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# Should it be illicit to solicit? A Legal Analysis of Policy Options to Regulate Solicitation of Organs for Transplant

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**ABSTRACT:** Recently, there have been several well-publicized cases in which a patient in need of a transplant has solicited an organ through the use of commercial advertising and organized media campaigns. When deceased organs are directed to an individual as a result of solicitation rather than allocated through the national system, equity and medical utility are sacrificed. For this reason, regulation of deceased organ solicitation may be desirable. However, because solicitation of organs is likely to be considered constitutionally protected charitable speech, there are significant legal issues to consider. This article analyzes the legality of four possible policy options to resolve the ethical dilemma raised by solicitation of deceased organs for transplant.

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## I. Introduction:

The idea of a patient in need of a transplant using the media to secure an organ is not novel - potential recipients and their advocates have been appealing directly to the public for specific organ donations as far back as the early 1980's.<sup>1</sup> However, recently there have been several well-publicized cases in which a potential recipient has solicited an organ for transplantation through the use of commercial advertising. In August 2004, Todd Krampitz received a liver donation after advertising through billboards, e-mails, the internet, and by launching an extensive media campaign.<sup>2</sup> A donor family had responded to these efforts by requesting that their deceased relative's liver go to Krampitz.<sup>3</sup> On October 20, 2004, the first known organ donation in the U.S. to be arranged through a commercial website took place when Robert Smitty donated a kidney to Robert Hickey, whom Smitty had found through MatchingDonors.com.<sup>4</sup> Hickey had paid the website a monthly fee of \$250 to advertise for a donor.<sup>5</sup> In July of 2005, a highly publicized media campaign was launched on behalf of Shari Kurzrok, a gravely ill New York public

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<sup>1</sup> Lainie Friedman Ross, *Media Appeals for Directed Altruistic Living Liver Donations: Lessons from Camilo Sandoval Ewen*, 45 *Perspectives in Biology and Medicine*, 329, 330-331 (2002) (In 1982, Charles Fiske, a health care executive, pleaded to a ballroom full of doctors to help him find a liver for his infant daughter, and in 1983, President Reagan made a public appeal on his weekly radio address on behalf Ashley Bailey, an infant). However, these early cases do not raise the same ethical concerns that exist today as discussed below, in part because transplants were rare and in part because Congress did not create the national organ allocation system until 1984. In fact, some would say that the national system was created as a result of Charles Fiske's public appeals. *See infra* text accompanying notes 136-139.

<sup>2</sup> Christopher Snowbeck, *Publicity Campaigns Seeking Organ Donations Raise Ethics Questions*, *Headlines & Deadlines* (newsletter of the Pa. Newsp. Assn.), ¶ 2 (August 27, 2004), [http://www.headlinesanddeadlines.org/2004/Aug\\_27\\_04/organ\\_donors.html](http://www.headlinesanddeadlines.org/2004/Aug_27_04/organ_donors.html).

<sup>3</sup> *Id.* at ¶ 3.

<sup>4</sup> Arthur Caplan, *Organs.com: New Commercially Brokered Organ Transfers Raise Questions*, *Hastings Ctr. Rep.*, Nov.-Dec. 2004, at 8, 8.

<sup>5</sup> Caplan, *Hastings Ctr. Rep.* at 8; *but see* MatchingDonors.com, <http://www.matchingdonors.com/life/index.cfm?page=services&CFID=79334&CFTOKEN=55949044> (last visited Oct. 11, 2005) (requesting that those who cannot afford membership call for a free membership code). About 70% of the patients with active profiles are being listed without charge. Robert Steinbrook, *Public Solicitation of Organ Donors*, 353 *N. Engl. J. Med.* 441, 442 (2005).

relations executive in need of a liver transplant.<sup>6</sup> Although Kurzrok ultimately received a liver transplant through the established national system, this case together with the Krampitz and Hickey cases heightened public attention about organ solicitation and raised significant concerns about fairness, utility and the adequacy of the current donation and transplant system.

All three of these recent cases involved solicitation of organs for transplant into a specific patient. This is referred to as “directed donation” meaning that the donor (or his or her family) directs donation of a specific organ to a specific recipient. The Smitty case is an example of a directed donation in the living donor context. Smitty agreed to donate one of his kidneys to a specified recipient. The Krampitz and Kurzrok cases are examples of solicitation for directed donation in the deceased context. The liver donation being solicited in both cases would come from a deceased donor.

In both the living and deceased donor contexts, directed donations to strangers are rare. The overwhelming majority of deceased donations are not directed donations. Instead, donated deceased organs are allocated to anonymous recipients through the United Network for Organ Sharing (hereafter “UNOS”) system.<sup>7</sup> In those rare cases when a deceased donor’s family directs a donation, it is usually to another family member or an individual with which the donor or family has a personal bond.<sup>8</sup> In comparison, directed donations are the norm among living donors. Two thirds of living

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<sup>6</sup> See Daily News, July 27, 2005. See also Deborah L. Shelton, *Debate Over Appeals for Organs Heats Up*, St. Louis Post Dispatch, Aug. 23, 2005, at ¶ 7, available at <http://www.fortwayne.com/mld/fortwayne/12453164.htm>.

<sup>7</sup> The Organ Procurement and Transplantation Network (hereafter “OPTN”), *Request for Public Input Regarding OPTN/UNOS Facilitation of Living Unrelated Kidney Donation: Appendixes*, at 6, [http://www.optn.org/PublicComment/pubcommentPropExhibit\\_21.pdf](http://www.optn.org/PublicComment/pubcommentPropExhibit_21.pdf).

<sup>8</sup>*Id.*

donations are directed to biological relatives and many of the rest donate to a spouse.<sup>9</sup> Still, only a handful of living donations have been publicly reported in which the donor and recipient met solely for the purpose of donation and had no preexisting relationship before the recipient's need for a transplant was first identified.<sup>10</sup>

Over the past couple of years, however, public donor solicitations resulting in directed donations to strangers are increasing. MatchingDonors.com alone has facilitated more than a dozen transplant surgeries between living donors and recipients who were strangers before the donation. Dozens more are reportedly in the presurgery stage, and Matchingdonors.com has over 2400 potential donors registered on its website to whom potential recipients can appeal.<sup>11</sup> The intensity of donor solicitations may be increasing as well, as evidenced by the Kurzrok campaign which allegedly resorted to posting flyers in hospitals asking families to direct a liver donation to Kurzrok, tracking trauma patients in emergency rooms, and urging police and emergency medical workers to identify accident victims who might serve as donors.<sup>12</sup> Another interesting development is the increasingly complex forms that organ solicitations are taking. One website (with over 3,200 members) offers a reciprocal sharing agreement whereby members pledge to direct their organs in the event of their death first to other members if a suitable match can be found before donating to the UNOS waiting list.<sup>13</sup>

Federal law does not prohibit directed donation to an individual and most states expressly permit it by statute under the Uniform Anatomical Gift Act which governs

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<sup>9</sup> *Id* at 2.

<sup>10</sup> *Id* (UNOS does not collect data on how often this occurs).

<sup>11</sup> Rob Stein, *Search for Transplant Organs Becomes a Web Free-for-All*, Washington Post, September 23, 2005, at A01 ¶ 15, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/22/AR2005092201901.html>; MatchingDonors.com.

<sup>12</sup> *Id* at 6; see also Deborah L. Shelton, *Debate Over Appeals for Organs Heats Up*, St. Louis Post Dispatch, Aug. 23, 2005, at ¶ 7, available at <http://www.fortwayne.com/mld/fortwayne/12453164.htm>.

<sup>13</sup> LifeSharers, <http://Lifesharers.com> (last visited October 11, 2005).

organ donation.<sup>14</sup> Federal regulations promulgated by the Department of Health and Human Services (hereafter “HHS”) expressly permit directed donations.<sup>15</sup> Despite the current legality of directing a donation to a solicitor, many commentators consider this practice unethical, particularly in the deceased context. This is because directed donation allows a potential recipient to effectively “jump the line” by soliciting the donation of an organ that otherwise might have been allocated to a recipient ranked higher on the UNOS national waiting list.<sup>16</sup> The UNOS organ allocation policies are designed to balance equity for potential recipients with medical utility. Preferences are given according to certain equitable factors such as time spent on the waiting list and medical urgency.<sup>17</sup> The allocation process is designed to accomplish utility by using clinical factors to distribute organs to recipients who are expected to realize the greatest clinical benefit in terms of survival.<sup>18</sup> Because these allocation policies are applied uniformly, potential recipients compete equally for organs, receiving preferences only according to these factors.

Solicitations for deceased donor directed donations bypass this system and may therefore unfairly give preference to “attractive patients” with greater means of purchasing advertising or drawing media attention.<sup>19</sup> There is, however, a recognized competing autonomy interest in allowing a donor or donor family to choose who will

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<sup>14</sup> See 42 U.S.C. § 273-274 (2005); Unif. Anatomical Gift Act § 6(a)(3) (amended 1987); *but see* Vt. Stat. Ann. tit. 18 § 5242(a), (d) (2005) (allowing only living donors to make a directed donation).

<sup>15</sup> 42 C.F.R. § 121.8(h) (2005).

<sup>16</sup> Geoff Drushel, *Directed organ donation is legal, but is it right?* Hepatitis Mag., Jan.–Mar. 2005, at ¶ 6-8, available at <http://www.hepatitismag.com/storydetail.asp?storyid=133> (quoting Arthur Caplan).

<sup>17</sup> OPTN, Policies 3.2.1.7-3.2.1.7.9, 3.5.5., <http://www.optn.org/policiesAndBylaws/policies.asp> (revised Nov. 19, 2004). Note that whether the potential recipient has been a living organ donor in the past is considered.

<sup>18</sup> *Id.* at Policy 3.5.3.3.1.

<sup>19</sup> Caplan, Hastings Ctr. Rep. at 8.

receive their anatomical gift by directing the donation.<sup>20</sup> Some have argued that donor solicitations are consistent with utility principles because they may increase total donations (especially in the context of living donor solicitation), thereby benefiting all potential recipients by moving successful solicitors off of the national waiting list.<sup>21</sup>

This article analyzes the legality of four possible policy options to resolve the ethical dilemma raised by solicitation of organs for transplant. Expedient resolution of this issue is critical given that there are over 90,000 potential recipients listed on the UNOS waiting list and that 4,856 patients from this list died in 2005 while awaiting an organ for transplant.<sup>22</sup>

## **II. Should public organ donor solicitations be restricted at all?**

### **a. Solicitation of deceased organ donations should be restricted to maintain equity and medical utility in the organ allocation system.**

Directed donation creates a conflict between distributive justice and donor autonomy.<sup>23</sup> The UNOS allocation policies serve principles of distributive justice by balancing equitable factors such as time spent on the waiting list and medical urgency with medical utility factors that measure which potential recipients will realize the greatest clinical benefit from a particular organ.<sup>24</sup> This system “levels the playing field” and allows potential recipients to compete equally, giving preferences only according to these equitable and medical factors. Solicitations bypass this carefully crafted system because they encourage selection of potential recipients outside of the established equity

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<sup>20</sup> Mark D. Fox, *When an Organ Donor Names the Recipient*, Am. J. Nursing, July 1996, at 66, 66.

<sup>21</sup> Christopher Robertson, *Organ Advertising: Desperate Patients Solicit Volunteers*, 33 J.L. Med. & Ethics 170, 172 (2005).

<sup>22</sup> OPTN, Data Reports, <http://www.optn.org/latestData/viewDataReports.asp> (last visited Jan. 25, 2006).

<sup>23</sup> Fox, Am. J. Nursing at 66.

<sup>24</sup> *See supra* notes 18-19.

and utility factors. However, solicitations for directed donations serve to maximize a competing interest, donor autonomy.

The autonomy interest in directing an organ donation is often compared to the autonomy interest in directing material wealth to a specific individual or organization through one's will.<sup>25</sup> Proponents of donor solicitation believe that this interest outweighs society's interest in medical utility. They also believe that solicitations will increase the total number of organ donations by persuading people who otherwise would not donate to do so.<sup>26</sup> By analogy, if one could not direct monetary donations to the charity of one's choice, total charitable donations would arguably decline.<sup>27</sup> If a solicitation causes an organ donation that otherwise would not have happened, patients listed below the solicitor on the national waiting list would benefit from the solicitor receiving a transplant because that individual would then move off the list, and patients listed above the solicitor would be unaffected. Each deceased donation caused by solicitation may also have a collateral effect on medical utility because a deceased donor usually donates multiple organs resulting in multiple recipients receiving transplants.<sup>28</sup>

It is unlikely, however, that the autonomy interest in donating to a solicitor is what motivated state legislators to pass the Uniform Anatomical Gift Act (hereinafter the "UAGA") which permits directed donation. The framers of the UAGA did not contemplate directed donations arranged through solicitations and made in the absence of

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<sup>25</sup> Cite DAN BROCK in Symposium issue; and Klaus D Teichmann, *Directed Tissue Donations*, 33 *Clinical and Experimental Ophthalmology* 112 (2005).

<sup>26</sup> Robertson, 33 *J.L. Med. & Ethics* at 172.

<sup>27</sup> Aaron Spital, *Must Kidney Donation by Living Strangers be Nondirected?*, 72 *Transplantation* 966 (2001).

<sup>28</sup> The national average in 2005 was 2.79 organs transplanted per deceased organ donor. See UNOS website.

any preexisting relationship between the donor and the designated recipient.<sup>29</sup> Instead, the directed donation provision in the UAGA was designed to permit families to donate needed organs to another family member awaiting transplant.<sup>30</sup> The autonomy interest at stake in directing a donation to a stranger is clearly distinguishable from and not nearly as great as the interest that one has in directing a donation to a family member or close friend.

Furthermore, a donated organ is not a private gift similar to wealth devised through a will because transplantation requires greater cooperation from people other than the donor and intended recipient in order to effectuate the gift.<sup>31</sup> In this way, organ donations can be characterized as social gifts and therefore society may be justified in limiting a donor's autonomy in order to promote equity among potential recipients and ensure that the full utility of the gift is realized.<sup>32</sup>

The likely outcome of continuing to allow public solicitations of deceased organs is that deceased organs that might otherwise be made available would be withheld from those patients ranked higher than the solicitor on the UNOS waiting list.<sup>33</sup> It is unknown whether organ solicitations increase total donations, but donors of deceased organs who direct donations to solicitors are likely to have donated anyway.<sup>34</sup> Thus, solicitors may move ahead of those who have waited longer, would benefit more, or have more critical

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<sup>29</sup> E-mail from Blair L. Sadler (a drafter of the UAGA), President and CEO, Children's Hospital and Health Center, to author, (Dec. 13, 2005, 13:40:00 EST) (on file with author); Drushel, *Hepatitis Mag.* at ¶ 9-10 (quoting R. Patrick Wood); Sheldon Zink & Stacey L. Wertlieb, *Examining the Potential Exploitation of UNOS Policies*, *Am. J. Bioethics*, July-Aug. 2005, at 6, 8.

<sup>30</sup> *Id.*

<sup>31</sup> Eike-Henner W. Kluge, *Designated Organ Donation: Private Choice in Social Context*, *Hastings Ctr. Rep.*, Sept-Oct. 1989, at 10, 11.

<sup>32</sup> *Id.* at 11-13. See also Dan Brock, *Harvard Symposium* (2005).

<sup>33</sup> Drushel, *Hepatitis Mag.* at ¶ 7-8 (quoting Arthur Caplan).

<sup>34</sup> See Alvin Powell, *HMS examines ethics of Internet organ donation*, *Harv. U. Gaz.*, May 19, 2005, at ¶ 22 (quoting Dan Brock), available at <http://www.news.harvard.edu/gazette/2005/05.19/09-organ.html>, (it is unknown whether public organ solicitation increases total donations).

need.<sup>35</sup> Case in point, Todd Krampitz did not meet the UNOS listing criteria because he had metastatic cancer, and died just eight months after receiving transplantation of the liver he solicited.<sup>36</sup>

Also, not all policies that might increase total donations are desirable, as is shown by the fact that most nations ban the purchase and sale of organs.<sup>37</sup> Organ solicitations could undermine public support for the entire procurement and allocation system because this practice inequitably favors those patients with “attractiveness” and the means to purchase advertising or draw media attention.<sup>38</sup> An appeal for a six-month old infant in need of a liver donation tugs on potential donors’ heartstrings, while the same appeal from a middle-aged alcoholic may not, unless the individual happens to be a national hero.<sup>39</sup> Organ solicitations imply that the solicitor is ethically special compared to other potential recipients, and invite donors to choose recipients that appear more deserving rather than those in greater need or who will benefit the most medically.<sup>40</sup>

Thus, public solicitations of deceased organ donors are likely to reduce both the equity and efficiency (as measured by medical utility) of the organ allocation system. Lawmakers, UNOS, and healthcare providers should therefore consider limiting or prohibiting deceased donor solicitations.

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<sup>35</sup> Drushel, *Hepatitis Mag.* at ¶ 7-8 (quoting Arthur Caplan).

<sup>36</sup> Zink, *Examining the Potential Exploitation of UNOS Policies*, *Am. J. Bioethics*, at 6; Sheldon Zink & Stacey L. Wertlieb, *Response to Commentators on “Examining the Potential Exploitation of UNOS Policies”*, *Am. J. Bioethics*, Sept.-Oct. 2005, at W15, available at [http://www.bioethics.net/journal/j\\_articles.php?aid=842](http://www.bioethics.net/journal/j_articles.php?aid=842).

<sup>37</sup> Andrew H. Barnett, Roger D. Blair, & David L. Kaserman, *Improving Organ Donation: Compensation versus Markets*, in *The Ethics of Organ Transplants: The Current Debate*, 209, 209-212, (Arthur L. Caplan & Daniel H. Coelho eds., Prometheus Books 1998) (Arguing that donor compensation would increase total donations); Ross, 45 *Perspectives in Biology and Medicine* at 333.

<sup>38</sup> Caplan, *Hastings Ctr. Rep.* at 8.

<sup>39</sup> Ross, 45 *Perspectives in Biology and Medicine* at 333.

<sup>40</sup> Kluge, *Hastings Ctr. Rep.* at 12.

**b. Solicitation of living donations should be permitted because they increase total donations without sacrificing equity and medical utility.**

There is currently no national system for allocating organs from living donors and no organized waiting list for potential recipients as there is for deceased organs.<sup>41</sup> Thus, the effect of a solicited donation from a living donor is significantly different. A living donation to a solicitor is far less likely to deprive any potential recipient of an organ that he or she would otherwise have received.<sup>42</sup> Instead, a directed living donation takes the solicitor off the waiting list for deceased organs or eliminates the solicitor's need to go on the list to begin with, thereby benefiting the patients that are or would have been listed below the solicitor. Additionally, the data supports a conclusion that solicitation will likely increase living donations because living donors prefer to donate to a person they know.<sup>43</sup> "Please donate your kidney" will never elicit the same response as "Please donate your kidney to Robert Hickey."<sup>44</sup> For example, a media appeal in Canada on behalf of a specific recipient resulted in 50 calls to transplant centers from people wishing to be living donors, when transplant centers normally only receive a few such calls a month.<sup>45</sup>

Living donors do sometimes donate without specifying a recipient. In those instances, the donated organ goes through a local matching system to a patient on the UNOS waiting list.<sup>46</sup> Accordingly, it is possible that a solicitor may receive an organ from living donors that would have been allocated to a different recipient on the UNOS list. However, anonymous, non-directed donations to the waiting list from living donors,

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<sup>41</sup> Drushel, *Hepatitis Mag.* at ¶ 6 (quoting Arthur Caplan).

<sup>42</sup> *Id.*

<sup>43</sup> *Supra* note 9 at 2; see also Jacob M. Appel, *Organ Solicitation On the Internet: Every Man for Himself?* *Hastings Ctr. Rep.*, May-June 2005, at 14, 15.

<sup>44</sup> *See id.*

<sup>45</sup> Ross, 45 *Perspectives in Biology and Medicine* at 332.

<sup>46</sup> See e.g. New England Kidney Exchange at [www.nepke.org](http://www.nepke.org); OPTN, *supra* note 8, at 4.

called “Good Samaritan donations,” are rare. Only 87 transplants of organs from living altruistic donors were performed nationwide in 2004.<sup>47</sup>

Good Samaritan donations are rare because of an important distinction between donation in the living and deceased contexts; the living donor’s significant personal sacrifice. Unlike a deceased donor or a deceased donor’s family, a living donor must bear the personal health risks of invasive surgery and living without the donated organ. In comparison to solicited deceased donors who likely would have donated anyway, most solicited living donors would likely not have donated unless they could direct their donation to the solicitor. Thus, permitting solicitation of living donors is more likely to increase total organ donations that otherwise would not have occurred. This is a benefit to the entire organ donation and transplantation system.

The serious sacrifice made by living donors is also significant to evaluating the donor’s autonomy interest in directing a donation. A living donor makes a far greater personal sacrifice than a deceased donor and, unlike the deceased donor, may also experience some benefit through forming a personal bond with the recipient after transplantation. As a result, one may argue that society should give the donor’s autonomy interest more weight in the living context than in the deceased context.

It remains true that “attractive patients” and those with greater means of purchasing advertising or drawing media attention will inevitably be more successful at soliciting living donors.<sup>48</sup> Also, there is a possible added inequity in the living context because federal law permits payment of reasonable compensation for the living donor’s

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<sup>47</sup> *Id.* at 2.

<sup>48</sup> Caplan, Hastings Ctr. Rep. at 8.

travel expenses and lost wages associated with living donation.<sup>49</sup> A solicitor who has the financial means to reimburse a living donor for these costs may be more likely to successfully solicit a living donor. In one recent case, these expenses included a stay in a luxury hotel and totaled \$5,000, a sum that not all solicitors can afford.<sup>50</sup>

The existence of possible inequities may not justify prohibiting living donations directed to solicitors as they do in the case of deceased donation. The over-riding consideration is that solicitations of living donors are more likely to increase total organ donations. Increasing the total number of living organ donations is more likely to benefit other potential recipients rather than to deprive them of organs that they otherwise might have received. There is no system for living donation carefully crafted to maximize equity and efficiency that donor solicitations would disrupt. Also, the living donor's autonomy interest in directing a donation deserves more significant weight given the personal sacrifice involved. Lawmakers, UNOS, and healthcare providers should, therefore, continue to permit solicitations of living donors and directed donations made by living donors to solicitors.

### **III. Legal Analysis of Organ Donor Solicitations as Constitutionally Protected Speech**

Regardless of how deceased organ donor solicitations are classified, they are protected free speech under the first amendment of the United States Constitution. An outright government ban on deceased organ donor solicitations would, therefore, clearly be unconstitutional. Certain reasonable regulations may, however, pass constitutional scrutiny depending on the level of legal scrutiny that applies.

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<sup>49</sup> 42 U.S.C. § 274e(c)(2). Although the deceased donor does not incur travel costs or lost wages, the costs associated with a deceased donation are never born by the donor family.

<sup>50</sup> Appel, Hastings Ctr. Rep. at 14.

**a. Protection for Charitable Solicitations: Strict Scrutiny Review**

It is settled law that charitable organizations that solicit gifts or financial contributions are protected under the first amendment.<sup>51</sup> Charitable appeals are protected free speech because they involve a variety of speech interests such as communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes.<sup>52</sup> Additionally, charitable solicitation is characteristically intertwined with informative speech promoting economic, political, and social issues.<sup>53</sup> Although the Supreme Court has not specifically considered whether an individual solicitor seeking private charity is protected under the first amendment, circuit courts have found no meaningful distinction between soliciting for oneself versus soliciting for a charitable organization because both forms of speech contain social messages.<sup>54</sup>

The Supreme Court applies the most exacting level of scrutiny, strict scrutiny, to any regulation that restricts protected speech on the basis of its content.<sup>55</sup> To meet strict scrutiny, any regulation must be necessary to serve a compelling state interest and must be narrowly drawn to achieve that end.<sup>56</sup>

In contrast, commercial speech receives only intermediate protection under the first amendment. The courts have not, however, treated charitable solicitation as commercial speech. Speech is considered commercial when it is primarily related to the economic interests of the speaker, or is primarily concerned with providing information

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<sup>51</sup> *Village of Schaumburg v. Citizens for a Better Env.*, 444 U.S. 620, 632 (1980).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Gresham v. Peterson*, 225 F.3d 899, 903-904 (7th Cir. 2000) (holding that even panhandling is protected free speech because it may contain social messages on the issue of poverty).

<sup>55</sup> *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-642 (1994).

<sup>56</sup> *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (U.S., 1987).

about the costs of goods and services or proposing a commercial transaction.<sup>57</sup> For example, a contraceptive manufacturer that mails advertisements for its products engages in commercial speech despite the fact that the communication contains information on issues such as venereal disease and family planning.<sup>58</sup> Here it can be inferred that the manufacturer's primary purpose was not disseminating information on venereal disease and family planning. This is because the communication took the form of an advertisement for a specific product and was motivated by an economic interest, (soliciting a commercial transaction).<sup>59</sup>

Applying this test to charitable solicitation, the Supreme Court has found that charitable solicitations are not commercial speech.<sup>60</sup> This is because they are concerned with more than just the economic interests of the speaker, providing cost information about goods and services, or proposing a commercial transaction. They are intertwined with informative speech advancing economic, political, and social issues.<sup>61</sup>

Courts distinguish between commercial and noncommercial speech on the basis of the content of the message itself, not the mode in which the speaker transmits it. Speech that is otherwise considered noncommercial does not become commercial merely because its speaker delivers the message in a paid advertisement.<sup>62</sup> For example, in considering whether a newspaper committed libel for running a paid advertisement, the Supreme Court held that whether the newspaper was paid for the advertisement was

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<sup>57</sup> *Schaumburg*, 444 U.S. at 632; *C. Hudson Gas and Elec. Corp. v. Pub. Serv. Commn.*, 447 U.S. 557, 561 (1980);

*Va. Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976).

<sup>58</sup> *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67-68 (1983).

<sup>59</sup> *Id.*

<sup>60</sup> *Schaumburg*, 444 U.S. at 632.

<sup>61</sup> *Id.*

<sup>62</sup> *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 514-515 (U.S., 1981) (the court treated messages conveyed on billboards as noncommercial on the basis of their content even though they were paid advertisements).

irrelevant in determining whether it had engaged in commercial speech.<sup>63</sup> “To hold otherwise would convert virtually all books, newspapers, and magazines into commercial speech [merely because the printer was paid], and call into question the traditional protections afforded these types of publications.”<sup>64</sup> In fact, the Supreme Court has clarified that a speaker may even hire canvassers to promote a noncommercial message without engaging in commercial speech.<sup>65</sup> The first amendment protects the right not only to advocate a cause, but also to select the most effective means for doing so.<sup>66</sup>

**b. Intrusive Charitable Solicitations: Reasonableness Standard**

More intrusive charitable solicitations, such as those requesting funds, are subject to reasonable regulation.<sup>67</sup> For example, courts have reasoned that solicitations of funds on a public street are intrusive because the solicitor and others watch and may exert social pressure on the person solicited, who may then have to stop on a busy street and open his wallet.<sup>68</sup> This type of solicitation is considered more intrusive than solicitations that merely involve the distribution of literature.<sup>69</sup> Of course, even the most benign solicitations can be considered intrusive and therefore subject to reasonable regulation in certain circumstances; the first amendment would not require a city to permit a man with a communicable disease to distribute leaflets on public streets.<sup>70</sup>

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<sup>63</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964).

<sup>64</sup> *U.S. Olympic Comm. v. Am. Media, Inc.*, 156 F. Supp. 2d 1200, 1208 (D. Colo. 2001).

<sup>65</sup> *Meyer v. Grant*, 486 U.S. 414, 426 (1988) (the court found that paid petition circulators engaged in noncommercial speech because the content of the speech itself was noncommercial).

<sup>66</sup> *Id.* at 424.

<sup>67</sup> *Schaumburg*, 444 U.S. at 632.

<sup>68</sup> *U.S. v. Kokinda*, 497 U.S. 720, 734 (1990).

<sup>69</sup> *Id.*

<sup>70</sup> *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943).

The reasonableness standard is considerably easier for the government to meet than the strict scrutiny standard. To be reasonable, a regulation must appropriately balance legitimate government interests against the right to free speech and cannot be overly broad.<sup>71</sup> For example, the Supreme Court has held that the Government's legitimate interest in preventing fraudulent solicitations, (such as burglars posing as canvassers), justifies the reasonable requirement that canvassers register with a town prior to canvassing and establish their identity and affiliation with the organization they represent.<sup>72</sup>

**c. Organ Donor Solicitations are Charitable Solicitations**

Nonprofit organizations such as MatchingDonors.com that solicit donors are likely to be considered protected under the first amendment as charitable solicitors because their services promote the social issue of organ donation by encouraging organ donations in the broader context.<sup>73</sup> An individual organ solicitor is also likely to be protected under the first Amendment because the solicitation promotes the social issue of organ donation generally. For example, the appeals on behalf of Todd Krampitz always contained broader requests for people to donate organs, and after he received a directed donation, the family put up a new billboard that said "Thank You" and encouraged more people to donate organs for transplant.<sup>74</sup>

Deceased organ donor solicitations are likely to be considered noncommercial speech because they are not primarily concerned with providing information about the

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<sup>71</sup> *Watchtower Bible and Tract Socy. v. Village of Stratton*, 536 U.S. 150, 165 (2002).

<sup>72</sup> *Id.* at 162-163.

<sup>73</sup> MatchingDonors.com is now a nonprofit organization. Secretary of the Commonwealth of Massachusetts, Corporate Database Listing for MATCHINGDONORS.ORG, INC., <http://corp.sec.state.ma.us/corp/corpsearch/CorpSearchSummary.asp?ReadFromDB=True&UpdateAllowed=&FEIN=000891332>, (last visited Oct. 11, 2005) (listing MATCHINGDONORS.ORG, INC. as a nonprofit organization).

<sup>74</sup> Drushel, *Hepatitis Mag.* at ¶ 4; Snowbeck, *Headlines & Deadlines* at ¶ 32.

costs of goods and services or proposing a commercial transaction, nor are they primarily related to the economic interests of the organ solicitor. They are primarily concerned with obtaining a life saving gift from potential deceased donors and promoting the social message that more people should donate life-saving organs. Although made in the form of an advertisement, these solicitations make no reference to a specific product or to the costs of goods or services, and, at least on their face, do not propose a commercial transaction.

A for-profit corporation that posts paid solicitations for organ donors may not be considered to have engaged in commercial speech either because the content of the solicitor's message itself is not commercial. Such a corporation would be treated and protected like a newspaper that is paid to print constitutionally protected advertisements.<sup>75</sup> Even if a corporation were actively soliciting organ donors on behalf of its clients, it would still not be engaging in commercial speech because the clients' noncommercial messages are not made commercial merely because they took the form of a paid advertisement or because the clients paid others to present them.<sup>76</sup> Here, the corporation would be treated and protected like canvassers paid to promote a speaker's political message.<sup>77</sup> Again, the first amendment protects not only the solicitor's right to communicate his message, but also the right to select the most effective means for doing so.<sup>78</sup>

**d. Reasonable Regulation of Intrusive Deceased Organ Donor Solicitations**

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<sup>75</sup> See *New York Times*, 376 U.S. at 266.

<sup>76</sup> *Metromedia*, 453 U.S. at 514-515.

<sup>77</sup> See *Meyer*, 486 U.S. at 426.

<sup>78</sup> *Id* at 424.

Whether a court subjects regulations of deceased organ donor solicitations to the strict scrutiny standard or the reasonableness standard of review will depend on how intrusive the particular solicitations involved are. If a particular solicitation is found not to be intrusive, any regulation of it would have to satisfy strict scrutiny by being necessary to serve a compelling state interest and narrowly drawn to achieve that end. Examples of less intrusive solicitations may include informative media reports, the general posting of an organ donation request in a public place or the internet, and the LifeSharers website, which invites members to agree to direct their organs in the event of their death first to other members if a suitable match can be found (a reciprocal sharing agreement).<sup>79</sup> In these cases, the solicitor does not physically approach anyone and the person solicited is free to ignore the solicitation with no consequence. Then again, in the case of posting requests in a public place or the internet, it is possible to argue that the intrusive part of the solicitation occurs later, when the person solicited contacts the solicitor to discuss the details.

If a particular type of solicitation is not considered intrusive, an outright government ban is unlikely to satisfy the strict scrutiny standard of review. The government might argue that banning deceased organ donation solicitations is necessary to achieve its primary objects of preserving equity and medical utility through the current system. However, there is no empirical data to show that deceased organ solicitations will harm the national organ allocation system or to refute the counter-argument that

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<sup>79</sup> LifeSharers, <http://www.lifesharers.com/> (last visited Oct. 4, 2005). Membership in an organization such as LifeSharers is also protected by the first amendment right to freedom of association. *See Scales v. U.S.*, 367 U.S. 203, 229 (1961) (explaining that the government can only prohibit membership in a group if there is specific intent to further a group's illegal activities). However, there is no statutory right to direct a donation to a class of people because statutes define directed donation as donation to a "designated individual." Unif. Anatomical Gift Act § 6(a)(3). Thus, it is unclear whether a court would uphold the right to direct a donation to members of the organization generally rather than to a specific individual.

solicitations may increase total donations.<sup>80</sup> Thus, it would be difficult for the government to show that an outright ban on deceased organ donation solicitations is “necessary” to accomplish those goals. Other less restrictive measures may be possible as discussed below.

Deceased organ solicitations that can fairly be characterized as intrusive could be subject to reasonable regulation. Because society values donated organs as a scarce resource and because of the personal and physical nature of an organ donation, deceased organ solicitations are likely to be considered at least as intrusive as solicitations for funds.<sup>81</sup> Certainly deceased organ solicitations involving direct contact with emergency workers or hospital staff or where there is an in-person solicitation of a potential donor or donor family are likely to be considered intrusive.<sup>82</sup> Moreover, the government has several legitimate interests in regulating deceased organ solicitations. First, it has an interest in promoting equitable and efficient allocation of deceased organs. Second, it has an interest in preventing solicitors from putting undue emotional pressure on potential donors or donor families or misrepresenting their condition.<sup>83</sup> Finally, it has an interest in preventing solicitors from inappropriately offering to purchase organs from donors, which is a federal offense.<sup>84</sup>

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<sup>80</sup> See Powell, Harv. U. Gaz. at ¶ 22 (quoting Dan Brock).

<sup>81</sup> See discussion of the extreme sacrifice a living organ donor makes *supra* Part I.2.

<sup>82</sup> Of course, restrictions against such extreme forms of donor solicitation would probably meet the strict scrutiny standard as well. Nevertheless, the reasonableness standard is likely to be applied to any restriction on solicitations in hospitals even without a showing that the solicitation is intrusive because a hospital is not a traditional public forum intended to promote the free exchange of ideas. See *Intl. Socy. for Krishna Consciousness v. Lee*, 505 U.S. 672, 680 (U.S. 1992). This distinction could be important for a solicitation such as a flyer posted in a hospital, which might not be considered intrusive and its regulation therefore might otherwise be subject to strict scrutiny rather than the reasonableness standard of review.

<sup>83</sup> Caplan, Hastings Ctr. Rep. at 8.

<sup>84</sup> See *infra* note 103 (the sale of organs is illegal).

To be reasonable, any restriction must balance the right to free speech with these legitimate interests. Reasonable restrictions may include requirements that deceased organ solicitors establish their identity, present only truthful information regarding the potential recipient's condition and use non-coercive language. Restrictions on the time, place, and manner of deceased organ solicitation, (such as a prohibition on solicitations in a hospital) are also reasonable. It may even be reasonable to require deceased organ solicitations to carry a disclaimer that UNOS does not support deceased directed donations to solicitors, and the URL for a website containing information on the issue to dissuade such donations. All of these restrictions on deceased organ solicitation are likely to be considered reasonable if such a standard applies. However, an outright ban on deceased donor solicitation is unlikely to withstand a constitutional challenge that it is an unreasonable restriction because it would not adequately balance government interests with the right to free speech. Thus, while Congress and states cannot outright ban deceased organ donor solicitations, they may be able to pass reasonable regulations on intrusive deceased organ solicitations.

e. **Organ Donor Solicitations are Protected Even if Characterized as Commercial Speech.**

Although it receives less protection than other forms of speech, commercial speech is still protected under the first amendment.<sup>85</sup> The government may only restrict commercial speech if the speech presents deceptive information or if the restriction directly advances a substantial government interest and is not excessive.<sup>86</sup> To assert that

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<sup>85</sup> *Edenfield v. Fane*, 507 U.S. 761, 765-766 (1993).

<sup>86</sup> *Hudson*, 447 U.S. at 564-565.

a restriction advances a substantial interest, the government must show that there are real harms that the restriction will alleviate to a material degree.<sup>87</sup>

For commercial solicitations, the government can meet its burden in showing that the restriction will alleviate real harms if it is reasonable to presume that more often than not, the solicitations are injurious to the person solicited.<sup>88</sup> For example, the Supreme Court has held that a state may prohibit lawyers from soliciting clients in-person because lawyers are trained in the art of persuasion and are capable of convincing an injured and distressed lay person into placing trust in the lawyer regardless of the lawyer's qualifications or the individual's actual need for legal representation.<sup>89</sup> Also, the Court stated that the lawyer's solicitation itself may cause distress to the layperson at the time of injury.<sup>90</sup> Thus, the Supreme Court found that it is reasonable to presume that more often than not, in-person solicitations by lawyers are injurious to the person solicited.<sup>91</sup> In contrast, the Supreme Court struck down a state ban on personal solicitations by certified public accounts because it is not reasonable to presume that such solicitations are injurious to the person solicited more often than not.<sup>92</sup> The court reasoned that accountants are not trained in the art of persuasion and the clients they solicit are sophisticated business executives who can choose when and where to meet them.<sup>93</sup>

In the case of commercial deceased organ donor solicitation, it is unlikely that the government could show that a flat ban advances a substantial interest and is not excessive. The government has legitimate interests such as preventing solicitors from

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<sup>87</sup> *Edenfield*, 507 U.S. at 770-771.

<sup>88</sup> *Edenfield*, 507 U.S. at 776; *Ohralik v. Ohio St. B. Assn.*, 436 U.S. 447, 466 (1978).

<sup>89</sup> *Ohralik*, 436 U.S. at 465.

<sup>90</sup> *Id.* at 466.

<sup>91</sup> *Id.*

<sup>92</sup> *Edenfield*, 507 U.S. at 776.

<sup>93</sup> *Id.* at 775-776.

coercing donors and donor families, preventing them from presenting deceptive information, and preventing them from offering payment for organs (a federal offense).<sup>94</sup> It may be difficult, however, for the government to show that the solicitations are injurious to the person solicited more often than not. In the deceased context, the primary harm of organ solicitations for directed donations is to other potential transplant recipients. This possible harm to other potential recipients results from donors exercising their statutory right to direct organ donations, and not directly from the solicitation itself. There may also be some emotional harm to the donor's family if the solicitation is insensitive, offensive, or intrusive. A deceased organ solicitation made by one skilled in the art of persuasion at a hospital or at the donor's time of death may be injurious in the same way a lawyer's solicitation of an injured and distressed client is. Still, an outright ban would likely be considered excessive because in most other contexts, these solicitations will not be injurious to donors or donor families more often than not.<sup>95</sup>

The government has a legitimate interest in preventing the harm to other potential recipients that would occur if deceased organ donor solicitations prevent the equitable and efficient allocation of organs. Nevertheless, the government is unlikely to meet its burden of showing that a ban would alleviate a real harm to the national allocation system because there is no direct evidence to refute the counterargument that solicitations will

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<sup>94</sup> See *supra* text accompanying notes 81-83 (discussing these legitimate government interests).

<sup>95</sup> In the living context, there is an argument that living donors are always harmed when they donate an organ. Yet this is balanced by the argument that living donors may benefit by knowing that they have saved or improved a life. Thus, it is not reasonable to presume that living donor solicitations will harm living donors more often than not and therefore unlikely that the government could show that a ban would alleviate a real harm to living donors. Also, a ban on living donor solicitations would be considered excessive because living donors can be protected through the informed consent process.

increase total donations.<sup>96</sup> Thus, at least at the present time, it would be difficult for the government to show that a ban would advance the substantial interest of preventing harm to the national organ allocation system.

Therefore, even if deceased organ solicitations could be classified as commercial speech, it is unlikely that an outright ban would withstand a constitutional challenge. Nevertheless, other restrictions would be constitutional if they restrict deceptive solicitations or advance a substantial interest and are not excessive. Potential regulations include those discussed above in the previous section as reasonable regulations of more intrusive charitable solicitations.

#### **IV. Policy Options to Restrict Deceased Organ Donor Solicitations**

##### **a. Banning Deceased Organ Donor Solicitations is Not Legally Viable.**

The government may ban speech that incites illegal activity if the speech is directed toward producing imminent illegal action and is likely to succeed.<sup>97</sup> To show that speech is directed toward producing illegal action, the government must show that the speaker had intent to produce illegal action.<sup>98</sup> A ban on speech that incites illegal activity must only apply to speech that satisfies this intent requirement.<sup>99</sup> Otherwise, courts will consider the ban overly broad because it will apply to constitutionally protected speech as well and will cause individuals to refrain from protected speech for fear of criminal sanctions.<sup>100</sup> Thus, a ban on speech that incites illegal activity must be

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<sup>96</sup> See Powell, Harv. U. Gaz. at ¶ 22 (quoting Dan Brock).

<sup>97</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

<sup>98</sup> *Id.*

<sup>99</sup> *Gooding v. Wilson*, 405 U.S. 518, 520-521 (1972); *Brandenburg*, 395 U.S. at 447-448.

<sup>100</sup> *Gooding*, 405 U.S. at 520-521.

narrowly drawn to apply only to cases where the speaker intended to produce illegal activity.<sup>101</sup>

Although directed organ donation is legal, federal law and most state laws prohibit the purchase and sale of human organs.<sup>102</sup> Even where state law does not prohibit selling organs, federal law is controlling.<sup>103</sup> After Robert Hickey's transplant, suspicions ran high that he paid Robert Smitty for his kidney. This was based on the fact that Smitty was arrested days after the transplant for failure to pay child support, and anonymous benefactors posted the funds necessary for his release.<sup>104</sup> Additionally, MatchingDonors.com admits that its clients have been barraged with requests for cash from potential donors.<sup>105</sup>

Nevertheless, these events are not enough to justify a ban on organ donor solicitations as incitement of illegal activity. Absent a showing that a specific organ solicitor intended to pay for an organ, a solicitation cannot be characterized as incitement of illegal activity. An outright ban on organ solicitation would be considered overly broad because it would apply to many cases in which a solicitor did not intend to pay for an organ, and would thus infringe constitutionally protected speech. A ban may only survive a constitutional challenge if it is narrowly drawn to apply only where a solicitor intends to offer payment. Thus, the government cannot outright ban organ solicitations as incitement of illegal activity.

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<sup>101</sup> *Gooding*, 405 U.S. at 520-521; *Brandenburg*, 395 U.S. at 447-448.

<sup>102</sup> 42 U.S.C. § 274e(a) (It is illegal to sell an organ for valuable consideration); *but see* Unif. Anatomical Gift Act § 10 (prohibiting payment only for deceased organs); Mass. Gen. Laws ch. 113, § 1-14 (2005) (with no prohibition on payment at all).

<sup>103</sup> Roderick T. Chen, *Organ Allocation and the States: Can the State Restrict Broader Organ Sharing?*, 49 *Duke L.J.* 261, 288, (1999) (explaining that Congress validly enacted the National Organ Transplant Act (hereafter "NOTA") under its power to regulate interstate commerce because organ procurement, allocation, and transplantation necessarily involves interstate commerce).

<sup>104</sup> Robertson, 33 *J.L. Med. & Ethics* at 170.

<sup>105</sup> Stein, *Washington Post* at ¶ 28-29.

**b. Restricting Transplants for Solicitors of Deceased Organs.**

After Robert Hickey received his transplant, St. Luke's, the University of Colorado hospital that performed the transplant, issued a moratorium on transplants for internet-matched living donation pairs.<sup>106</sup> Since then, hundreds of other hospitals nationwide have followed suit.<sup>107</sup> If legally permissible, these policies could effectively prevent directed donations made to solicitors in both the living and deceased contexts. Such policies raise the issue of common law liability for patient abandonment, but transplant centers can take steps to protect themselves.

Transplant centers and surgeons owe a common law duty to their patients to continue providing care until their services are no longer needed, or are dispensed with by the patient.<sup>108</sup> Once a physician/patient relationship is initiated, a healthcare provider is liable for abandonment if it withdraws from providing care without giving reasonable notice so that the patient may secure other medical care, and if an injury results.<sup>109</sup> Patient abandonment gives rise to liability for both negligence and breach of contract claims.<sup>110</sup>

Patient abandonment liability exists for breach of contract because the provider has unilaterally terminated the physician/patient relationship.<sup>111</sup> And, patient abandonment liability for negligence exists because the provider has breached its duty by choosing not to provide the patient with professional services at the pertinent standard of

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<sup>106</sup> Bill Scanlon, *Kidney Transplant a 'Success'*, Rocky Mountain News, June 10, 2005, at ¶ 15, available at [http://www.rockymountainnews.com/drmn/local/article/0,1299,DRMN\\_15\\_3847091,00.html](http://www.rockymountainnews.com/drmn/local/article/0,1299,DRMN_15_3847091,00.html).

<sup>107</sup> *Id.*

<sup>108</sup> *Tierney v. Univ. of Mich. Regents*, 257 Mich. App. 681, 684 (2003).

<sup>109</sup> *Id.* at 684-685.

<sup>110</sup> *Smith v. Lerner*, 387 N.W.2d 576, 579 (Iowa 1986) (citing Angela R. Holder, *Medical Malpractice Law* 374, 377 (2d Ed., 1978)).

<sup>111</sup> *Id.*

care.<sup>112</sup> This differs from ordinary negligence in that the provider consciously chooses not to provide appropriate services, rather than fails to meet the standard due to carelessness.<sup>113</sup> An abandonment claim fails if the provider gives reasonable notice of withdrawing services or if the physician/patient relationship is terminated by mutual consent.<sup>114</sup>

Additionally, an abandonment claim should fail if the provider has not assumed a duty of care for the patient. Thus, it may be possible to forestall an abandonment claim by limiting the scope of the physician/patient relationship before the provider assumes a duty of care for the patient. The physician/patient relationship is essentially a contractual one, and providers have the right to contractually limit the scope of services that they will provide patients with when they assume care.<sup>115</sup> Although such a contract might appear to be an adhesion contract at first blush (because the provider presents it on a “take it or leave it basis” and the patient lacks bargaining power), courts have distinguished between contracts limiting the scope of services to be provided and contracts limiting the patient’s right to sue for negligence, and have only voided the latter as adhesion contracts contrary to public policy.<sup>116</sup>

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<sup>112</sup> *Smith*, 387 N.W.2d at 579 (citing Holder). The pertinent standard of care is met when a physician renders professional services consistent with that objectively ascertained minimally acceptable competence he may be expected to apply given the qualifications and level of expertise he holds himself out as possessing and given the circumstances of the particular case. *Hall v. Hilbun*, 466 So. 2d 856, 871 (Miss. 1985).

<sup>113</sup> *Smith*, 387 N.W.2d at 579 (citing Holder).

<sup>114</sup> *Dickie v. Graves*, 9 Kan. App. 2d 1, 3 (1983); Restatement (Second) of Torts § 323 (a),(b), comment (c) (1965) (in tort, an actor is not liable for terminating services unless his failure to provide services increases the risk of harm or the harm is suffered because of the other’s reliance. This is not met if the provider gives reasonable notice for the patient to find care elsewhere, or if the patient agrees to termination).

<sup>115</sup> See *Emory Univ. v. Porubiansky*, 248 Ga. 391, 392-393 (1981) (finding that a teaching clinic can require patients to waive their right to insist on complete treatment, but cannot require them to waive their right to sue for negligence if the clinic fails to meet the standard of care required by statute).

<sup>116</sup> See *Id.*

There are no provisions in the National Organ Transplant Act (hereafter “NOTA”) or state anatomical gift statutes that abrogate a provider’s common law duty not to abandon.<sup>117</sup> Nevertheless, it is likely that transplant surgeons could establish a policy of refusing to perform a transplant for a solicitor of deceased organ donors without exposing itself to abandonment liability. A provider can discharge a patient from care and give reasonable notice for the patient to obtain care at another transplant center if it discovers that a patient is soliciting for a deceased organ donation.

However, if the transplant surgeon does not discover that the patient has solicited until a directed donation of an organ from a deceased donor is made, it is unlikely to be able to give reasonable notice because deceased organs must be transplanted within hours.<sup>118</sup> Still, transplant surgeons may be able to protect themselves from liability even in this situation by informing potential recipients of their policies against facilitating transplants of deceased organs that have been directed through solicitation. Appropriate notice of such a policy must occur before a physician/patient relationship is established and should be acknowledged and consented to by prospective patients.<sup>119</sup> This could be accomplished by having prospective patients agree up front that the transplant surgeon is not accepting a duty to transplant deceased organs that are directed as a result of solicitation and consent to termination of care if the center discovers that the patient has solicited. Such a policy is consistent with a provider’s right to contractually limit the scope of care provided. Faced with a breach of contract claim or a negligence claim, a

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<sup>117</sup> See Daniel G. Jardine, *Liability Issues Arising out of Hospitals’ and Organ Procurement Organizations’ Rejection of Valid Anatomical Gifts*, 1990 Wis. L. Rev. 1655, 1669 (1990) (arguing that there is negligence liability for rejecting donations directed to a particular race or class of people because doing so will foreseeably result in harm to potential recipients).

<sup>118</sup> Robert M. Veatch, *Transplantation Ethics*, 367 (Georgetown U. Press 2000).

<sup>119</sup> Assuming that the transplant center feels strongly enough against donor solicitation to refuse care and allow the directed organ to go to waste.

provider should be able to argue that it never accepted a contract or assumed a duty to treat the patient under these circumstances, and that there is mutual consent to termination because the patient has agreed in advance to termination of care in the event that the patient solicited deceased organ donations.

There is precedent establishing that agreements limiting the scope of care to be provided are not adhesion contracts.<sup>120</sup> Also, such policies are not likely to increase organ wastage, as Organ Procurement Organizations (hereafter “OPOs”) might effectively dissuade directed donations to solicitors by informing donor families of transplant surgeons’ policies against transplanting solicited deceased organs.<sup>121</sup>

**c. Refusing to Facilitate Certain Directed Donations.**

Organ Procurement Organizations (OPOs) are defined by federal regulation as nonprofit entities that coordinate the consent, recovery, and allocation of organs from deceased donors through the UNOS system.<sup>122</sup> All parties involved in organ transplantations from deceased donors depend on OPO personnel to facilitate donation. Since the federal government designates only one OPO per geographical region with no

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<sup>120</sup> See *Emory Univ. v. Porubiansky*, 248 Ga. at 392-393. Even in the face of such a challenge, a provider could argue that such contracts support rather than undermine public policy by preserving the integrity of the national organ allocation system.

<sup>121</sup> Interestingly, if the OPTN or Congress decided to ban these moratoriums on the grounds that refusing these transplants wastes organs, this would likely be a valid exercise of authority under either Congress’s power to regulate interstate commerce or its spending power. However, it is unlikely that the federal government would enact such a policy given the fact that the OPTN publicly opposes directed donation to solicitors. See *infra* text accompanying notes 136-142. It would appear also that state legislatures could amend their anatomical gift statutes to ban such moratoriums under their police power. However, such a law might be overturned for infringing a physician’s due process right to not enter a physician/patient relationship, a right that courts have generally upheld outside of the emergency care context. See *Hiser v. Randolph*, 126 Ariz. 608, 610 (1980) (a medical provider is free to contract for his services as he sees fit and can refuse to treat a patient even under emergency situations), *overruled by Thompson v. Sun City Community Hosp.*, 141 Ariz. 597, 603 (1984) (holding that hospitals cannot deny emergency care without a valid cause).

<sup>122</sup> 42 C.F.R. § 486.302, 486.306.

overlap, an OPO policy of refusing to facilitate deceased directed donations made to solicitors would effectively prevent deceased donors and their families within that OPO's region from making such donations.<sup>123</sup>

In order to avoid any appearance that the federal government is somehow indirectly prohibiting protected free speech (OPOs are not government entities but do receive Medicare funding), such a policy could be written as a refusal to accept and procure donations directed to any recipient with whom the deceased donor has not had a preexisting relationship with before the recipient's need for a transplant was first identified.<sup>124</sup> Such a policy should reduce any potential OPO liability because there is no established duty in statute or common law for an OPO to facilitate any particular directed donation.<sup>125</sup>

Laws that permit directed donation allow a donor or donor family to designate an individual recipient for donation; they do not require the donee (often the OPO) to accept the donation and facilitate its allocation for transplant.<sup>126</sup> In fact, state anatomical gift statutes expressly preserve a donee's right to reject an anatomical gift.<sup>127</sup> Thus, these laws do not grant either the donor or the designated recipient the right to conscript an OPO to aid him in removing the organ.<sup>128</sup>

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<sup>123</sup> *Id.* at § 486.316.

<sup>124</sup> See discussion *infra* Part II.3.B.

<sup>125</sup> But see Colavito; [add cite]

<sup>126</sup> See Unif. Anatomical Gift Act § 6(a)(3).

<sup>127</sup> *Id.* at § 7(a): "A donee may accept or reject an anatomical gift."

<sup>128</sup> *Colavito v. New York Organ Donor Network, Inc.*, 356 F. Supp. 2d 237, 245-246 (E.D.N.Y. 2005) (holding that a designated recipient of a deceased directed donation did not have an action against an OPO which allocated one of the donor's kidneys to another recipient, leaving the plaintiff with only one kidney, which was untransplantable). The court found that the state anatomical gift statute was ambiguous with respect to a designated recipient's rights. It then weighed the OPO's interests in equitably and efficiently allocating organs against the interest of a designated recipient of a directed donation, and found that the OPO's interest precluded a private right of recovery for damages for the designated recipient. **UPDATE**

It is true that federal regulations require OPOs to conduct systematic efforts to acquire all usable organs from potential deceased donors and avoid organ wastage.<sup>129</sup> However, federal regulations also require OPOs to have a system for equitably allocating donated organs among transplant patients.<sup>130</sup> Thus, an OPO may argue that by refusing to facilitate deceased donations directed in the absence of a preexisting relationship it is fulfilling its other statutory duty to equitably allocate donated organs. It may also argue that such a policy fulfills its duty to acquire all usable organs more broadly by protecting the integrity of the entire allocation system.

Under common law, the conclusion is the same. An OPO owes no legal duty to designated recipients of directed donations because it never initiates or enters into a physician/patient relationship with these potential recipients and so never assumes a duty of care toward them.<sup>131</sup> In spite of this, some have argued that an OPO assumes a duty to procure deceased organs for potential recipients by rendering services that it should recognize as necessary for the protection of potential recipients, (a gratuitous undertaking).<sup>132</sup>

An entity only assumes a duty of care through a gratuitous undertaking if its failure to exercise care increases the risk of the harm or if the harm suffered is because of the other's reliance.<sup>133</sup> An OPO that refuses to facilitate a directed donation does not increase the designated recipient's risk beyond the risk that would exist if the OPO had not rendered any services at all. Also, the harm suffered by the designated recipient

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<sup>129</sup> 42 C.F.R. § 486.306(g)(2).

<sup>130</sup> *Id.* at § 486.306(i).

<sup>131</sup> See discussion *supra* Part II.2.A.

<sup>132</sup> Jardine, 1990 Wis. L. Rev. at 1669 (1990) (citing the Restatement (Second) of Torts § 323) (arguing that there is negligence liability for rejecting donations directed to a particular race or class of people because doing so will foreseeably result in harm to potential recipients).

<sup>133</sup> Restatement (Second) of Torts § 323.

cannot be caused by reliance on the OPO if the OPO policy is made public. Moreover, even if a common law duty could be found, it is possible to argue that federal regulations and state anatomical gift statutes abrogate this duty by preserving a donee’s right to reject any anatomical gift and by requiring OPOs to equitably allocate organs.<sup>134</sup> Thus, there is no legal duty for OPOs to facilitate directed donations made in the absence of a preexisting relationship between the donor and the designated recipient, and OPOs can refuse to facilitate such donations without incurring liability.

**d. OPTN Policy Prohibiting Facilitation of Certain Directed Donations.**

In 1984, Congress authorized the Organ Procurement and Transplantation Network (hereafter “OPTN”) to set national organ allocation policies through NOTA.<sup>135</sup> This broad grant of authority is supported by Congress’s spending power and its power to regulate interstate commerce.<sup>136</sup> NOTA requires the Secretary of HHS to contract with a private nonprofit organization to maintain the OPTN, but leaves the authority to set allocation policies with the OPTN.<sup>137</sup> UNOS has held this contract and maintained the OPTN since 1986.<sup>138</sup>

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<sup>134</sup> Note however, that if an OPO does endeavor to coordinate a directed donation it may be held liable for fulfilling that undertaking. **Cite Colavito.**

<sup>135</sup> 42 U.S.C. § 274(b)(2): “The [OPTN] shall – (A) establish in one location or through regional centers -- (i) a national list of individuals who need organs, and (ii) a national system, through the use of computers and in accordance with established medical criteria, to match organs and individuals included in the list, . . . . (B) establish membership criteria and medical criteria for allocating organs....”

<sup>136</sup> 42 U.S.C. § 273 (granting the Secretary of HHS the authority to make grants to organ procurement organizations); Chen, 49 Duke L.J. at 288 (explaining that Congress validly enacted NOTA under its power to regulate interstate commerce because organ procurement, allocation, and transplantation necessarily involves interstate commerce).

<sup>137</sup> Chen, 49 Duke L.J. at 280.

<sup>138</sup> *Id.* at 266.

Hospitals that perform organ transplants must maintain membership with the OPTN in order to receive access to organs from the OPTN/UNOS system and receive federal Medicare funding.<sup>139</sup> Thus, the OPTN can enforce its policies by denying membership and access to organs from its system to transplant centers that do not comply. The Secretary of HHS can support OPTN policies by cutting federal Medicare funding for transplant centers and OPOs that do not comply.<sup>140</sup> Because the OPTN has broad Congressional authority to set national allocation policies and the power to set policies that transplant centers in all 50 states must abide by, an OPTN policy against organ donor solicitations may be the most politically expedient solution to the issue. So far, the OPTN Board of Directors has adopted a statement opposing public solicitations of deceased organs and has established a committee to examine the issue in both the living and deceased contexts, but has not amended its allocation policies.<sup>141</sup>

It would appear that the OPTN has the authority to adopt a policy prohibiting its members from allowing patients to solicit organs. There are two potential ways to draft such a policy, both of which could apply to deceased donations. The first option would prohibit members from facilitating transplants for any recipient that has solicited, regardless of whether or not the recipient obtained a directed donation. The second possibility would be to only prohibit members from transplanting or procuring organs that were directed to the recipient as a result of a solicitation. To support either policy,

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<sup>139</sup> 42 C.F.R. § 482.45(b) (membership with the OPTN is a Medicare condition of participation for hospitals that perform organ transplants); 42 C.F.R. § 121.9(a) (1)(participation in Medicare is required in order to receive organs from the OPTN); *see supra* note 136 (the OPTN has authority to set national allocation policies).

<sup>140</sup> *See supra* notes 137, 140.

<sup>141</sup> UNOS News Bureau, *OPTN/UNOS Board of Directors Statement Regarding Solicitation of Deceased Donation*, <http://www.optn.org/news/newsDetail.asp?id=374> (Nov. 19, 2004); OPTN, <http://www.optn.org/members/committeesDetail.asp?ID=64> (last visited October 11, 2005) (the OPTN has created an ad hoc committee on public solicitation).

the OPTN and HHS would deny access to organs from the OPTN/UNOS system and Medicare funding to members that are in violation. However, neither policy is likely to pass a constitutional challenge because both policies infringe protected free speech.

**i. The Unconstitutional Condition Doctrine**

Under the unconstitutional condition doctrine, the government may not withhold valuable government benefits that would otherwise be available because an individual has exercised a constitutionally protected right, such as the right to free speech.<sup>142</sup> The government may not condition a benefit on the abstention from a protected right even if the individual has no fundamental right to receive the benefit.<sup>143</sup> For example, a state university cannot deny a non-tenured professor continued employment because he exercised his constitutional right to publicly criticize the university, even though the professor has no fundamental right to employment at the University.<sup>144</sup> The government may not use conditional benefits to indirectly restrict a constitutional right that it could not directly restrict.<sup>145</sup>

Of course, the government can selectively choose which programs to subsidize, and does not infringe a constitutional right merely by choosing not to subsidize the exercise of that right.<sup>146</sup> For example, in *Rust v. Sullivan*, the Supreme Court upheld a federal regulation that prohibited recipients of federal funds for family-planning services from providing counseling concerning the use of abortion as a method for family-planning.<sup>147</sup> The Supreme Court found that the government was not conditioning funds that would

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<sup>142</sup> *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

<sup>143</sup> *Id.* at 594-595.

<sup>144</sup> *Id.* at 587.

<sup>145</sup> *Id.*

<sup>146</sup> *Rust v. Sullivan*, 500 U.S. 173, 192 (1991).

<sup>147</sup> *Id.* at 179.

otherwise be available on the funding recipients forgoing a constitutional right; it was merely choosing to subsidize certain forms of counseling at the exclusion of others.<sup>148</sup>

However, government funding decisions based on abstentions from protected speech are only upheld in situations where the government is itself the speaker or has used private speakers to transmit information pertaining to its own program.<sup>149</sup> When the government distributes public funds to private entities to convey a governmental message, it may take appropriate steps to ensure that the message is not distorted by the grantee.<sup>150</sup> This was the case in *Rust*, because the Court characterized the recipients of the funding as entities chosen by the government to transmit the government's chosen family-planning message.<sup>151</sup>

**ii. Directing OPTN Members to Prohibit Solicitation Creates an Unconstitutional Condition**

In the case of an OPTN policy against its members facilitating transplants for any recipient that has solicited, the government would be acting through the OPTN to condition valuable government benefits that would otherwise be available to potential recipients, on the condition that potential recipients forgo their constitutional rights. Potential recipients would have to abstain from exercising their first amendment right to solicit organ donations in order to receive access to organs from the OPTN/UNOS system and transplantations from Medicare funded centers.<sup>152</sup> If constitutional, such a policy

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<sup>148</sup> *Id.*

<sup>149</sup> *Leg. Serv. Corp. v. Velaquez*, 531 U.S. 533, 541 (2001).

<sup>150</sup> *Id.* (quoting *Rosenberger v. Rector & Visitors of U. of Va.*, 515 U.S. 819, 833 (1995)).

<sup>151</sup> *Velaquez*, 531 U.S. at 541; *Rust v. Sullivan*, 500 U.S. 173.

<sup>152</sup> See discussion of the first amendment right to solicit *supra* Part II.1. A.

would allow the government to indirectly do what it cannot do directly: prohibit speech that solicits organ donations.<sup>153</sup>

Although transplant centers with membership in the OPTN may be characterized as private entities that the OPTN uses to transmit information about its own programs, it is not these centers that the OPTN would be forcing to forgo constitutional rights. Instead, the OPTN would prohibit potential recipients from exercising their constitutional rights, and these patients are neither government speakers nor entities used by the government to transmit information. Thus, an OPTN policy prohibiting its members from facilitating transplants for recipients that have solicited is unlikely to withstand constitutional challenge.

Similarly, in the case of the more narrow policy of prohibiting members from transplanting or procuring solicited organs, the government would be acting through the OPTN to condition valuable government benefits on the condition that potential recipients forgo their constitutional right to speech. The OPTN would be denying recipients the ability to receive transplantation of directed organs at Medicare funded centers that would otherwise be available, on the basis of whether or not the recipient has solicited.

On the other hand, recipients would not be directly penalized for exercising their right to solicit because they would still have access to non-solicited organs from the OPTN/UNOS system and transplantations of these organs at Medicare funded centers, regardless of whether they have ever solicited. Additionally, it is possible to argue that the speech itself is not being directly or indirectly regulated, because patients are not

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<sup>153</sup> *Id.*

coerced to forgo their constitutional right to solicit. Instead, they are denied a benefit that they may not have even if they remained silent.

However, the OPTN would still be conditioning benefits that would otherwise be available on whether the designated recipient has exercised his right of free speech. For each directed donation, members would have to determine whether the donation was solicited. If the named recipient did not solicit the donation, the transplantation could go forward. If the recipient did solicit, transplantation of the directed donation could not proceed. Thus, the OPTN would be denying the recipient a government benefit that would otherwise be available; transplantation at a Medicare funded hospital involving a directed organ, because that recipient had exercised a constitutional right.

Furthermore, this less restrictive policy cannot be defended on the grounds that transplant centers and OPOs are private entities used by the OPTN to transmit information concerning its own programs. This policy would affect the constitutional rights of potential recipients rather than OPTN members, and potential recipients are neither government speakers nor entities used by the government to transmit information. Thus, an OPTN policy prohibiting its members from transplanting solicited organs is also unlikely to withstand constitutional challenge.

**iii. The OPTN may be able to prohibit its members from facilitating donations directed toward solicitors on the basis of the relationship between the donor and the designated recipient.**

In contrast to an OPTN policy that focuses on the actions of the designated recipient, an OPTN policy against *donors* directing donations to solicitors, if carefully drafted, may withstand a constitutional challenge. This policy would state that member transplant centers and OPOs cannot allow deceased donors, or families of deceased

donors to make directed donations to individuals with whom the deceased donor has had no preexisting relationship with before the recipient's need for a transplant was first identified. This would prevent the allocation of organs to individuals whom the donor or donor family came into contact with solely for the purpose of facilitating an organ donation, without infringing the right to make directed donations to family members, friends, and others with whom the donor had previous emotional ties to.<sup>154</sup> The OPTN may be able to condition transplant center and OPO membership on compliance with such a policy. There is certainly a potential enforcement issue given that it may be difficult to define or discern a "preexisting relationship." But, it is clear that in cases of pure solicitation there is no "preexisting relationship." Thus, such a policy may effectively prevent directed donations that result from deceased organ solicitation.

This policy would likely not violate the unconstitutional condition doctrine because the OPTN would not be conditioning benefits on a recipient's exercise of the right to free speech.<sup>155</sup> Regardless of whether the patient solicited, he would still have access to organs from the OPTN/UNOS system and transplantations from Medicare funded centers for any organs received from the OPTN or from a directed donation made in the presence a preexisting relationship. The OPTN would not be directly or indirectly regulating protected speech because recipients who solicit would not lose any benefits that they otherwise would have otherwise had based on the solicitation.

Similarly, OPOs and transplant centers would make the distinction on the basis of whether there was a preexisting relationship, and not on whether the recipient exercised

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<sup>154</sup> One recent proposal would allow directed donations made within blood relationships and marriage but would require OPTN approval on a case by case basis for all other directed donations. Zink, *Examining the Potential Exploitation of UNOS Policies*, Am. J. Bioethics at 9-10.

<sup>155</sup> See *supra* text accompanying notes 143-152 (discussing the unconstitutional condition doctrine).

the constitutional right to free speech. Such a policy would not limit a recipient's right to engage in free speech. Instead, it would limit a donor's ability to direct a donation. A donor's right to direct a donation to a stranger can hardly be considered a valuable government benefit in the same way that access to organs from the OPTN system and access to federally funded transplant centers can be. For these reasons, such a policy would likely pass an unconstitutional condition challenge.

iv. **An OPTN policy preventing its members from facilitating deceased directed donations made in the absence of a preexisting relationship would not fatally conflict with state or federal law.**

Federal regulations and many state anatomical gift statutes expressly authorize directed organ donations from both living and deceased donors.<sup>156</sup> For example, the UAGA states that an anatomical gift may be made to “a designated individual for transplantation or therapy needed by that individual.”<sup>157</sup> Nonetheless, there would be no true conflict between these laws and an OPTN policy against member transplant centers and OPOs facilitating directed donations made in the absence of a preexisting relationship between the deceased donor and the designated recipient.

Federal regulations and state anatomical gift statutes that permit directed donation do not create any legal duty for transplant centers or OPOs to agree to facilitate any particular directed donation.<sup>158</sup> These laws specify what entities a donor may name as the donee of an anatomical gift, but do grant either the donor or the designated recipient the right to conscript transplant centers and OPOs into their services to effectuate the

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<sup>156</sup> See *supra* notes 15-16.

<sup>157</sup> Unif. Anatomical Gift Act § 6(a)(3).

<sup>158</sup> See discussion *supra* Part II.2 (A)-(B). But, if an OPO undertakes coordination of a directed donation, the directed recipient may have an enforceable right to receive such organ. See *Colavito v. NY Donor Network, Inc. et al.*, 2<sup>nd</sup> Cir (Feb 23, 2006).

gift.<sup>159</sup> A transplant center or OPO does not violate laws or regulations permitting directed donations by refusing to facilitate any particular directed donation. Therefore, transplant centers and OPOs would be able to comply with an OPTN policy prohibiting facilitation of directed donation in the absence of a preexisting relationship without violating federal or state laws that permit directed donations generally.

Under such a policy, the OPTN would be limiting the ability to direct a donation. This limitation may be appropriate and consistent with the legislative history; permitting directed donations to strangers was not the intention behind the UAGA directed donation provision. The drafters of the UAGA never contemplated directed donations arranged through solicitations and made in the absence of any preexisting relationship.<sup>160</sup> An OPTN policy prohibiting facilitation of deceased directed donation to strangers would only limit the right to direct a deceased donation in a way that the right was never intended to be exercised. Thus, it is unlikely that a court would find that such a policy conflicts with the letter or the purpose of federal regulations and state laws that permit directed donation.<sup>161</sup>

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<sup>159</sup> *Id.*

<sup>160</sup> *See supra* note 29.

<sup>161</sup> Nevertheless, even if there was a perceived conflict, this OPTN policy would likely be enforceable. Although federal regulations expressly permit directed donation and require the Secretary of HHS to approve all OPTN policies, this HHS final rule may be unconstitutional to the extent that it conflicts with OPTN allocation policies because Congress granted the OPTN and not HHS the authority to set allocation policies. *See* 42 C.F.R. § 121.4, 121.8(h); Chen, 49 Duke L.J. at 280, *supra* note 136. Also, given that such a policy would not conflict with the purpose of the regulation permitting directed donation, there is little reason to think the Secretary would not approve it. With regard to state law, if there was a conflict, the OPTN policy would preempt the state law through either conflict or field preemption to the extent that state laws permit directed donation in the absence of a preexisting relationship because Congress has authorized the OPTN to set national allocation policies under NOTA. *See supra* n. 136. NOTA was validly enacted under Congress's spending power and its power to regulate interstate commerce. *See* notes 136-141 *supra* and accompanying text; *but see* Chen, 49 Duke L.J. at 281-282 (arguing that courts are reluctant to find that a private organization's policies preempt state law and reluctant to find that a federal interest preempts and entire field of law).

e. **Legislatively Restricting Directed Donations**

A carefully drafted amendment to NOTA or to state anatomical gift statutes could effectively prevent directed donations to deceased organ solicitors and withstand a constitutional challenge. Such a restriction could be written to prohibit directed donation to an individual with whom the deceased donor has had no preexisting relationship with before the recipient's need for a transplant was first identified. This would prevent deceased directed donations to individuals with whom the donor or donor family came into contact with solely for the purpose of facilitating a transplant, without affecting directed donation to family members or friends.<sup>162</sup> Such a law might be challenged on the grounds of infringement of free speech, state/federal conflict of law principles, or substantive due process. However, neither the free speech argument nor a conflict of laws challenge is likely to be successful as discussed above. The substantive due process challenge merits a close look.

Generally, courts defer to legislatures and will only invalidate a law on substantive due process grounds if the law infringes a fundamental right.<sup>163</sup> If a right is not enumerated in the Constitution, the Supreme Court often will only consider it fundamental if it is deeply rooted in the nation's history and tradition.<sup>164</sup> An important factor for determining whether a right is rooted in tradition is how broadly the right can be defined.

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<sup>162</sup> It is possible to draft the law more broadly to prohibit all deceased directed donations. See Vt. Stat. Ann. tit. 18 § 5242(a), (d) (allowing only living donors to make a directed donation). However, such a law would prohibit even deceased directed donations to family members and friends, which may be undesirable as a policy matter.

<sup>163</sup> *U.S. v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>164</sup> *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

The right to direct an organ donation is not deeply rooted in the history and tradition of the nation. Traditionally at common law, courts have found that at most, one has only a quasi-property right in one's own tissues and only a limited right to direct burial and disposition in the body of a deceased family member.<sup>165</sup> Also, most courts have refused to apply the traditional legal frameworks of property and contract law to organ transplantation cases when there is an applicable statute that has balanced the moral and social issues.<sup>166</sup> Thus, the legal right to direct a donation as either a fundamental property or contract right is not likely to be considered deeply founded in our nation's history and tradition. It is statutory, and was created by state legislatures following the adoption of the UAGA in 1968.<sup>167</sup> And, in fact, at least one state expressly prohibits directed deceased donation.<sup>168</sup>

Of course, it may be possible characterize directed donation as a traditional right by more broadly defining it as the right to control the disposition of one's body materials or remains.<sup>169</sup> In *Brotherton v. Cleaveland*, the 6<sup>th</sup> Circuit and in *Newman v. Sathyavaglswaran*, the 9<sup>th</sup> Circuit found a fundamental right to control the final disposition of one's body that extended to property interests of possession and transfer, and which was protected by the due process clause of the fourteenth amendment.<sup>170</sup> Defined this broadly, such a constitutional right would seem to prevent legislatures from limiting one's ability to transfer an anatomical gift to an individual of one's choosing.

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<sup>165</sup> *Perry v. St. Francis Hosp.*, 886 F. Supp. 1551, 1563 (D. Kan. 1995). *But see* discussion of *Colavito*, *supra* at 42.

<sup>166</sup> *Wilson v. Adkins*, Ark. App. Div. 1 43, 48 (1997). *But see* discussion of *Colavito*, *supra* at 42 in which the 2<sup>nd</sup> Circuit raises the issue of whether property law may apply to organ donation.

<sup>167</sup> Unif. Anatomical Gift Act § 3 (1968) (amended 1987).

<sup>168</sup> *See Supra* note 14.

<sup>169</sup> *Venner v. State*, 30 Md. Spec. App. 599, 626 (1976).

<sup>170</sup> *Brotherton v. Cleaveland*, 923 F.2d 477, 482 (6<sup>th</sup> Cir. 1991); *Newman v. Sathyavaglswaran*, 287 F.3d 786, 796 (9<sup>th</sup> Cir. 2002).

Nevertheless, both the *Brotherton* and *Newman* cases related to a situation in which the state interfered with the rights of the next-of-kin by statutorily authorizing coroners to remove a deceased's corneas without consent or even providing the next-of-kin notice.<sup>171</sup> Thus, the more narrow reading of these holdings is simply that the state cannot violate the next-of-kin's property interest in a deceased's body by taking a body part without obtaining consent. Framed this way, the protected right seems to be a negative right to be free from interference with possession of property, not a positive right to demand that medical providers effectuate a transfer of property.

Although the Second Circuit in *Colavito v. New York Donor Network*, raises the question of whether the designated recipient of a directed donation has a property right in the directed organ, no court has found a fundamental legal right to transfer a body part to a specific person of one's choosing.<sup>172</sup> Defining the right to control the disposition of the body broadly enough to encompass such a right may have undesirable consequences. For example, one would be able to argue that an organ donor has a fundamental legal right to place racial restrictions on a donation so that only certain races or classes of people could be recipients. State laws such as the Florida statute that prohibits donors from placing discriminatory restrictions on potential recipients of an anatomical gift on the basis of race, color, religion, sex, national origin, age, physical handicap, health status, marital status, or economic status might be invalid.<sup>173</sup> A right to place such discriminatory

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<sup>171</sup> *Id* at 798.

<sup>172</sup> *Colavito v. New York Donor Network* (2nd Cir., February 23, 2006)(certifying questions back to the Court of Appeals of the State of New York including whether New York law vests directed donation recipients a property right in the directed organ).

<sup>173</sup> Fla. Stat. § 765.513(4) (2005). The UNOS board of directors supports such laws. See UNOS, *Bioethics White Paper on Directed Donation*, (April 1999), available at <http://www.unos.org/resources/bioethics.asp?index=10>.

restrictions on an organ donation is not traditional and has never been recognized as such at common law or in statute.<sup>174</sup>

Congress and the states adopted NOTA and the UAGA before patients were publicly soliciting directed donations, and legislators probably only contemplated deceased directed donations made to family members, close friends, or others with whom the donor had emotional ties.<sup>175</sup> Given this and the undesirable consequences of drawing the right more broadly, a court is likely to find that if there is a traditional legal right, it is defined only as the right to direct a donation to a family member or friend. Thus, even if the right to direct a deceased donation could be construed as rooted in the nation's history and tradition and therefore fundamental, the right to direct a donation to a stranger would likely fall outside of this right. Therefore, a federal or state law that prohibits directed donation in the absence of a preexisting relationship would not violate substantive due process and would withstand a constitutional challenge.

## V. **Conclusion**

Lawmakers and healthcare providers should continue to permit solicitations of directed donations from living organ donors because this practice will increase total organ donations without depriving any potential recipients of organs they otherwise would have received or compromising an established allocation system. In contrast, solicitations of directed donations from deceased donors should be restricted because such donations unjustifiably sacrifice medical utility and are inequitable in that they favor patients with “attractiveness,” wealth, and the ability to draw media attention. Public

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<sup>174</sup> There has never been a right to direct a donation to a class of people because statutes define directed donation as donation to a “designated individual.” Unif. Anatomical Gift Act § 6(a)(3).

<sup>175</sup> See *supra* note 29.

solicitations threaten to undermine the national system which is carefully established to equitably and efficiently allocate deceased organs.

An outright ban on deceased organ solicitations may not be desirable and is not likely to withstand a constitutional challenge because charitable solicitations are protected under the first amendment as free speech. However, intrusive organ solicitations for a directed donation can and should be subject to reasonable regulations, such as restrictions on the information contained in organ solicitations and the time, place, and manner in which solicitations are made. Additionally, transplant centers should carefully consider whether they wish to adopt a policy restricting transplants on recipients who solicit deceased organs. Organ Procurement Organizations should also carefully consider adoption of any policy refusing to facilitate deceased organ donations directed in the absence of a preexisting relationship. Most importantly, the Organ Procurement and Transplantation Network (OPTN) likely has Congressional authority to prevent member OPOs and transplant centers from facilitating deceased directed donations made in the absence of a preexisting relationship between the donor and the designated recipient; and this may be the most politically expedient solution to the issue. Finally, Congress and states have the power to enact a statutory ban on deceased directed donations made in the absence of a preexisting relationship. Lawmakers, UNOS and its member OPOs and Transplant Centers, as well as healthcare providers should consider all of these options to limit donors and donor families from directing deceased organ donations to solicitors. The integrity of the national organ allocation system as a mechanism to maximize utility and equity of a scarce resource and the thousands of people awaiting a fair chance at receiving life saving transplants depend on it.