerce in organs has endorsed such a departure from established practice. Instead, trafficking in organs is tacitly accepted, and the sound and fury of the debate over organ sales is directed at whether the first transfer of property rights ought to be a donation or a sale.[44]

The absence of serious proposals to shut down commerce in transplantable organs is both telling and poignant. Notwithstanding the distaste and disgust the idea of profiting from human biological materials stirs, it is a truth universally grasped—just not universally acknowledged—that forces of altruism alone are unlikely to deliver organs to all those in critical need of transplants. The inadequacy of altruism is due not only to a paucity of individual selflessness—although it is hard to envision hospitals, physicians, and others who profit from the organ business foregoing remuneration altogether—but to the formidable information and coordination problems inherent in the organization of altruistic activities.[45]

B. Would Financial Incentives Crowd Out Donations?

One response to the claim that organ sales are inevitable is that even if a system devoid of the taint of market activity lies beyond our capabilities, surely we prefer more generosity to less. Under this reasoning, a distribution chain made up of a first, altruistic link followed by bargained-for exchanges is superior to one in which money changes hands at every stage. If this is correct, then payments to organ sources would cause societal harm if sales "crowd out" donations, leading those who would have made organs available for free to insist on compensation.[46] To be convincing, however, this line of argument would have to justify its assumption that more altruism is necessarily preferable

44. Mahoney, *supra* note 4, at 183–85 (explaining how the market functions in the distribution of corneas).

45. *Cf.* Avner Ben-Ner & Louis Putterman, *Values and Institutions in Economic Analysis*, *in* ECONOMICS, VALUES, AND ORGANIZATIONS 3–4 (Avner Ben-Ner & Louis Putterman eds., 1998) (describing the difficulties of establishing and maintaining nonmarket resource-distribution networks).

46. *See* Gabriel M. Danovitch & Alan B. Leichtman, *Kidney Vending: The "Trojan Horse" of Organ Transplantation*, 1 CLIN. J. AM. SOC. NEPHROLOGY 1133–35 (2006).

to less. Yet this assumption ignores the distributional and other consequences of acts of altruism.[47]

A more extreme version of the "crowding out" argument—one which Congress articulated in its deliberations over NOTA[48]—posits that the availability of financial incentives might so disturb potential donors that many will refuse to allow their organs to be harvested.[49] Should that occur, introducing financial incentives would cause not just inchoate, hard-to-measure harms such as a reduction in generous sentiments in society, but also catastrophic loss of life and damage to health. Opponents of financial incentives have invoked the specter of a plunge in the organ supply as reason to refuse to undertake even preliminary pilot programs.[50]

The chief problem with the "crowding out" line of argument is that—as even its proponents admit—it is highly speculative.[51] Evidence suggests that in certain circumstances, offering rewards and punishments to encourage prosocial behavior can backfire. That is, in some instances the presence of extrinsic motivations can erode the willingness of individuals to provide goods or engage in (or refrain from) particular actions.[52] At the same time, there is also evidence that in certain circumstances, external intervention can "crowd in" intrinsic motivation—indeed, the notion that incentives fuel internal motivation enjoyed wide currency in western thought in the sixteenth through nineteenth centuries.[53] Finally, it is entirely plausible that in many contexts, external rewards and penalties will, as standard neoclassical economic theory predicts, have no effect on intrinsic motivation.[54] Whether a particular reward will

47. *See* Mahoney, *supra* note 4, at 216–18.

48. *See supra* II.

49. *See, e.g.*, Jeffrey Prottas, *Buying Human Organs—Evidence That Money Doesn't Change Everything*, 53 TRANSPLANTATION 1371 (1992); *see also* INSTITUTE OF MEDICINE REPORT, *supra* note 6, at 11 ("[T]he relationship between financial payments and a willingness to donate may not conform to the pattern that applies to ordinary consumer goods; payments may 'crowd out' other motivations, and some families who would donate under an altruistic system may refuse to donate.").

50. *See, e.g.*, INSTITUTE OF MEDICINE REPORT, *supra* note 6, at 243 ("[I]f organ donation were to become 'commercialized' because of the use of payments, some families who are willing to donate under an altruistic system may refuse to provide consent . . . ."); *id.* at 259 (recommending against "the use of financial incentives to increase the supply of transplantable organs . . . at this time").

51. *See, e.g.*, *id.* at 243 (acknowledging the lack of "scientific research bearing on the possibility that legitimizing financial payments will crowd out nonfinancial motivations for organ donation or on whether the problem could be reduced in a carefully regulated market"); Sheila Rothman & David Rothman, *The Hidden Cost of Organ Sale*, 6 AM. J. TRANSPLANTATION 1524, 1525 (2006) (cataloging experiments in which a crowding-out effect was found and conceding that "[n]one of these exercises are without important methodological weaknesses").

52. *See* Roland Benabou & Jean Tirole, *Incentives and Prosocial Behavior*, 96 AMER. ECON. REV. 1652, 1654 (2006).

53. *See* BRUNO S. FREY, NOT JUST FOR THE MONEY: AN ECONOMIC THEORY OF PERSONAL MOTIVATION 24–25 (1997).

54. Bruno S. Frey, *A Constitution for Knaves Crowds Out Civic Virtues*, 107 ECON. J. 1043, 1044 (1997); *see also* ALBERT O. HIRSCHMAN, THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH 93–113 (1977) (detailing how Adam Smith's

"crowd out," "crowd in," or have a "crowding neutral" effect on internal motivation is hard to predict.

The challenge of drawing on studies of intrinsic and extrinsic motivation is compounded by the fact that most situations in which researchers have detected "crowding out" differ markedly from organ procurement. Well-known examples of "crowding out" include a Swiss community where a proposal to establish a nuclear-waste repository contingent on compensating all residents garnered less support than a proposal to establish an identical facility without compensation,[55] an Israeli day-care center where the imposition of small fines for late pick-ups resulted in more failures to collect children on time,[56] and a study of teenagers who solicited funds for disabled children, in which unpaid subjects outperformed paid ones.[57] It is unclear whether and to what degree we can extrapolate from these situations to organ donation. One recent study of Swedish, potential blood donors found, interestingly, a "crowding out" effect for women but not for men.[58] To date, this finding has not been replicated. Moreover, even with fact patterns that bear some resemblance to organ procurement, difficult questions arise concerning the relevance of the findings to other situations and cultures.[59] Until far more work is done, "crowding out" must remain an interesting, but unconvincing, hypothesis. Although we cannot dismiss it out of hand, in no way does the available evidence for "crowding out" point to the conclusion that sweeping bans on donor compensation are sensible policy.

C. Safety Concerns

The conviction that unpaid donors are safer sources of human tissue than compensated ones gained wide currency in the early 1970s, when Richard Titmuss published his seminal work, *The Gift Relationship: From Human Blood to Social Policy*. Comparing the blood-collection systems of the United States and Great Britain, *The Gift Relationship* argued that the American practice of using blood obtained from paid donors had deleterious health consequences for blood recipients.[60] Over the next two decades, a number of studies appeared that lent credence to Titmuss's assertion: paid blood sources admitted to more risky behaviors and were infected with blood-borne diseases at a higher rate

---

vision of human motivation diverged from those of earlier thinkers who argued that monetary incentives improved intrinsic motivation).

55. Frey, *supra* note 53, at 1047–48.

56. Uri Gneezy & Aldo Rustichini, *A Fine is a Price*, 29 J. LEGAL STUD. 1, 6–8 (2000).

57. Uri Gneezy & Aldo Rustichini, *Pay Enough or Don't Pay at All*, 115 Q.J. ECON. 792, 799–800 (2000).

58. Carl Mellstrom & Magnus Johannesson, *Crowding Out in Blood Donation: Was Titmuss Right?*, 6 J. EUR. ECON. ASS'N 845, 852–54 (2008).

59. *Cf.* Richard A. Epstein, *The Human and Economic Dimensions of Altruism: The Case of Organ Transplantation*, 37 J. LEGAL STUD. 459, 478–79 (2008).

60. RICHARD TITMUSS, THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY 142–57 (1970).

than unpaid ones, and purchased blood was found to be more likely to transmit hepatitis.[61]

But the safety question is a complicated one. For one thing, the failure to pay sources is not a reliable proxy for human-tissue quality. Carefully chosen and monitored groups of paid donors have yielded safe blood, while voluntary donors have acted as vectors for HIV.[62] Indeed, far from serving as a guarantor of public welfare, the devotion of the U.S. blood industry to unpaid donors—a policy instituted in the wake of *The Gift Relationship*—contributed to the nation's slow response to the emerging threat of AIDS.[63] Another consideration in assessing the safety implications of compensating organs sources is that if financial incentives lead to a sufficient jump in the organ supply, transplant programs will have more latitude to reject less-desirable organs. As a result, the overall quality of transplanted organs could increase, resulting in health benefits for organ recipients.[64]

D. Compensating Organ Sources and the Cost of Transplants

The claim that financial incentives will raise the cost of transplants flows from the assumption that money or other valuable consideration offered to organ sources constitutes an additional expense, one that will inevitably be passed on to transplant recipients.[65] By raising the price of an already expensive procedure, the argument goes, compensation for organ sources would place intolerable financial burdens on critically ill patients and possibly even reduce access to transplants.

This line of thinking is flawed. First, paying organ sources may prove a cheaper means of procuring organs than soliciting donations. Under the current system, substantial sums are devoted to public-information campaigns and other efforts to persuade potential donors to consent to organ harvest.[66] With financial incentives to donate, these "exhortation" costs will in all likelihood fall. Whether the decline in exhortation costs will offset the total amount of compensation paid is an empirical question, of course, but the key point is that right now organ procurement is not cheap, even though organ sources go unpaid. Second, far from making transplants less affordable, financial incentives could *decrease* the cost of transplants. If financial rewards alleviate the organ

---

61. *See* Julia D. Mahoney & Pamela Clark, *Property Rights in Human Tissue*, *in* PROPERTY RIGHTS DYNAMICS: A LAW AND ECONOMICS PERSPECTIVE 144 (Donatella Porrini & Giovanni Ramello eds., 2007).

62. HEALY, *supra* note 31, at 87–109.

63. *Id.*

64. *See* A.H. Barnett, R.D. Blair & David L. Kaserman, *Improving Organ Donation: Compensation Versus Markets*, 29 INQUIRY 178, 376 (1992).

65. Roger W. Evans, *Organ Procurement Expenditures and the Role of Financial Incentives*, 269 J. AM. MED. ASS'N 3113, 3116–17 (1993); Stephen R. Munzer, *An Uneasy Case Against Property Rights in Body Parts*, *in* PROPERTY RIGHTS 262 (Ellen Frankel Paul et al. eds., 1994).

66. *See* Emanuel D. Thorne, *The Cost of Procuring Market-Inalienable Human Organs*, 10 J. REG. ECON. 191, 194–95 (1996).

shortage, competition among transplant programs can be expected to increase, as patients will have greater ability to choose among rival programs.[67] One likely avenue of competition is price. An increase in the supply of organs might also enable transplant programs to operate more efficiently, leading to cost reductions that could translate into consumer savings. Finally, even if monetary incentives do increase the total cost of transplantation procedures, the magnitude of the increase may be relatively modest.[68]

E. Exploitation of the Vulnerable

For all their recognized advantages, markets generate unease. It is feared that bargained-for exchanges might lead not to mutual gain, but to the flourishing of the strong either at the expense of the weak or with no concomitant benefit for them. Such worries are especially acute in the area of organ sales. Individuals willing to accept cash or other valuable consideration for solid organs—particularly their own—might be in desperate financial or emotional straits. To protect the vulnerable, many argue, the law should prevent people from selling their organs, just as it protects workers—at least some of the time—from dangerous, degrading, or extremely low-paid occupational conditions. Advocates of freedom of contract disagree, and point out that constraining the choices of prospective organ sellers might hurt rather than help them.[69] But even opponents of compensation bans are, in general, hard-pressed to defend organ sales in ringing terms.

By contrast, gifts of organs tend to elicit favorable reactions. In the case of organs obtained from the dead, donations are lauded as noble acts of selflessness that allow something good to emerge from tragedy. Harvesting the organs of deceased donors not only saves lives, but serves as a means of memorializing the dead and comforting the bereaved.[70] Attitudes toward living donation are less rhapsodic, but still positive. Though it is recognized that subjecting a healthy individual to significant short-term and long-term risks raises grave ethical questions, both the transplant community and the broader public support procuring organs from living donors.[71] Many reform proposals for living-donor practices call for improvements within the process of obtaining informed consent and for more extensive studies of medical and other consequences—but not for halting the use of living donors altogether.[72]

---

67. BARNETT & KASERMAN, *supra* note 41, at 20–23.

68. *See* Gary S. Becker & Julio Jorge Elias, *Introducing Incentives in the Market for Live and Cadaveric Organ Donations*, J. ECON. PERSP., Summer 2007, at 3, 3 (concluding that financial incentive schemes could "eliminate the large queues in the organ market . . . while increasing the overall cost of transplant surgery by no more than about 12 percent").

69. *See* MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 34–36 (1994).

70. HEALY, *supra* note 31, at 27–35.

71. *See, e.g.*, INSTITUTE OF MEDICINE REPORT, *supra* note 6, at 263–77.

72. *Id.* at 270–77.

Yet the assumption that offering to compensate organ sources necessarily entails a greater danger of exploitation than soliciting donations is unfounded. Both market and donative relationships exhibit great complexity, running the full gamut from the mutually beneficial to the disempowering. It is wrong to think that knowing whether a transfer of goods or services is paid or gratuitous gives us full information about its meaning for those involved. Bargained-for exchanges may forge interpersonal connections and solidify social relationships—even intimate relationships.[73] Acts of charity, on the other hand, may underscore gaps in status and capabilities, creating or widening distances between donors and recipients. In calculating risks of exploitation, it makes sense to focus on the capacities and expectations of the parties—what information is conveyed and how—and the organization and operation of mediating institutions.[74] Only then are we in a good position to judge the effects of various regimes on organ sources.

Applied to the current system, such scrutiny stirs disquiet. Prospective organ sources—some of whom would have a hard time obtaining transplants were they in need, due to the "green screen" that can impede transplant access for the insolvent and uninsured—are encouraged to donate so that organ-procurement organizations, hospitals, and others can reap financial rewards. This practice would be worrisome enough if donors were fully apprised of the extent to which their gifts can generate financial bonanzas. That the information furnished fails to disclose how lucrative the transplant business is only compounds the unattractiveness of denying organ sources compensation while neither urging nor expecting similar generosity from the others involved.

There is another, subtler concern. The insistence on altruistic procurement means that potential organ sources confront a stark choice: donate or refuse to help save a life. This constricted set of options is an anomaly in the realm of charitable activity. In other contexts, individuals are afforded latitude to balance altruistic projects—an important part of most lives—with the pursuit of other goals.[75] Thus a doctor may devote ten hours per week to treating the indigent, just as the owner of a valuable painting may sell it to a museum for less than the full market price. In neither case is the prospective altruist forced either to give more than she feels capable of giving or not to give at all. Organ sources are denied this freedom, even though it would be wholly

73. *See* VIVIANA A. ZELIZER, THE PURCHASE OF INTIMACY 3 (2005) (rejecting the view that "public policy must insulate household relations, personal care, and love . . . from an invading, predatory, economic world" and analyzing "how all of us use economic activity to create, strengthen, and renegotiate important ties"); *see also* Luke Dauter & Neil Fligstein, *The Sociology of Markets*, 33 ANN. REV. SOC. 105, 113 (2007) (detailing how many "market actors are involved in day-to-day social relationships with one another, relationships built on trust, friendship, power and dependence").

74. *See* Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 65 WASH. & LEE L. REV. 203, 211–31 (2008) (analyzing the interests and incentives of participants in markets for parental rights).

75. *See* Mahoney, *supra* note 4, at 215–20; *see also* Julia D. Mahoney, *Should We Adopt a Market Strategy to Increase the Supply of Transplantable Organs?*, *in* THE ETHICS OF ORGAN TRANSPLANTATION 73–76 (Wayne Shelton & John Balint eds., 2001).

understandable for a prospective donor to prefer that his organs be made available for transplant upon his death *and* that his survivors receive compensation.

Insisting that organ sources either act out of pure altruism or forego donation altogether raises particularly difficult issues when applied to living donors. Although laws and regulations sometimes prohibit workers from undertaking vocational risks, in a number of other contexts, individuals are permitted to take dangerous jobs and to receive a "risk premium" on top of normal wages as compensation for the perils they face.[76] What is unheard of is to refuse to pay workers for dangerous work, but to urge that they do it for free instead on the grounds that their sacrifices would generate social value. Yet this, in effect, is precisely what we pressure living donors to agree to. Denied the chance to both do good by helping others and do well by enriching themselves, prospective donors must choose from a truncated and unsatisfactory menu.

IV

INSTITUTIONS AND COMPLEX MOTIVATIONS

That the arguments for refusing to compensate organ sources are unpersuasive does not mean that instituting financial rewards would necessarily prove to be a good policy choice. Introducing financial incentives raises significant challenges, not least among them overcoming the potential hostility of procurement professionals, bioethicists, and others who fiercely espouse the principle of altruistic donation. Compounding such resistance are formal and informal constraints on financial incentives.[77] Removing, modifying, or declining to enforce the formal constraints—that is, the laws and regulations prohibiting compensation for organ sources—will not automatically dissolve the informal constraints of organizational practice and social norms.

That said, there is reason to suspect that informal institutional limits on financial incentives are malleable.[78] At the very least, some forms of financial incentives might prove both effective and acceptable. But, in assessing potential institutional modifications, we are hampered by our limited knowledge of how societal attitudes change. Another stumbling block is our rudimentary understanding of the organizational framework that encourages and supports altruism in the context of organ donation.[79]

---

76. *See* W. Kip Viscusi, *The Value of Risks to Life and Health*, 31 J. ECON. LITERATURE 1912, 1913–14 (1993).

77. *Cf.* DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 4 (1990) (distinguishing between formal institutions consisting of "rules that humans devise" and informal institutions such as "conventions and codes of behavior").

78. *See* SHARP, *supra* note 13, at 244 (examining the culture of organ procurement and suggesting that "the bedrock of an assumed gift economy has already eroded").

79. *See* Healy, *supra* note 11, at 387–90.

It is worthwhile to examine the four most prominent financial-incentive proposals and assess their feasibility. Any such analysis is necessarily preliminary, for the long-standing, strict proscriptions against compensating organ sources make it hard to predict how procurement organizations and professionals, prospective donors, the general public, and others will react to policy innovations.[80]

A. Rewarded Gifts

One approach to introducing financial incentives is to provide compensation but claim that the donative framework remains intact.[81] Instead of being labeled a "sale," a transaction that involves the exchange of something valuable for consent to organ harvest will be termed a "gift," albeit a rewarded one. By avoiding the language of the market, or so the reasoning goes, this approach will allow both the transplant community and the general public to regard compensating organ sources as a slight modification of current procedure rather than as a substantial innovation. Careful word choice will thus enable financial rewards to gain acceptance by salving the feelings of those who are put off by the notion of body parts as commodities. In this context—as in so many others—euphemism can function as a social emollient.

This scheme has the powerful advantage of requiring the least institutional modification. Organ Procurement Organizations, hospital staff, and others involved in obtaining consent to harvest deceased organs could continue to solicit "gifts of life" in much the same way as before. Public-service campaigns and other efforts to encourage living organ donation could proceed largely unchanged.

At the same time, "rewarded gift" proposals stir serious misgivings. For one thing, characterizing as a gift what may fairly be described as a sale is disingenuous, if not outright deceptive. In recent decades, medicine has claimed to embrace the values of truthfulness, fair dealing, and transparency.[82] A method of organ procurement that entails anything less than full disclosure of all material facts is in profound tension with these ideals. There are practical dangers as well. If prospective donors and the public reject the distinction between "an incentive of material value and a payment for organs,"[83] the upshot could be serious reputational harm for the transplant profession with no concomitant benefit of increasing the organ supply.

Finally, if potential donors do believe that what is on offer is in fact a gift rather than a sale, the "rewarded gift" approach may fail to increase the organ

80. *See* Howard, *supra* note 29, at 30–32.

81. *See* INSTITUTE OF MEDICINE REPORT, *supra* note 6, at 247–48 (detailing proposals to offer financial rewards that are intended to "function within the gift model" and to avoid undermining the belief that "organs are donated rather than sold").

82. *See generally* THOMAS L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS (2001).

83. INSTITUTE OF MEDICINE REPORT, *supra* note 6, at 248.

supply. The reason to supplement opportunities to donate with financial rewards, after all, is to tap into various human motivations: just as altruists will not respond to offers of payment, so nonaltruists cannot be expected to be moved by appeals to generosity.[84] But if nonaltruists fail to grasp that what is offered is in fact compensation—not just another chance to be generous—they will not respond.

B. Designated Compensation

Another option—one that, like the "rewarded gift" approach, aims to realize the benefits of financial rewards while keeping at bay an obvious, full-blown market in solid organs—is to require that compensation be devoted to particular purposes. Stipends for funeral expenses and donations to charity have been suggested as appropriate uses for money paid to organ sources.[85] Other forms of compensation, including payment of medical expenses or insurance premiums, are also possibilities.

Designated compensation is, in some respects, promising. Members of the transplant community and broader public who are uncomfortable with unrestricted cash payments for organs may find designated-compensation schemes more palatable, simply because (in their minds) some good consequences are guaranteed to flow from the transactions. In addition, designated compensation might be deemed unobjectionable—or less objectionable than unconstrained compensation—on the grounds that the motives of those receiving the money are more admirable than the motives of those willing to accept flat-out payment. Individuals who have pledged to devote the proceeds to health, education, or the burials of loved ones inspire sympathy and respect in a way that those free to spend the money to drink and gamble do not. Another possible benefit of designated compensation is its effect on potential donors. It is plausible—although of course uncertain—that a significant fraction of donors who hesitate to accept unrestricted funds would agree to make organs available if it is clear to others (and also, possibly, themselves) that they will use the money for socially admired purposes.

There are drawbacks to designated compensation. First, the conceptual and logistical challenges are daunting. What considerations will determine what the recipients of compensation may spend the money on? What measures will organizations charged with administering payment programs take to ensure that funds are not diverted to unapproved uses? What remedies will be invoked if recipients of funds fail to comply with conditions? It seems unlikely that organizations that dispense funds would be willing to sue recipients. As yet, these and other hard questions remain for the most part unaddressed. Another

84. Kenneth J. Arrow, *Gifts and Exchanges*, 1 PHIL. & PUB. AFF. 343, 349–51 (1972).

85. *See* L.A. Siminoff & M.D. Leonard, *Financial Incentives: Alternatives to the Altruistic Model of Organ Donation*, 9 J. TRANSPLANT COORDINATION 250, 253 (1999); *see also* Howard, *supra* note 29, at 31 ("The form and presentation of payment can help to mitigate against crowding out of altruistic donations.").

concern is that designated compensation might be construed as suggesting that organ sources and their survivors cannot be trusted to make sound decisions about how to spend money. If that is correct, then limiting compensation to particular uses risks insulting organ sources.

C. Unrestricted Payments for Organs from Deceased Donors

A more controversial proposal is to offer unrestricted payments for organs of deceased donors. Funds could be disbursed directly to survivors or to the decedent's estate and distributed in accordance with testamentary instructions or applicable intestacy laws. Alternately, living individuals could sell rights to harvest organs upon death, in the event they are eligible donors.[86] In any case, recipients would be free to use the money for any purpose.

Unlike rewarded gifts or designated compensation, this approach does not skirt the issue whether the first link of the organ distribution chain will include commercial activity. As such, unrestricted payments to deceased donors have the virtue of honesty. The transparency of the significant shift in social practice has the added benefit of signaling to potential donors that compensation is now on offer. Consequently, this approach may be a highly effective means of incentivizing nonaltruists to make organs available for transplant. It is also possible that this approach will meet with public approval on fairness grounds. Recent stories in the mainstream media about transfers of human biological materials have detailed how, in many transactions involving human tissue, everyone but the human source profits.[87] If these narratives take hold in the public consciousness, then extending the opportunities to share in the financial gains made possible by organ harvest may strike many as simple justice. Above all, straightforward economic analysis indicates that monetary incentives would increase the organ supply.[88]

But for all its appeal, the unrestricted-payment approach carries significant hazards. Vociferous and long-standing insistence that organ transplantation operates entirely within the "gift model" may lead procurement professionals and others who promote donation to resist the transition to a regime that solicits both donations and sales. To be sure, such a transition is by no means inconceivable, especially in light of the fact that other nonprofit organizations—for example, art museums—both purchase and receive invaluable goods as donations. But although the culture of organ procurement is in many respects one of change and innovation,[89] it is impossible to say with confidence what the reaction would be.

---

86. *See* Cohen, *supra* note 1, at 32–36.

87. *See, e.g.*, Jeremy Laurance, *Surgeon: Organ Trade Should Be Legalised*, THE INDEPENDENT, June 13, 2008, at 10.

88. *See* Becker & Elias, *supra* note 68, at 9 (concluding that payments would "help close the gap between [the] quantity supplied and [the] quantity demanded" of organs).

89. *See* SHARP, *supra* note 13, at 242 (describing the shifts in "labels, rhetorical phrases, and attitudes" among procurement workers).

Even if transplant professionals come to embrace payments for organs, the problem of popular acceptance remains, for the "gift paradigm" might exert a strong hold on the public mind.[90] Should public support fail to materialize, it is by no means certain that efforts by government entities or procurement organizations to inculcate it will succeed. If nothing else, our experience with information campaigns aimed at convincing the public to become organ donors has taught us that modifying preferences is no easy task.[91] Finally, we cannot dismiss as preposterous the warnings of adherents of the "crowding out" hypothesis, that explicit payments could trigger such a backlash that prospective sources would refuse to donate—let alone sell—organs, decimating the organ supply.[92] Although the probability of such a catastrophe is unlikely to be very high, policymakers may be unwilling to chance it.

D. Unrestricted Compensation for Living Donors

Allowing unrestricted compensation for living donors has many of the same advantages as unrestricted payments for deceased organs, most notably, frank acknowledgement of the departure from the gift framework and a solid likelihood of motivating a substantial number of nonaltruists to make organs available.[93] Also in common with payments for organs acquired from the dead, compensating living donors may fail to increase the organ supply due to lack of enthusiasm among transplant workers and the general public—or even have the perverse effect of reducing the organ supply.

There are some key differences. Living organ sources are subject to physical and mental health risks, many of which are of uncertain character and magnitude.[94] If the availability of compensation boosts the number of living donors—which, after all, is its goal—the result will be more death and disability among organ sources. Living donors may also suffer the detrimental financial consequences of lost wages and trouble obtaining affordable health and disability insurance.[95] Moreover, the negative consequences of living donation extend beyond harms to donors. Physicians and other health-care workers often suffer due to the ethical quandaries posed by operating on healthy individuals. However worthy the motivation for removing organs from living donors, surgery that is not intended to help the patient conflicts with the *primum non nocere* (first do no harm) principle.[96] Compensating living donors does have one

90. *See* Howard, *supra* note 29, at 30–32.

91. *See* INSTITUTE OF MEDICINE REPORT, *supra* note 6, at 187–99 (recounting the limited success of efforts to increase altruism).

92. *See supra* III.B.

93. *See* Becker & Elias, *supra* note 68, at 21–22.

94. *See* J.R. Inglefinger, *Risks and Benefits to the Living Donor*, 353 N. ENG. J. MED. 447, 447 (2005) (stating that although physical and emotional risks for the living donor remain, the risks are now better understood).

95. *See* R.S. Brown & M.W. Russo, *Financial Impact of Adult Living Donation*, 9 (10) LIVER TRANSPLANTATION (SUPPLEMENT 1) S12, S14 (2003).

96. INSTITUTE OF MEDICINE REPORT, *supra* note 6, at 263–64.

distinct advantage over payments for deceased organs, though: it does not contravene the strong social norms against profiting from the sale of the corpses of loved ones.

Implementing a system of compensation for living donors would in some respects be simple. Already, those in need of organs and potential organ providers generally deal directly with one another in arranging for altruistic transfer. For the most part, these nonmediated arrangements involve donors and recipients who are closely related, although some pair strangers with recipients whose plight is publicized through social-networks' media stories or internet appeals.[97] To add the option of payment would not require the cooperation of any of the organizations that operate as facilitators and fomenters of altruism. Compensation for living donors would, however, entail the elimination or non-enforcement of formal restrictions, as well as the revision of social norms. These norms are particularly strong in the context of familial and intimate relationships, in which explicit, bargained-for exchanges are often viewed as problematic.[98]

V

CONCLUSION

Formal restrictions on financial incentives for organ sources were put in place decades ago. Imposed in haste and without careful analysis of the complexities of gift and market relationships, these prohibitions have long been justified as measures to prevent the commodification of the human body, to protect public health, and to shield the vulnerable from exploitation. In fact, bans on payments to organ sources accomplish none of these goals. Instead, the stubborn commitment to wholly altruistic procurement has resulted in a curious system, one in which individuals are exhorted to donate rights to valuable goods that are then sold to generate profits for others.

The weaknesses in the arguments for refusing to pay organ sources suggest that the system is ripe for transformation. But here we must tread carefully, for changing organ transplantation entails more than revising formal laws and regulations. Also vital are the constraints imposed by social custom and organizational practice. Our understanding of how these constraints evolve—much less how to foster societal and institutional transformation—is as yet limited.

97. The vast majority of living donors are family members of recipients. *See* Organ Procurement and Transplant Network, 2007 Annual Report of the OPTN and SRTR, *available at* http://www.optn.org/data/annualReport.asp (last visited Mar. 22, 2009).

98. *See generally* ZELIZER, *supra* note 73.