

KIDNEY, MONEY, AND THE *SHĪ'AH* IMPLEMENTATION OF THE RULE OF NECESSITY

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ABSTRACT

In the U.S., over 43,000 people die every year waiting for a kidney. In Iran, however, monetary incentives have eliminated such a waitlist. Iran is the only country in the world with an unrelated living kidney donor program that has allowed for monetary incentives in the form of an altruistic gift, which has become known as “the Iranian Model.” Nevertheless, the legal details of the system remain vague and scholars both in and outside of Iran continue to debate the nature of the system. Does the Iranian system consider kidneys a commodity? Can you legally buy a kidney in Iran? If not, what is the legal nature of the monetary incentive? The answers to these questions are particularly important as many countries seek to find the right approach in addressing kidney shortages. This Article follows the newly established guidelines of the Iranian Model and seeks to answer these questions. It argues that Iran’s peculiarity is neither related to its view on the marketability of the kidney nor the proprietary nature of the organ; instead, it can be associated with the principle of necessity as interpreted by *Shī’ah* Islam in Iran. The legal nature of the act of giving monetary incentives is also best described under the Islamic contract of *ju’ala*—the unilateral contract of reward. This Model as explained in this article can be implemented outside of Iran, eliminating the need to create a market for the sale of kidneys as some scholars have suggested.

ABOUT THE AUTHOR

Assistant Professor of Law, University of Denver Sturm College of Law. I am grateful to Intisar Rabb and Govind Persad for helpful conversations and comments in developing this article. I dedicate this to Larry, the excellent Fordham Law librarian who encouraged me to write on comparative law as a doctoral candidate. May he rest in peace.

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INTRODUCTION

Larry held a juris doctor from Columbia Law School and worked as the head of instructional services at the Maloney Library, Fordham University School of Law in New York City.¹ For many incoming law students at Fordham, he was the first person to enthusiastically welcome them to the library. Unfortunately, after years of living with kidney failure and the inability to secure a kidney donor, Larry passed away in October 2019.² His story is like thousands of other in the United States and around the world. In the U.S. alone, over 43,000 people die every year waiting for a kidney.³

One major reason for this staggering death toll is the illegality of receiving monetary compensation for donating a kidney. Under the U.S. National Organ Transplant Act,⁴ it is “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.”⁵ Similar regulations can be found all over the world. However, since 1988, Iran has implemented a regulatory monetary scheme to facilitate and encourage living kidney donation.⁶ As a result, anyone who is medically eligible for a kidney transplant operation will ultimately receive one.⁷

In other countries, many scholars have advocated for adding a monetary incentive to increase organ donations.⁸ Nevertheless, there are not many

1. *A Librarianship that Doesn't Wait at a Desk: Remembering Fordham Law Treasure Larry Abraham*, FORDHAM (Nov. 1, 2019), <https://news.law.fordham.edu/blog/2019/11/01/a-librarianship-that-doesnt-wait-at-a-desk-remembering-fordham-law-treasure-larry-abraham>.

2. Nicole Larosa, *Helping a Law School Librarian Find a Kidney Donor*, FORDHAM (June 19, 2019), <https://news.fordham.edu/law/helping-a-law-school-librarian-find-a-kidney-donor>.

3. Dylan Matthews, *Study: The Kidney Shortage Kills More Than 40,000 People a Year*, VOX (Jan. 2, 2019), <https://www.vox.com/future-perfect/2019/1/2/18165077/kidney-disease-transplant-waiting-list> (citing Frank McCormick et al., *The Terrible Toll of the Kidney Shortage*, 29 J. AM. SOC. NEPHROLOGY 2775 (2018)).

4. 42 U.S.C. § 274(e) (1984) (“The preceding sentence does not apply with respect to human organ paired donation”).

5. *Id.* According to paragraph c: “The term ‘human organ’ means the human (including fetal) kidney, liver, heart, lung, pancreas, bone marrow, cornea, eye, bone, and skin or any subpart thereof and any other human organ (or any subpart thereof, including that derived from a fetus) specified by the Secretary of Health and Human Services by regulation.”

6. Ahad J. Ghods & Shekoufeh Savaj, *Iranian Model of Paid and Regulated Living-Unrelated Kidney Donation*, 1 CLINICAL J. AM. SOC’Y NEPHROLOGY 1136 (2006).

7. Bahar Bastani, *The Iranian Model as a Potential Solution for the Current Kidney Shortage Crisis*, 45 INT’L BRAZILIAN J. UROLOGY 194 (2019).

8. See, e.g., A.H. Barnett et al., *Improving Organ Donation: Compensation Versus*

discussions within the current legal English scholarship regarding the nature of the Iranian Model, which is an atypical system that no other country has adopted. Most comparative studies that have sought to explain the Iranian model in English have also at times misinterpreted the Iranian laws and the nature of the model.⁹ Is it a contract of sale? Can you legally “buy” a kidney in Iran? Does Iran consider kidneys as commodities? Given that Iran’s regulatory system requires consistency with *Shī’ah* Islam,¹⁰ does that mean *Shī’ah* Islam allows for monetary schemes? If so, on what basis? This Article seeks to answer these questions.

This Article focuses on living kidney donation¹¹ and asserts that previous scholarly works have incorrectly described the Iranian Model as involving a kidney “purchase.” This Article illustrates that any contract of sale, or *‘aqd al bai’* in Islamic terminology,¹² involving a kidney is illegal in Iran. Moreover, this Article argues that the reason for Iran’s peculiarity is neither related to its view on the marketability of the kidney nor a proprietary view toward the organ; instead, it is the principle of necessity as interpreted by *Shī’ah* Islam in Iran. The principle of necessity allows one to forgo certain legitimate religious concerns if lives may be saved. Based on this view, the Iranian model is meant to be only temporary and operates as long as conditions necessitate. Should medical advancements, or other factors, eliminate the overall need for kidney transplants or kidney shortage in the future, Iran’s current model will lose its legal justification. By eliminating the false notion of “legally selling an organ,” other countries may be more willing to temporarily implement the Iranian model, thereby reducing the number of preventable deaths.

Markets, 29 INQUIRY 372 (1992); Julia D. Mahone, *Altruism, Markets, and Organ Procurement*, 72 L. & CONTEMP. PROBS. 17 (2009); Walter K. Graham & Jason P. Livingston, *Perspectives on Financial Incentives to Induce Live Donor Kidney Donation: Scholarships in Exchange for the Gift of Life*, 2 ST. LOUIS U. J. HEALTH L. & POL’Y 347 (2009) (citing E.A. Friedman & A.L. Friedman, *Payment for Donor Kidneys: Pros and Cons*, 69 KIDNEY INT’L 960, 961 (2006); Francis L. Delmonico et al., *Ethical Incentives—Not Payment—For Organ Donation*, 346 NEW ENGLAND J. MED. 2002 (2002)) (reviewing numerous proposals and their pros and cons).

9. See e.g. Glen Cohen, *Transplant Tourism: The Ethics and Regulation of International Markets for Organs*, 41 J. LAW MED. & ETHICS 269, 278 (2013) (stating that “Iran has robust regulation of kidney selling.”); Rupert WL Major, *Paying Kidney Donors: Time to Follow Iran?* 11 MCGILL J. MED. 67–69 (2008) (noting that in the context of kidney transplant: “one of the few countries that has legalized the sale of organs is Iran.”).

10. *Shī’ah* make up around 10 percent of the Muslim population. In Iran 99.4 percent of people are Muslim, out of which about 93 percent are *Shī’ah*, making it the largest *Shī’ah* majority country in the world. See *Sunni and Shia Muslims*, PEW RSCH. CTR. (Jan. 27, 2011), <https://www.pewforum.org/2011/01/27/future-of-the-global-muslim-population-sunni-and-shia>.

11. This is the for which model Iran is famous. As Part II illustrates, legal discussions on the permissibility of cadaver kidney donation in Islam are a separate topic beyond the scope of this article.

12. *Aqd* is the Arabic term used for contract, which is also commonly used in Farsi.

The Article proceeds as follows: Part I explains the Iranian Model as revised in 2019 by the Iranian Ministry of Health and Medical Education.¹³ Part II analyzes the different theoretical approaches in *Shī'ah* Islam that permit monetary compensation for certain organ donation from living donors. It argues that the rule of necessity is at the heart of the *fatāwā*¹⁴ and religious debates in this realm. Part II further illustrates the benefits of upholding the view on necessity and its compatibility with other Islamic teachings. Part III addresses three major concerns raised against the monetary system in the U.S. and explains why they are not satisfactory to forgo the implementation of a system with monetary incentives for organ donation. This comparative study concludes that, until medicine eliminates the necessity for such propositions, the benefits of allowing monetary incentives for kidney donations for patients who may otherwise die outweighs its costs.

I. THE IRANIAN KIDNEY MODEL: TIMELINE AND PROCEDURE

The first kidney transplant in Iran was performed in 1967, and until 1985, only 112 other renal transplants took place.¹⁵ In 1974, the Ministry of Health and Medical Education established the first dialysis center. In the meantime, due to a lack of necessary medical equipment, the Ministry sent patients to other countries for renal transplants.¹⁶ In 1984, two medical transplant teams in Iran began performing living related donor renal transplant surgeries.¹⁷ The first living *unrelated* renal transplant surgery in Iran—and for that matter, in the Middle East—took place in January 1987.¹⁸ The shift to living unrelated renal transplant was not only a matter of experimental medicine, but a matter of wartime necessity. “The Iran-Iraq war (1980–1988), economic sanctions, [and] lack of sufficient dialysis facilities” had created a dire situation which led to a growing number of deaths among renal patients without transplants.¹⁹

Evidently, there were not enough living donors to meet the need. Iran also had not yet legalized deceased donor transplants since early religious

13. In this Article, “Ministry” is the Iranian Ministry of Health and Medical Education, unless otherwise noted.

14. *Fatwā* (plural *fatāwā*) in Islam is a formal ruling on a question issued by a *marja'* or *mujtahid* (also known as *mufti*). Merriam Webster's dictionary defines *fatwa* as “a legal opinion or decree handed down by an Islamic religious leader.” *Fatwa*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/fatwa> (last visited May 27, 2020). Although the definition of *fatwa* and *mujtahid* is more complex, this translation is sufficient for the purposes of this Article.

15. Mitra Mahdavi-Mazdeh, *The Iranian Model of Living Renal Transplantation*, 82 *KIDNEY INT'L* 627, 627 (2012).

16. Nasser Simforoosh et al., *Living Unrelated Kidney Transplantation: Does It Prevent Deceased-Donor Kidney Transplantation Growth?*, 1 *EXPERIMENTAL & CLINICAL TRANSPLANTATION J.* 250, 251 (2019).

17. *Id.*

18. *Id.*

19. *Id.*

interpretations had cast doubt on whether such operations on deceased patients were permissible in Islam. Therefore, the government initiated the “gift of altruism” to increase living donors. In 1989 the physician Dr. Fazel received a *fatwā* from Imam Khomeini, the late Supreme Leader of Iran, to initiate deceased-donor organ transplants.²⁰

In 2000 the Iranian parliament enacted the “Organ Transplantation and Brain Death Act”²¹ that officially regulated organ transplants from deceased patients declared brain dead. The statute was passed after three attempts: two had resulted in failure to secure enough votes and the third was blocked by the Guardian Council, the government body responsible for assuring that any bill passed by the parliament is in accordance with Islam and the Iranian Constitution.²² The bill finally became law when the Guardian Council did not respond to the bill’s compliance by the official deadline.²³ To this day, Iran lacks a comprehensive law regulating living kidney donation. The current regime is based on ordinances that do not enjoy the protection and the force of statutes.²⁴

Nevertheless, the altruism gift for donors continued to motivate kidney donations. Founded with the support of Ayatollah Hashimi Rafsanjani, The Charity Foundation for Special Diseases (CFSD), became in charge of processing the governmental altruism gift.²⁵ However, the gift of one million toman²⁶ soon lost value under high inflation and became insufficient. To help patients

20. *Id.* at 252.

21. Qānun Peyvand Azāye Bimārān Fot Shode Yā Bimārāni ke Marge Maghzi Anān Mosalam Ast, 1379, 01, 17 [The Organ Transplantation and Brain Death Act] (Mar. 20, 2000) (Iran). In their will, the patient should have either stated their desire to donate organs in the case of brain death, or as defined by the law, the next of kin would consent to the donation.

22. Hokme Imam Khomeini dar Tasvibe Qānun va Naqsh Ayatollāh Khāmenei dar Tasvib ān [Ayatollah Khomeini’s fatwa for Enacting the Law and The Role of Ayatollah Khamenei in it] آیت‌الله‌خامنه‌ای در تصویب حکم امام‌خمينی برای پیوند عضو و نقش قانون خمینی-برای-پیوند-عضو-و-نقش-آیت-الله- KHABAR ONLINE (May 21, 2019), <https://www.khabaronline.ir/news/1262508/آیت-الله-خامنه‌ای-در-تصویب-حکم>.

23. Tahmoores Bashiriyeh, *Tahlil Qānun Peyvand Azāye Bimārān Marge Maghzi va Ayiinnameye Ejraiye ān* [Analysis of the Organ Transplantation and Brain Death Act and Its Bylaws] 6 J. MED. ETHICS & HIST. MED. 96, 97 (2012). If the Guardian Council does not respond to the legality of a bill passed by the parliament within the stipulated time frame of ten days, the bill automatically becomes enforceable as law. QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 94 [1980]. It is plausible that the lack of response to this bill may have been intentional.

24. Shahla Moazami, Mehdi Vahdani & Parisa Zadeh Dabbagh, *Examination and Analysis of Laws and Regulations Related to Organ Transplantation in Iran*, 6 IRANIAN J. MED. ETHICS & MED. 1 (2013), <http://ijme.tums.ac.ir/article-1-5185-fa.pdf>.

25. BONYĀDE OMURE BIMĀRIHĀYE KHĀS [CHARITY FOUNDATION FOR SPECIAL DISEASES], <https://www.cffsd.org>.

26. Iran’s currency, known as rial, may be changing to toman. *See Iran Approves Plan to Cut Four Zeros From Falling Currency*, REUTERS (May 4, 2020), <https://www.reuters.com/article/iran-currency/iran-approves-plan-to-cut-four-zeros-from-falling-currency-report-idUSL8N2CM1E9>.

find donors, the Iranian Patients Kidney Foundation (IPKF),²⁷ founded in 1980,²⁸ was placed in charge of donor-patient matchmaking. It facilitated the process with the help of philanthropists, who would help the patient pay what the donor demanded as a “gift,” in addition to the one million toman paid by the IPKF.²⁹ Moreover, under this model, kidney transplantation was only offered to Iranian citizens and, under certain conditions, citizens of “countries with no transplant program like Afghanistan.”³⁰

The Iranian Model diminished the domestic kidney black market and transplant tourism for Iranian patients. IPKF’s supervision also ensured that donors could not demand unrealistic sums of money. Research suggests that despite opening a legal avenue for the altruism gift, the Model did not cause a decrease in donations with no gift from deceased patients or other living donors who did not expect the altruism gift.³¹

Despite these measures, the matchmaking process soon exhibited the characteristics of negotiating a deal. Although the IPKF itself played no role in the exchange of information and did not keep track of the monetary amount to ensure privacy, the process enabled the patient to bargain for a higher altruism gift. To reduce the possibility of bad actors taking advantage of this process, the Ministry of Health and Medical Education worked continuously to improve the Iranian Model and provide other avenues that could increase kidney donations.

For example, the Ministry worked to promote and normalize organ donation after death. In 2015,³² the government set up an online registration system that issues ID cards for those wishing to donate organs upon death.³³ However, this procedure has its own limitations. According to the Iranian Law, the ID card is not a legally binding will; it can only serve as a corroborating evidence in the procedure.³⁴ Therefore, there was still a need to revise the living kidney donor transplant guidelines and improve the living donation system. The latest

27. Iranian Patients Kidney Foundation (IPKF), <http://www.irankf.com/vsda^In-1lkt47,1.k5hk4.html> (last visited Apr. 29, 2020).

28. Mahdavi-Mazdeh, *supra* note 15, at 629.

29. Katayoun Najafzadeh, *Yek Ghadam tā Barchidan Bāzār Siyāh Koliyeh Foroushi [One Step Until Eliminating the Dark Market of Kidney]* IRNA (May 2015), <https://www.irna.ir/news/81621097/> يك-قدم-تا-بازار-چين-بازار-سياه-كلييه-فروشي.

30. Nasser Simforoosh, *An Updated Iranian Model in Kidney Transplantation: Rewarded Gifting a Practical Solution to Kidney Shortage Crisis*, 13 *UROLOGY J.* 2803 (2016) (The Afghan patients needed to secure permission from Iran’s Ministry of Health).

31. Simforoosh et al., *supra* note 16, at 251 (concluding that that “deceased-donor kidney transplant procedures have steadily increased despite an active unrelated living-donor kidney transplant program” in Iran.); *see also* Simforoosh, *supra* note 30.

32. *Hamechiz Darbāre-ye Marge Maghzi va Peyvand e Azā [Everything About Brain Death and Organ Transplant]*, ASRIRAN, <https://www.asriran.com/fa/news/392279/> نداء-اعضا (last visited Apr. 30, 2020).

33. IRANIAN SOC’Y OF ORGAN DONATION, <https://ehda.center> (last visited Apr. 30, 2020).

34. Currently, there should be either a valid will or the next of kin should consent to the donation and the donation card alone is not sufficient.

reform occurred in 2019 when the Ministry passed a new ordinance regulating the living kidney donorship procedure.³⁵

The aim of the most recent ordinance is to remove the illegal bargaining process by moving the registration procedure online and banning patients from bringing their own unrelated kidney donor to the hospital without first registering them through the online system.³⁶ The new ordinance requires that the “possible expenses of donation should be paid to the donor”³⁷ through the IPKF³⁸ and prohibits introducing a patient to a living donor until the transplant management office has designated and matched them to each other.³⁹

With the new online registration system, hospitals and kidney donors are also prohibited from direct involvement in payment; all payments are processed through the IPKF. The ordinance reinforced the preexisting ban on private hospitals from performing kidney transplants and reaffirmed the mandate that only designated public hospitals are allowed to conduct the procedure.⁴⁰ The ordinance also introduces sanctions for any guideline violations.⁴¹

The altruism gift and the updated ordinance in Iran relies on the permissibility of kidney donations in *Shī'ah* jurisprudence. The next Part analyzes the religious forces behind the development of these laws and regulations.

II. SHĪ'AH JURISPRUDENCE AND KIDNEY DONATION

Iran's legal system mandates that its laws should not be in contradiction with the *Shī'ah* interpretation of Islam. Two scenarios for the permissibility of kidney donation are imaginable in Iran: (1) donations from brain-dead donors and (2) donations from living donors.⁴² Although Iran has developed a reputation for compensating living unrelated kidney donations, it is helpful to first review Iran's current procedures for donations from brain-dead donors.

The controversy among religious scholars and legal actors surrounding brain-dead donation was just as intense — if not even more — as the controversy surrounding living donation. Two major issues contributed to this disagreement

35. Ordinance of Sept. 2019 (Evaluation of Living Kidney Donors in Authorized Hospitals), http://treatment.sbm.ac.ir/uploads/2-fa.Evaluation_of_Adult_Live_Kidney_Donor.pdf (Iran).

36. The kidney is the only organ allowed to be donated from living donors. *Joziyāte Ehdāe Ozv az Farde Zende* [Details of the Ordinance of Living Kidney Donors], ISNA (Sep. 10, 2019), <https://www.isna.ir/news/98061608173/جزئیات-آیین-نامه-جدید-اهدای-عضو-از-فر-د-زنده>.

37. Ordinance of Sept. 2019, *supra* note 35, art. 2, 2-2-1.

38. The Foundation is officially under the authority and supervision of the Ministry of Interiors.

39. Ordinance of Sept. 2019, *supra* note 35, art. 2, 2-2-1.

40. *Id.*; Simforoosh, *supra* note 30.

41. Ordinance of Sept. 2019, *supra* note 35, art. 3.

42. In this Article, I am only addressing the narrow question of kidney donation. The unique nature of each organ does not permit me to dive into a thorough analysis of each in this article.

which continues to be debated among *marāji*⁴³ to this day:⁴⁴ (1) the lack of recognition of brain death as death and (2) the prohibition of desecration of the body of a dead Muslim, which brain-dead donations seems to resemble.⁴⁵

Regarding the latter issue, a prominent hadith from Prophet Muhammad ﷺ, narrates that “the sanctity of a Muslim when he is dead is the same as when he is alive.”⁴⁶ Another commonly cited hadith among *Shī‘ah* scholars narrates that when Imam Sadiq was told someone had beheaded a dead body, the Imam stated that the desecrator must pay damages (*diyāh*), since the sanctity of a dead person is the same as a living one.⁴⁷ The debate as to whether these, and other hadith, suffice to prohibit brain-dead organ donation merits its own separate research and is beyond the scope of this article.⁴⁸

As to the question of whether or not brain death amounts to death in Islam, it suffices to say that *fuqahā* are silent in their early writings on the issue of defining death.^{49,50} Not as a matter of neglect but as a matter of apparent simplicity.⁵¹ The advancement of medical technology enabling a person to be physically breathing and with a beating heart, despite being brain-dead, posed the question of what death means in Islam.⁵²

43. “[T]welve Shī‘ite Muslims choose a religious clerk as their reference point to turn to for answers to their questions about their religious obligations... In its literal sense, *marja’ taqlid* means the source to follow.” Zahra Takshid, *Organic Labeling: Reconciling Religious Freedom and Animal Welfare in the European Union*, ISLAMIC L. BLOG (Nov. 19, 2019), <https://islamiclaw.blog/2019/11/13/commentary-organic-labeling-reconciling-religious-freedom-and-animal-welfare-in-the-european-union>.

44. For example, Ayatollah Sistani does not consider one to be dead when they are brain-dead, a viewpoint that does not allow for removing organs from brain dead patients. See *Fatwas Related to Organ Donations and Organ Transplants*, AYATOLLAH SISTANI, <https://www.sistani.org/persian/qa/02448> (last visited Nov. 8, 2019) (noting that as long as his heart and lungs are working, even though dependent on the machine, the patient is not dead according to religious teachings).

45. There are additional reasons for the debate on brain death which are outside of the scope of this article. See generally Ali Asghar Hatami & Neda Masodi, *Mabāni Fiqhi Peyvand Aazā az Mordegān Maghzi va Tahlil Māde Vāhede Rājebe Peyvand Aazā Mosavab 1379* [*Islamic Basis of Brain Dead Organ Transplant and the Analysis of the Brain Dead Donating Act Passed in 1379*] 1 PRIV. L. RES. Q. 106, 108 (2012).

46. Seyed Mohsen Kharazi, *Goftāri dar Tashrih [About Dissection]* 25 FIQH AHL ALBAYT FARSI J. 21, 23 (2001).

47. Hatami & Masodi, *supra* note 45, at 108.

48. Kharazi, *supra* note 46, at 23. For similar reasons, when medical dissection (study of autonomy) is permitted in Islam, payment of *diyāh* is nevertheless mandatory. For more information See Hamid Sotoodeh & Ahmad Ahmadi, *Medical Dissection; From Fiqh and Legal Perspective* [Kālbod Shekāfi; Pardāzesh Feqhi-Hoghghi] [in Farsi], 4 J. MED. FIGH, 101 (Mar. 16, 2013), <https://journals.sbmu.ac.ir/mf/issue/view/466>.

49. Islamic jurists are commonly called *faqih*; the plural is *fuqahā*.

50. Mohammad Mehdi Tavakoli, *Marge Maghzi az Manzar Islam [Brain Death from the Perspective of Islam]* 9 MED. L.Q. 63, 66 (2009) (Except for the moment when the soul leaves the body).

51. *Id.*

52. See generally *id.*; Hamid Sotoodeh & Meysam Kalhorniya Golkar, *Marge Maghzi*;

The first major approval for a brain-dead patient kidney donation among *Shī'ah marāji'* came from Imam Khomeini in an interview following the 1979 revolution, paving the way for the legalization of kidney transplants. In response to a question from a patient with a kidney disease, Imam Khomeini stated: “[s]hould organ transplant save a person from dying, it is not religiously impermissible.”⁵³ Later, one of the medical doctors involved with living kidney transplants asked for an official *fatwa* from Imam Khomeini. The new *fatwa* allowed parliament to legalize the procedure.⁵⁴

The principal question of this article is the uniqueness of the Iranian Model: the living unrelated donorship and the altruism gift given to them aimed at incentivizing living kidney donation. Is this compensation permissible under the Iranian interpretation of *Shī'ah* Islam? If so, what is the nature of the transaction? Is a kidney considered to be property and the transaction a contract of sale? Or is there room for other interpretations?

In *Shī'ah fiqh* (jurisprudence), a thing must possess several attributes to constitute a chattel.⁵⁵ First and foremost, there must be a rational benefit in transferring it in the view of a reasonable person.⁵⁶ This criterion changes with time: the reasonable person today thinks differently from a reasonable person 100 years ago.

As it relates to our discussion, the first successful kidney transplant in the world was performed in Boston in 1954.⁵⁷ In the years prior, one could not have imagined the benefits of transferring a kidney through surgery. Given that such a surgery is now viable and in many cases life-saving, is there a benefit in kidney donation in the eyes of a reasonable person by *fiqh* standards today? Medical advancements have proven that humans can live with just one kidney, and that a kidney can be successfully transplanted from one to another. For these reasons, in the eyes of a reasonable person, there are current benefits in paying money to acquire a kidney to save a life.

The second criterion for a thing to be considered property is that it must be attributable to a person.⁵⁸ A kidney is attributable to the person who pos-

az Mahiyat ta Ahkam va Asar Feqhi-Hoghhuhi [Brain Death; From its Substance to its Legal and Islamic Meaning and Rules] 22 MED. L.J. 113 (2012).

53. Khabar Online, *supra* note 22.

54. See *supra* Part I.

55. In this article, I am using the term chattel to refer to a tangible personal property. However, the term used in *fiqh* is *māl*. *Mal* is the thing that has the attributes discussed in this Part. Once that *māl* مال is claimed, it becomes a *melk* ملك. See AYATOLLAH SHEIKH MOHAMMAD YAZDI, 2 FIQH AL-QURAN 8 (2015), Entesharat-e-Eslami.

56. Mahdi Dargahi, *Vākāvi Asār Saltanat Ensān bar Azāye Badan Khod dar Kharid va Foroush Ozv [Investigation of the Effect of Man's Authority over His Own Organs in Organ Trading]* 1 MA'RIFAT-I HOGHUQI L. REV. 111, 120 (2012) (citing to more than 16 religious clerks and Iranian legal scholars who have a consensus on this attribute for a widget to be a chattel).

57. *History of Living Donation*, TRANSPLANTLIVING, <https://transplantliving.org/living-donation/history> (last visited Nov. 7, 2019).

58. Fatemeh Rajaei & Seyed Mostafa Mohaghegh Damad, *Legal and Jurisprudential Consideration of Human Organ's Value*, 8 J. MED. FIGH 137, 151 (2016) (citing the most agreed upon narratives among *Shī'ah marāji'* to examine whether a thing is a chattel).

sesses the kidney. The third criterion is that it must be transferable.⁵⁹ A kidney is—thanks to the aforementioned medical advancements—transferable; doctors perform such operations on a daily basis. Fourth, the thing must have economic value. A kidney has economic value.⁶⁰ The exact price of the widget is a separate issue, but as long as one can put a dollar amount on it, it has economic value. The uncertainty in pricing does not negate its marketability.⁶¹

According to these criteria, it appears that a kidney can be considered property that one can own in Islam. Despite these four elements and the apparent conclusion, Iran's Legal Office of the Judicial Branch stated in an advisory opinion that body organs are not property — and therefore cannot be sold.⁶² The office has sided with those Islamic opinions which hold that humans cannot be said to own their body in Islam.⁶³

59. *Id.* at 157.

60. *Id.* at 153. A similar comparison can be made to the value of statistical life (VSL) in the cost-benefit analysis system in the U.S., by which risk to life is monetized (it is not the valuation of life itself). VSL is estimated in the U.S. to make policy and regulations efficient in numerous circumstances. For more on VSL see Thomas J. Kniesner & W. Kip Viscusi, *The Value of a Statistical Life*, in OXFORD RESEARCH ENCYCLOPEDIA OF ECONOMICS AND FINANCE (Jonathan H. Hamilton et al. eds., 2019); Cass Sunstein, *The Value of a Statistical Life: Some Clarifications and Puzzles*, 4 J. BENEFIT-COST ANALYSIS 237 (2013).

61. See e.g., Gary S. Becker & Julio J. Elias, *Cash for Kidneys: The Case for a Market of Organs*, WALL ST. J. (Jan. 18, 2014), <https://www.wsj.com/articles/cash-for-kidneys-the-case-for-a-market-for-organs-1389992925>.

62. Dargahi, *supra* note 56 (citing CONSULTING OPINION OF LEGAL DEPARTMENT OF THE JUDICIAL BRANCH, Number 7/1558 (Apr. 27, 1997) (Iran)).

63. Seyed Mostafa Mohaghegh Damad, *Jināyat bar Aazāye Badan az Dīdgāh Fīqh va Hoquq Islami [Crime Against the Body from the Perspective of Fiqh and Islamic Law]* 11 J. MED. FIGH 24, 31–2 (2011), <http://journals.sbmu.ac.ir/mf/article/view/3807/3422> (citing *fuqahā* such as Imam Khomeini, Ayatollah Javadi Amoli, Ayatollah Mohammad Yazdi, Ayatollah). Just like any topic, there is not an agreement on this issue among the *Shī'ah fuqahā*. For a comprehensive discussion of all the possibilities regarding other body parts in *Shī'ah*, see e.g., AL-SHEIKH MOHAMMAD AASIF AL-MOHSINI, 1 AL-FIQH WA AL-MASAIL AL-TIBIYAH [*Fiqh and Medical Issues*] 211, <http://ar.lib.eshia.ir/71696/1/0>; AL-SHEIKH VSHIR HUSSEIN AL-NAJAFI, BUHUS FIQHIIYAH MUĀSERAH [*Contemporary Fiqh Discussions*] 177 (2006). Moreover, Ayatollah Sistani, one of the major *marāji'* of the *Shī'ah* community who lives in Iraq has issued a *fatwa* on the initial question of the permissibility of living organ transplant. According to this *fatwā*, organ donation and transplant in situations which do not pose a threat to the donor and have the consent of the donor are permissible, when the donor is not a child nor mentally ill. In such cases, receiving monetary compensation for the organ is also permissible. Ayatollah Sistani, however, stops short of calling the transaction a contract of sale—*aqd al-ba'i*—classifying it under the title “donations” instead. The *fatwa* only notes that when the organ donation itself is permissible, receiving compensation for it is also permissible. Ayatollah Sistani does not recognize brain death as death that would allow for kidney donations. See *Fatwas Related to Organ Donations and Organ Transplants*, AYATOLLAH SISTANI, <https://www.sistani.org/persian/qa/02448> (last visited Nov. 8, 2019) (noting that as long as his heart and lungs are working, even though dependent on the machine, the patient is not dead according to religious teachings).

This position asserts that humans are not the ultimate owners of their bodies; God is. Humans can enjoy the reasonable benefits of their physical bodies, but this does not grant them a full property interest over their own bodies.⁶⁴ This concept of bodily ownership can be compared to public trust property, where the government, the sovereign, has the right to manage and use such property in the best interest of the citizens, but does not otherwise have a full property interest over those lands or chattels.⁶⁵ It is only entrusted with care and management of the land. Similarly, humans have also been entrusted with their bodies and bound to use them towards their own best interests in a way that enables them to grow spiritually and do good in this world.⁶⁶ As such, any action that would cause injury to the body is impermissible, even with the stipulated authority that one has over their own body.⁶⁷

The official advisory opinion of Iran's Legal Office of the Judicial Branch demonstrates that the "sale" of kidneys in Iran is illegal, because in a contract of sale (*aqd al-bai'*), the subject of the sale must be a property (*māl*) that one can own.⁶⁸ Therefore, the terminology of "sale" should not be used in scholarly work to argue that one can *buy* a kidney in Iran; this would not be a factual statement under the current legal regime.

Based on this view, the act of "giving" also cannot be described as gifting. Gifting is a specific contract in Islam called *aqd al-hibah*⁶⁹ and one of the

64. Some *Shī'ah fuqahā* describe the right not as a right *per se*; it is a *hukm*, not a *haq* (right), meaning that you cannot forgo or transfer it; it also cannot be transferred upon death. Therefore, there is no right—*haq*—to live, it is a *hukm*. Seyed Mohamad HashemPour Mola, *Haq va Hukm dar Fiqh Emamiyeh*, 33 ISLAMIC L. RES. J. 65, 66 (2011). For similar reasons, inflicting harm on oneself, apart from its legal consequences, is forbidden in Islam. Therefore, the property interest in body is also for many of the *fuqahā*, a *hukm* not a *haq*. This discussion on different meanings of *haq* in *Shī'ah* fiqh is attributed to Sheikh Ansari who apparently first elaborated on different forms of *haq* in his book of al-Maksīb. See al-Sheykh al-Morteza al-Ansari, 3 KITAB AL-MAKASIB 8, <http://lib.eshia.ir/10141/3/8/> حَق (dividing *haq* to those which you cannot exchange with property or money (mal) transfer, like the *haq* to custody, etc).

65. Telephone Interview with Ayatollah Mohammad Yazdi (Apr. 13, 2020).

66. *Id.*

67. Although a routine procedure, a living kidney transplant is not without risk for the living donor. See, e.g., Linda O'Keeffe et al., *Mid- and Long-Term Health Risks in Living Kidney Donors: A Systematic Review and Meta-analysis*, 168 ANNALS INTERNAL MED. 276 (2018). Therefore, it can also be a form of harm to the body that one should avoid under normal circumstances. This is another reason why seeing the donation through the lens of necessity is further aligned with the reality of the surgery and how it can negatively affect the body of the donor.

68. Please note that there are competing opinions on this matter in *Shī'ah* fiqh. This Article only focused on the official opinion in the Iranian legal system that has enabled the legality of donations.

69. Some scholars raise this issue as a criticism of the official opinion which uses an Arabic term—*ihdah*—(to gift) to describe the act of giving the kidney. In other words, if kidney is not a *mal* (a property), the act of giving a kidney cannot be described as gifting since in order to gift something, based on *Shī'ah* law, you should also own the thing you gift in the *aqd of hibah*. Fatemeh Rajaei & Seyed Mostafa Mohaghegh Damad, *Legal and Jurisprudential Consideration of Human Organ's Value*, 8 J. MED. FIGH 137, 155 (2016).

conditions of such a contract is that the one who gifts should be the owner of the gift.⁷⁰ Therefore, if adhering to the view that one neither owns their body nor has a propriety interest in it,⁷¹ the permission to donate a kidney must be justified with other, secondary rules.⁷² In this case, it is the rule of necessity.⁷³

It was the rule of necessity that prompted living kidney donation in Iran in the first place. As explained earlier, the Iran-Iraq war had a toll on hospitals and many patients were stranded without adequate facilities or dialysis machines for care. During this period, Imam Khomeini had also initially stated that “if [organ transplant] can save a human from dying, it is religiously permissible.”⁷⁴ This view is drawn from the rule of necessity, which permits the commission of an act which would otherwise be impermissible, only if done to save a life or accomplish some other supreme good.

In *Shī‘ah fiqh*, the rule is cited as: “whatever *haram* (prohibition) one needs as a matter of necessity, it is *halal* (allowed).”⁷⁵ For example, in Islam, eating the meat of an animal that died from natural causes is *haram*. However, if one’s life depends on eating such meat, one is allowed to do so—however, only enough to prevent death, and not more.⁷⁶ This rule is derived from Qurānic verses, as in this verse:

He [God] has forbidden you only carrion, blood, the flesh of swine, and what has been offered to other than God. But whosoever is compelled by necessity—neither coveting nor transgressing⁷⁷—no sin shall be upon him. Truly God is Forgiving, Merciful.⁷⁸

70. QĀNUN MADANI [CIVIL CODE] Tehran 1307 [1928], art. 795 (Iran).

71. As the official advisory opinion of Iran’s Legal Office of Judicial Branch stated. CONSULTING OPINION, *supra* note 62.

72. *Al-ahkām-al-thānaviiah*. Other examples of secondary rules include hardship (*usr va haraj*), and coercion (*ikrārth*). See generally Mojtaba Elahian & Maryam Khademi, *Vākāvi Nesbat Ahkām va Anāvin Sānaviyeh bā Ahkām va Anāvin Avaliye dar Fiqh* [Examination of Relationship between “Secondary Laws and Titles” and “Primary Laws and Titles” in Jurisprudence], 8 ISLAMIC JURIS. RES. 59 (2012).

73. Telephone interview with Ayatollah Mohammad Yazdi, *supra* note 65.

74. *Imam Khomeini’s Recommendation for Organ Donations*, INST. FOR COMPLICATION & PUBL’N OF IMAM KHOMEINI’S WORKS, http://www.imam-khomeini.ir/fa/n22273/اهدای_عضو اهدای عضو (last visited Apr. 11, 2020).

75. Amir Vatani, *Barresi Fiqhi Idhterār va Dharurat* [Analysis of the Rule of Necessity] 81 ARTICLES & ANALYSIS 187, 187 (2002).

76. *Dars-e-khārej-e Ayatollah Makārim Shirazi Ketab-e-Hajj* [Avance Fiqh Courses of Ayatollah Makarim Shirazi, Book of Hajj], FEGHAHAT SCH. (2011), <http://www.eshia.ir/feqh/archive/text/makarem/feqh/90/900921>.

77. It is important to note that based on this rule, one cannot exceed what is necessary. For example, one must eat the *haram* only as much as necessary to prevent them from dying, not exceeding what is necessary such that it would resemble rebellion against what God has prohibited. That is how interpreters have interpreted the meaning of the terms *bāgh* (coveting) and *ād* (transgressing). See *Sūrah al-Baqara* [The Cow] 2:173, THE STUDY QURAN: A NEW TRANSLATION AND COMMENTARY 74 n.174 (Seyyed Hossein Nasr et al. eds., 2015).

78. *Id.*

A well-known hadith within *Shī'ah* fiqh, commonly known as *hadith al-raf'*,⁷⁹ also points to a lack of sanction for what is *haram* under nine conditions, one of which is necessity.⁸⁰ Ayatollah Makarim Shirazi further notes that the rule of necessity not only applies in circumstances where life is in danger, but also applies in less dire situations such as preventing sickness or extreme difficulty.⁸¹

Therefore, it is permissible to donate a living kidney when the following conditions are met: (1) saving a life depends on the procurement of a kidney; (2) there are not enough kidneys for transplant for all those in need; (3) such transplant in itself does not create a life threatening risk for the kidney donor; and (4) there are no other viable options. This would also mean that if, one day, technology eliminated the need for a real kidney,⁸² or the medical profession otherwise found a cure to save a failing kidney without the need of a transplant, kidney donation—either living or from a cadaver—would no longer be permissible under *Shī'ah* law.

Considering the permissibility of living donation through the lens of necessity as explained above is further aligned with the reality of the health risks of the surgery. There are numerous scientific studies that suggest donating a kidney—in addition to regular risks associated with any surgery—may have long term health risks for donors.⁸³ Therefore, the surgery itself can also be a form of harm to the body that one should avoid under normal circumstances, according to the *Shī'ah* jurisprudence.

Lastly, under the necessity approach, if saving a life depends on a kidney donation, donating becomes not only an altruistic act, but an obligation for a Muslim, based on the Quran and the *Shī'ah* jurisprudence which mandates saving the life of a *mu'min* (a believer).⁸⁴

79. This hadith has several versions. I am citing from AL-KĀFĪ (hadith book) by Abu Ja'far MUHAMMAD IBN YA'QUB IBN ISHAQ AL-KULAYNĪ AL-RAZĪ KNOWN AS SHAYKH AL-KULAYNĪ, who passed away in 329 A.H./ 941 C.E. Online version available at Fiqahat School Library <http://lib.eshia.ir/11005/2/462>. See also Seyed Hassan Khomeini, *Hadīth al-Raf'*, 47 MATIN RES. J. 13–60 (2018).

80. 2 AL-KĀFĪ, SHAYKH AL-KULAYNĪ, 462–63 (1986).

81. *Dars-e-khārej-e Ayatollah Makārim Shirazi Ketāb-e-Hajj*, *supra* note 76.

82. Such as the ongoing efforts to produce synthetic organs through stem cell generation and three-dimensional printing. See McCormick et al., *supra* note 3 (arguing in favor of compensation).

83. Umberto Maggiore et al., *Long-term Risks of Kidney Living Donation*, 32 NEPHROLOGY DIALYSIS TRANSPLANTATION 216 (2017); O'Keefe et al., *supra* note 67.

84. The obligation in this example will be *wajīb al-kafāi*. Obligations in fiqh are sometimes divided into two categories: *wajīb al-'ini* and *wajīb al-kafāi*. The former means that the obligation is mandated upon every Muslim: for example, the obligation to pray is upon every Muslim. The latter refers to obligations that are upon the Muslim community, with a caveat: as long as enough people undertake the obligation, the mandate is relieved from the rest of the people. One example can be the obligation to become a doctor to save lives; if there are enough doctors, the obligation is lifted from the rest of the Muslim community. Another example can be donating a kidney when otherwise a person may die. If there are

The impermissibility of using a contract of sale to secure a kidney does not equate impermissibility of receiving any form of compensation for giving up your kidney. There are other legal avenues in Islam that can legitimize the monetary incentive. One *Shī'ah marja'*—Ayatollah Makarim Shirazi—suggests that it is preferable to say the monetary gift is not for the kidney itself, but rather for the *act* of giving the kidney.⁸⁵ Based on this view, the money given to the donor is processed under the contract of reward—*aqd al-ji'ala* in *Shī'ah jurisprudence*—which is also enacted in Iran's civil code.⁸⁶ This is a form of unilateral contract that can be accepted by performance.

According to this specific contract, the offeror (*ja'il*) states that she will award whoever undertakes a certain act. *Aqd al-ji'ala* is not a binding contract until the *āmil* (the person who performs the act) has done the thing asked.⁸⁷ Therefore, unlike a contract of sale (*aqd al'bai'*), which is a binding contract and can be legally enforced with monetary damages in case of the breach of the contract, no one can be bount to perform an act—in this case donating a kidney—under a contract of reward (*aqd al-ji'ala*). If a kidney procurement were recognized as a contract of sale, a person who had decided to give her kidney to the other person who then changes her mind can be sued for damages by the other party. However, under the rubric of *aqd al-ji'ala*, the compensation only becomes an obligation when the other party has done or performed the thing asked. It is only once the person gives the kidney that she is entitled to the payment, not before. Neither party is under any obligations before the act is done.

Therefore, the money (the reward) is given to the donor for the act of donating her kidney as asked by the patient, the offeror, or *ja'il*. And the act itself, the living kidney transplant, is allowed under the rule of necessity. The next Part illustrates how a similar model can be implemented in the U.S.

enough kidneys for donation, you do not need to donate, however, if there are not enough donations and you know that a Muslim will die because of kidney failure, you are obligated to donate your kidney, as long you meet the medical requirements. See 1 FARHANG-NĀMEYE USŪL FIQH [Encyclopedia of Usūl al-Fiqh] 869 (2010), <http://lib.eshia.ir/71601/1/43>. For a discussion of applicability of different forms of *wujūb* in *usūl*, see MUHAMMAD BAQIR AL-SADR, PRINCIPLES OF ISLAMIC JURISPRUDENCE ACCORDING TO SHI'Ī LAW 104–11 (Arif Abdul Hussain trans.) (2003). However, the Islamic legal system would not be able to force you to donate; it would be a sin between you and God, similar to many sins that are not punishable by law.

85. *Fatwa By Ayatollah Makarim Shirazi*, MAKAREM, <https://makarem.ir/main.aspx?typeinfo=21&lid=0&catid=46876&mid=262107> (last visited Nov. 8, 2019).

86. QUĀNUN MADANI [CIVIL CODE] Tehran 1307 [1928], arts. 561–70 (Iran). Freedom of contract is recognized in Islam and Iran's Civil Code. *Id.* at art. 10. Nevertheless, there are specific contracts that were commonly used and have their own established terms and conditions in traditional religious books of contracts and were later enacted in Iran's Civil Code. *Aqd al-ji'ala* (translated as contract of reward) is one of those specific contracts.

87. Ali Abbas Hayati, *Mabāni Hoghughhi Ehdā Peyvand A'za Badan* [Legal Basis of Organ Donations and Transplants], MOZOSHENASI, <http://mozooshenasi.ir/pajooresh/3564> (last visited May 27, 2020).

III. MONETARY COMPENSATION IN LIEU OF A KIDNEY IN THE U.S.

Monetary compensation in exchange for a kidney is a controversial concept in the U.S. While it is outside the scope of this paper to fully discuss the many reasons that one might be for or against organ donation in general,⁸⁸ it is worth drawing our attention to a few reasons.

One objection is the belief that organ donation produces an unethical commodification of body parts.⁸⁹ However, the monetary scheme discussed in this Article is about the permissibility of offering monetary incentives for kidney donations for a person who would otherwise die. It is hard to imagine that giving an altruistic gift under such exceptional circumstances would lead to commodification. Is creating a monetary incentive for saving a life unethical? Not everyone shares altruistic motivations that would make kidney procurement easy.

Margaret Jane Radin, an opponent of monetization, points to the “domino effect,”⁹⁰ stating that the “commodification will drive out the non-commodified version.” This is simply not true in the case of kidney donations. In Iran, despite the monetary incentive provided for giving a kidney, kidney donations without any payment take place just as regularly.⁹¹ One study shows that in 2015 in one medical center in Iran, doctors undertook 123 cadaver transplants and 122 living unrelated transplantations.⁹² This suggests that even in a country with the monetary incentives available, a near equal numbers of transplants in the center involved those with altruistic motivations.⁹³ The monetary incentive is to incite individuals to give up a kidney and save a life when they otherwise may not have done so.

88. For a thorough discussion see JAMES STACEY TAYLOR, *STAKES AND KIDNEYS: WHY MARKETS IN HUMAN BODY PARTS ARE MORALLY IMPERATIVE* (2005).

89. MARGARET JANE RADIN, *CONTESTED COMMODITIES* 156 (1996). See also Glen Cohen, *The Price of Everything, the Value of Nothing: Reframing the Commodification Debate*, 117 HARV. L. REV. 689 (2003).

90. RADIN, *supra* note 89, at 95.

91. MASIH DANESHVARI [HOSPITAL PROCUREMENT OF ORGAN FOR TRANSPLANT UNIT], <http://ehda.sbmu.ac.ir> (last visited Aug. 23, 2020) (The official Iranian website for kidney donation that reports the kidney donations. To incentivize donations, it also posts the pictures of some of the donors).

92. Nasser Simforoosh et al., *Living Unrelated Kidney Transplantation: Does It Prevent Deceased-Donor Kidney Transplantation Growth?*, 1 EXPERIMENTAL & CLINICAL TRANSPLANTATION J. 250, 251 (2019); Simforoosh, *supra* note 30.

93. This is an important point since even brain-dead kidney donations are also not common in many countries and governments try different ways to increase organ donations (see e.g., Dee Gill, *How to Spot a Nudge Gone Rogue*, UCLA ANDERSON REV. (Sept. 12, 2018), <https://www.anderson.ucla.edu/faculty-and-research/anderson-review/rogue-nudges>) (noting the Netherlands' experience in 2016 in increasing organ donations that backfired). In Iran, noting the discussion on the history of difficulty of the religious *marāji* in accepting the organ donations of a brain-dead patient, having such high number of cadaver donation is noteworthy.

Another common argument for banning compensation is that it takes advantage of the poor. The economic incentive means that more likely than not, the poor will be most likely to give up their kidney for money. This important objection is true in many cases. Iran is also struggling with this issue. Disturbing ads—while illegal—are usually posted around hospitals with information on blood type and a phone number for those who are looking for a kidney. The new updated regulations in Iran aim to reduce the possibility of procuring a kidney outside of the official system. Nevertheless, as with most regulations, full compliance is rare.⁹⁴

However, the possibility of abuse should not rule out an avenue that significantly saves lives overall. There are many ways the legal system can fight such abuses and create tight regulations and oversight procedures to eliminate or significantly reduce the possible of abuse. Some advocates have offered behavior-based approaches. For example, the economists Gary S. Becker and Julio J. Elias argue for a market for organs. They have proposed putting in place “cooling off periods,” which gives individuals time before finalizing their decision to give up a kidney, in order to prevent impulsive behaviors.⁹⁵ Other possible options may include prohibiting online advertisements, creating licensed entities that are allowed to handle the payments, establishing an oversight body to reduce abuse, or prohibiting any transplant from people under the poverty line.

The current donation systems in the U.S. and other countries are also not immune to abuse. The rich have the monetary means to “register at distant centers with short lists,” or bear the costs of cross-country travels to secure a kidney,⁹⁶ whereas poor patients are left dealing with the shortage of kidneys. The illegality of paying compensation for such a transplant has created a black market referred to as transplant tourism.⁹⁷ Patients who can afford the costs take the risk of traveling to other countries to buy a kidney without the necessary medical and legal support in place for either party. As Cohen has noted in *Transplant Tourism*, in a black market, sometimes the kidney sellers (many of whom are poor) are abused and do not always receive full compensation.⁹⁸

94. In countries with little or no regulations, the situation is dire. For example, *The New York Times* interviewed five brothers who had all sold a kidney due to extreme financial hardship. See Adam Nossiter & Najim Rahim, *In Afghanistan, a Booming Kidney Trade Preys on the Poor*, N.Y. TIMES (Feb. 6, 2021, updated Feb. 15, 2021), <https://www.nytimes.com/2021/02/06/world/asia/selling-buying-kidneys-afghanistan.html>.

95. Becker & Elias, *supra* note 61.

96. JOSEPH WILLIAM SINGER AT AL., PROPERTY LAW: RULES POLICIES AND PRACTICES 273 (6th ed.) (citing Virginia Postrel, *With Functioning Kidneys for All*, ATLANTIC (July 9, 2009), <https://www.theatlantic.com/magazine/archive/2009/07/with-functioning-kidneys-for-all/307587>).

97. See, e.g., Glen Cohen, *Transplant Tourism: The Ethics and Regulation of International Markets for Organs*, 41 J. LAW MED. & ETHICS 269 (2013).

98. Elaine McArdle, *Patients Without Borders*, HARV. L. TODAY (July 1, 2013), <https://today.law.harvard.edu/feature/patients-without-borders-i-glenn-cohen-on-the-rise-of-med->

Here, as others have noted, we should ask ourselves whether “the harm of the activity in question is reduced and better controlled in a regulated market?”⁹⁹ Allowing compensation for receiving a kidney through a legal procedure can in turn save lives by taking many patients who are capable and willing to pay for a kidney out of the waiting line and thus opening slots in the waitlists for the poor who are incapable of paying to receive a kidney.

In an ideal system, we would be able to fulfill the need for kidney transplants by donations only. For years, countries have tried to increase the number of donations. Richard Thaler and Cass R. Sunstein suggest a system of liberal paternalism that would nudge people to become organ donors.¹⁰⁰ For example, countries can have an opt-out of not being an organ donor the default for organ donation in drivers' licenses registration forms. However, in a recent study, researchers showed that no significant rate difference exists between opt-in (informed consent) and opt-out (presumed consent) systems in total deceased organ donations.¹⁰¹

Lastly, patients may have religious objections to paying money for procuring a kidney. For one, maybe Larry, our Fordham Law School librarian, would have had a religious objection. Yet, providing monetary incentives for those who don't have such objections shortens the normal waitlist, while increasing the chances of those with such objections to secure a kidney without payment.

A. *Balancing Challenges and Opportunities*

When an action becomes permissible solely due to its reliance on the rule of necessity, its scope is limited; the action is only permissible so long as the situation remains dire, or the emergency persists. For example, to prevent “transplant tourism,” Iran restricts the market to Iranian nationals with very limited exceptions. Moreover, “[t]o ensure proper protocols, fair payment, and ethical application, all transplantation centers and compensated kidney donations are located and performed in university hospitals under close supervision of the Ministry of Health and Medical Education.”¹⁰² Any transplants from living donors under the age of 18 are considered a crime.¹⁰³ And human

ical-tourism (“There are disturbing aspects, including that many kidney sellers, who are promised around \$2,000 to \$4,000, don't get their full fee.”).

99. Rupert WL Major, *Paying kidney donors: time to follow Iran?* 11 MCGILL J. MED. 67 (2008).

100. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE* 177 (2009).

101. Adam Arshad et al., *Comparison of Organ Donation and Transplantation Rates Between Opt-Out and Opt-In Systems*, 95 KIDNEY INT'L. 1453 (2019) (comparing organ donations between 17 opt-out countries and 18 opt-in countries). See also Dee Gill, *How to Spot a Nudge Gone Rogue*, UCLA ANDERSON REV. (Sept. 12, 2018), <https://www.anderson.ucla.edu/faculty-and-research/anderson-review/rogue-nudges> (noting the 2016 Netherlands' experience that attempted to increase organ donations but backfired).

102. Jordan Potter, *Does the Iranian Model of Kidney Donation Compensation Work as an Ethical Global Model?*, 11 ONLINE J. HEALTH ETHICS 1 (2015).

103. Lāyehe-ye-Hemāyat az Koodakān va Nojavānān [Children and Teenagers Protection

trafficking laws in Iran also include any intention for the procurement of human organs.¹⁰⁴

The undesired consequences of allowing monetary incentives, such as illegal advertisements near hospitals or on social media platforms,¹⁰⁵ as well as the presence of illegal dealers and middlemen, illustrate why legalizing such a system is not in and of itself desirable and should be advocated only under the scope of a rule of necessity to save a human life where no other viable option exists. Given such risks and its unwanted consequences, it is the obligation of the state to do all that is necessary to slowly move away from the payment model and address the underlying issues that perpetuate the necessity of monetary incentives.

Over the years, a number of plaintiffs have brought legal challenges against the U.S. National Organ Transplant Act. For example, a group of plaintiffs brought an equal protection clause lawsuit challenging the prohibition of monetary compensation for bone marrow transplant.¹⁰⁶ Bone marrow is also a category for which compensation is prohibited by law in the United States. The 9th Circuit court outlined the policy and philosophical concerns of Congress, citing the potential for abuse of the poor and the commodification of organs.¹⁰⁷ However, the court acknowledged the following: “[t]hese reasons are in some respects vague, in some speculative, and in some arguably misplaced. There are strong arguments for contrary views. But these policy and philosophical choices are for Congress to make, not us.”¹⁰⁸ While there has not been any significant change to that law, in recent years, the United States has tried to at least remove monetary disincentives that prevent organ donations in general.¹⁰⁹ These steps are admirable, but they are inadequate for serving the

Bill] Tehran 1396 [2018], art. 13 (Iran).

104. Qānun-e-Mobāreze bā Qāchāq Ensān [Fighting Human Trafficking Act] Tehran 1384 [2004] (Iran). A new bill is currently in the Iranian Parliament that addresses the shortcomings of the previous law and explicitly calls out the human organ trafficking. For full text see *Lāyehe-ye-Mobāreze ba Qāchaq Insān va Azā-ye-Badan va Mojāzat e Oburdahandegān Gheyre Mojāz Afrād az Mārzhaye Keshvār* [The Bill of Fighting Human Trafficking and the Trafficking of Human Body Organs and the Punishment for Human Smugglers Crossing Borders] <http://dotic.ir/news/2731>.

105. Recall that the living kidney procurement is only allowed through the official procedure that makes sure the donor and the receiver are anonymous until the procedure is about to take place to eliminate the possibility of donor negotiating for a higher amount of altruistic gift. For this reason, among others, any advertisement is illegal.

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

107. *Id.*

108. *Id.* at 861–62.

109. *Trump Administration Proposes New Rules to Increase Accountability and Availability of the Organ Supply*, U.S. DEP’T OF HEALTH & HUM. SERVS. (Dec. 17, 2019), <https://www.hhs.gov/about/news/2019/12/17/trump-administration-proposes-new-rules-increase-accountability-availability-organ-supply.html>. For the full proposed rule, see *Removing Financial Disincentives to Living Organ Donation*, 85 Fed. Reg. 59,438 (Dec. 20, 2019) (to be codified at 42 C.F.R. 121).

public's interest in reducing the number of preventable deaths due to shortage of kidney transplants and will not meet the demand.

No system can be perfect. However, should we give up this viable option—gifting and compensation as an incentive—simply because there are people who may abuse the system? One example we can consider to help answer this question are legally prescribed medications, which are also easily misused.¹¹⁰ However, knowing that many lives depend on the use of such medications, legal systems try to put in place measures that reduce the risks and dangers, rather than banning them all together. Similarly, rather than banning monetary incentives for kidney procurement altogether, the legislature could regulate it to curtail abuses.

CONCLUSION

One day, perhaps technology and medicine will help us solve the kidney shortage without the need for living or brain-dead kidney donors. Or we might reach a utopian society in which there are enough donors to satisfy the shortage. But the harsh reality is that we are not there yet. As explained in this article, the Iranian Model has illustrated that there is no need to categorize organs as commodities nor enforce a sale's contract to be able to implement the Model. Legislatures can provide the monetary gift as a matter of necessity and award the donor under the unilateral contract of reward. Larry didn't need to die. Neither do all the patients that will die by the end of today waiting for a life-saving kidney.¹¹¹ In balancing the necessity of saving lives with a financial incentive such as the altruism gift, and considering the costs of the current ban and the lives lost, nudges that save lives must prevail as a matter of public policy.

110. The opioid crisis in the United States is one vivid example. See *Opioid Overdose Crisis*, NAT'L INST. OF DRUG ABUSE, <https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis> (last visited Apr. 12, 2020).

111. McCormick et al., *supra* note 3 (noting that among patients who need kidney transplant “approximately 106,000 (84 percent) who do not receive a transplant are fated to live an average of 5 years on dialysis therapy before dying prematurely”).

