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LETHAL LEGISLATION

ROBERT BERMAN

Imagine for a moment you are terminally ill and someone magically has the antidote to your illness buried in his body. He is willing to have it surgically removed, but only if you pay him for his pain, recuperation time, and the risk of having surgery. You would gladly agree, but there is one catch: U.S. law prohibits it. As a result, you die.

Welcome to the world of organ failure, where demand for organs far outstrips supply and buying organs is illegal. Over the past decade, the number of people waiting for organs has grown from thirty-five thousand to eighty-seven thousand, while the number of organ donors has remained flat. By and large, all attempts to increase organ donation rates have failed. Giving monetary compensation to incentivize live kidney donors is, in many cases, the last chance for life for the fifty thousand Americans awaiting a kidney. Yet due to U.S. legislation that prohibits the selling and purchasing of organs, more than sixty-five hundred Americans die unnecessarily every year.

In 1984, without much debate, Congress hastily passed the *National Organ Transplant Act* (NOTA) that, *inter alia*, makes it a federal crime to purchase or sell human organs for use in human transplantation. NOTA was enacted, in part, to protect poor people from being exploited. Ironically, it does just the opposite, *de facto* discriminating against poor people in two ways.

First, since NOTA makes buying an organ illegal, the only avenue to obtain one, given that fact that demand far outstrips supply, is the black market. Every year, approximately three hundred wealthy Americans travel to the third world, where law enforcement is often more lax, in order to acquire kidneys. Poor Americans, on the other hand, cannot afford the airfare, let alone the price of a kidney, which often exceeds \$100,000.

Second, as an act of misguided paternalism, NOTA deprives poor people the right to sell their kidneys in an effort to "protect" them from their own "poor judgment." If the government desires to address economic inequality, it should provide the poor with better access to basic necessities, such as health care. In the absence of providing thorough health coverage, the government should allow poor people the agency to act in their own best interest. Outlawing the sale of organs will not correct underlying social inequalities.

The unregulated and illegal nature of the growing black market for organs results in artificially inflated kidney prices (research shows that under a regulated free market kidneys would sell for \$3,000 rather than \$100,000), brokers absconding with deposits without delivering the organs, and an increase in medical risks due to the back-room operating environments found in the Far East and South America. Back-room organ procurement today is the illegal abortion of yesteryear.

Historically, the public feels that to donate an organ is divine but to sell an organ is sinful. The objections most often heard can be divided into two categories: ethical and pragmatic. Selling a body part seems, at first blush, unethical. Yet current U.S. law allows a person to do just that. It is legal for men to sell their sperm, women to sell their limited number of reproductive eggs, and people to sell their blood and hair, all of which specifically render the body a commodity. To apply a different standard to organ donation is inconsistent and, in fact, unethical.

Ethical support for financial compensation for organs is found in some religious law: the past three chief rabbis of Israel have all ruled that it is ethically permissible for both donor and recipient to exchange financial remuneration for an organ by explaining that ultimately accruing economic gain from this act would not deprive the life-saving donation of its original ethical quality.

Another concern is that poor people need to be protected from the pressure they might feel to sell an organ in order to receive the income. Yet pressure can stem from sources other than financial needs. A family member most likely feels obligated to “voluntarily” donate an organ to a relative due to feelings of guilt or pressure from other family members. These pressures might be even greater than those that a poor person feels due to economic desperation. Yet the government chooses not to prohibit altruistic family donations on these grounds of pressure. (If the government is adamant to “protect” the poor from selling their organs, it could legalize payment for organs and ban the poor from the donor pool while at the same time offering a higher price per organ to induce the middle class to sell. Of course this too is discrimination against the poor.)

There are two commonly raised pragmatic objections to permitting the sale of organs. First, the government doesn’t want to encourage people to undergo the medical risk of surgery. But the government does so by encouraging altruistic donations, and getting paid for it doesn’t increase this risk. Also, the medical establishment finds this risk of surgery to be acceptable (1 in 20,000 chance of dying).

Second, there exists the concern that life without an organ (e.g., liver lobe or kidney) will shorten one’s life span. This fear is muted by the fact that a liver cut in half grows back to full size and functions perfectly, and empirical evidence shows that one can live a normal life span with only one kidney. Accordingly, risk-conscious insurance companies do not raise their rates for someone who donated a kidney or a liver lobe.

Additionally, it is not unheard of for society to pay someone to bear a health risk for the benefit of others. Examples of such arrangements include the hazard pay offered to journalists in war zones, coalminers, bridge builders, firemen, and bomb disposal experts.

NOTA mandated the creation of the United Network of Organ Sharing (UNOS), the quasi-governmental organization that holds a monopoly on organ procurement. It is UNOS that persists in supporting the no-sale policy regardless of the organ shortage and the rising number of accompanying deaths.

To make matters worse, UNOS creates more obstacles by prohibiting donors from donating organs based on the recipient’s ethnic or religious affiliation. UNOS requires that a good Samaritan donate blindly, not knowing anything particular about the recipient that would motivate the donor to donate. To do otherwise, UNOS believes, would be discrimination.

But this approach effectively removes all incentives for altruistic donation. It is human nature to want to help a person who belongs to the group that you identify with. Favoritism toward one’s own group, known as particularism, is a natural sociological phenomenon. So as a result of people not being able to direct their donation to group members they identify with, people simply don’t donate at all. UNOS would rather operate in the fantasy of a normative politically correct world rather than in reality.

In fact, footprints of particularism are nonetheless visible in other legally and socially acceptable acts. A Black person may leave all his assets to a college fund that supports only Black students, and expectant mothers are allowed to “discriminate” when selecting their unborn child’s adoptive parents.

Furthermore, people are allowed to donate all of their money to the religious institution of their choice, such as a church, and they are not required by law to donate blindly to the charity that needs the money the most or to equally divide their money between all the different faiths.

If particularism is allowed in allocating one’s financial assets, why shouldn’t it similarly be permitted with one’s physical assets—especially when this policy would increase overall organ donor rates? If UNOS’s policy were applied to the charitable sector, it would greatly reduce charitable giving. People have a right to choose the recipient of their kidneys as well as their money.

By depriving sick Americans access to means that can save their lives, NOTA violates the Universal Declaration of Human Rights (to which the United States is a signatory) that recognizes a citizen's right to life. The International Forum for Transplant Ethics has recommended lifting the ban on kidney sales from living kidney donors pending better justification for the prohibition of such transactions. Their call should be heeded.

Tens of thousands of Americans have needlessly died because selling organs is illegal and altruistically donating organs to a person based on similarity of faith or race is prohibited. This appalling loss of life is avoidable. UNOS needs to be challenged to allow directed donation, and NOTA legislation must be changed to allow for financial remuneration. Paying for an organ is morally odious only to one who is not dying to get one.