

# A DEADLY DILEMMA: THE FAILURE OF NATIONS' ORGAN PROCUREMENT SYSTEMS AND POTENTIAL REFORM ALTERNATIVES<sup>1</sup>

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## I. INTRODUCTION

More than 80,000 people are currently awaiting life-saving transplants in the United States.<sup>2</sup> Of those waiting, approximately eighteen people die every day.<sup>3</sup> Only thirty-five to fifty percent of all potential donors consent to donation, resulting in numerous wasted organs.<sup>4</sup>

Robert Noel Test summarizes the true value and benefits of organ donation in his poem, *To Remember Me*:

The day will come when my body will lie upon a white sheet neatly tucked under four corners of mattress located in a hospital busily occupied with the living and the dying. At a certain moment a doctor will determine that my brain has ceased to function and that, for all intents and purposes, my life has stopped.

When that happens, do not attempt to instill artificial life into my body by the use of a machine. And don't call this my deathbed. Let it be called the Bed of Life, and let my body be taken from it to help others lead fuller lives.

Give my sight to the man who has never seen a sunrise, a baby's face or love in the eyes of a woman.

Give my blood to the teen-ager who was pulled from the wreckage of his car, so that he might live to see his grandchildren play.

Give my kidneys to one who depends on a machine to exist from week to week.

Take my bones, every muscle, every fiber and nerve in my body and find a way to make a crippled child walk.

Explore every corner of my brain. Take my cells, if necessary, and let them grow so that someday, a speechless boy will shout at the crack of a bat and a deaf girl will hear the sound of rain against her window.

Burn what is left of me and scatter the ashes to the winds to help the flowers grow.

If you bury something, let it be my faults, my weaknesses and all prejudice against my fellow man.

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<sup>1</sup> To my little sister, Megan, and everyone else who knows what it is like to wait...

<sup>2</sup> International Association for Organ Donation, *Newsroom*, at <http://www.iaod.org/newsroom-fact-sheets.htm> (last visited Feb. 4, 2004) [hereinafter *Newsroom*].

<sup>3</sup> *Id.*

<sup>4</sup> American Medical Association, *AMA testifies before Congress on organ donation motivation: Encourages study of financial incentives*, June 3, 2003, at <http://www.ama-assn.org/ama/pub/article/1616-7726.html> (last visited Jan. 24, 2004) [hereinafter *AMA testifies*].

Give my sins to the devil.

Give my soul to God.

If, by chance, you wish to remember me, do it with a kind deed or word to someone who needs you.

If you do all I have asked, I will live forever.<sup>5</sup>

All countries throughout the world vary in the way they procure organs, but they all have one thing in common: there is a fatal organ shortage because all the systems countries have imposed have failed. No procurement system in the world has been successful. Therefore, new procurement systems need to be implemented and tested, particularly financial incentives or a regulated organ market, to remedy these unnecessary and preventable deaths. This paper will explore the failures of current organ procurement systems as well as alternative reform systems. Part II provides a brief overview of the history of organ transplantation. Part III addresses the reasoning behind the shortage of organs. Part IV examines organ transplantation legislation in America, while Part V examines the varieties of legislation imposed abroad. Part VI discusses six alternative procurement systems, including: (1) express donation; (2) presumed consent; (3) conscription; (4) routine requests; (5) financial incentives; and (6) an organ market. Of these systems, four have been tried and failed, but two (financial incentives and an organ market) should be considered for trial.<sup>6</sup> In addition, the advantages and disadvantages of the two proposed systems are examined at length, as are the effect of the black market on organ donation, the different types of organ sales, and the enhancement of donation through international cooperation.

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<sup>5</sup> Monique C. Gorsline & Rachele L.K. Johnson, *The United States System of Organ Donation, the International Solution, and the Cadaveric Organ Donor Act: "And the Winner is..."*, 20 J. Corp. L. 5, 50 (1995) (quoting Robert Noel Test, To Remember Me).

<sup>6</sup> See generally DAVID L. KASERMAN & A.H. BARNETT, THE U.S. ORGAN PROCUREMENT SYSTEM, A PRESCRIPTION FOR REFORM (Marvin H. Kusters ed., American Enterprise Institute for Public Policy Research 2002) [hereinafter KASERMAN & BARNETT].

## II. A BRIEF HISTORY OF ORGAN TRANSPLANTATION

Doctor Christiaan Barnard conducted the very first human heart transplant in South Africa on December 2, 1967.<sup>7</sup> This historic moment captured the attention of the entire world, and to this day organ transplantation remains a topic that produces much literature and debate.<sup>8</sup> Today, hearts, kidneys, livers, pancreas, lungs, and other organs are transplanted on a regular basis.<sup>9</sup> Organ transplantation has become an important treatment tool to save lives.<sup>10</sup> Because successful transplants provide a virtual rebirth and allow patients to return to full and productive lives, they stand out as “one of the most significant medical advances of the past few decades.”<sup>11</sup> Organ transplantation offers the most dramatic life-saving tool and promotes the notion that through such heroic measures, we can overcome death and prolong precious life.<sup>12</sup> Of course, with organ transplantation comes the concept of organ procurement, which creates a huge public policy dilemma because of the persistent shortage of organs.<sup>13</sup> Since the advent of organ transplantation, legislative and regulatory actions across the world have been adopted to increase organ donation.<sup>14</sup> However, to this day all proposals have “glaring[ly]” failed; actually, the situation has continued to worsen.<sup>15</sup> The following are examples of legislative attempts across the world. Many prominent countries, including: Austria, France, Spain, Italy, Finland, Greece, Brazil, Belgium, Norway, and Sweden, have enacted presumed consent laws.<sup>16</sup> China has

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<sup>7</sup> GEORGE W. MILLER, *MORAL AND ETHICAL IMPLICATIONS OF HUMAN ORGAN TRANSPLANTS* 3 (Charles C. Thomas 1971).

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

<sup>9</sup> KASERMAN & BARNETT, *supra* note 6, at 1-2.

<sup>10</sup> *Id.* at 1.

<sup>11</sup> *Id.* at 2.

<sup>12</sup> NORA MACHADO, *USING THE BODIES OF THE DEAD: LEGAL, ETHICAL AND ORGANISATIONAL DIMENSIONS OF ORGAN TRANSPLANTATION* 5 (Dartmouth Publishing Company Limited, Ashgate Publishing Company Limited 2003) (1998).

<sup>13</sup> KASERMAN & BARNETT, *supra* note 6, at 2.

<sup>14</sup> *Id.* at 3.

<sup>15</sup> *Id.*

<sup>16</sup> Troy R. Jensen, *Organ Procurement: Various Legal Systems and their Effectiveness*, 22 *Hous. J. Int'l L.* 555, 559 (2000). *See also* KASERMAN & BARNETT, *supra* note 6, at 46.

harvested organs from executed prisoners since 1984.<sup>17</sup> For religious reasons, Japan and Iran do not conduct organ transplants but rather import organs from other countries.<sup>18</sup> The United States passed the National Organ Transplant Act (NOTA) in 1984, containing a voluntary donation policy as well as a prohibition on the sale of human organs.<sup>19</sup> Consequently, there are no well-regulated commercial markets.<sup>20</sup>

### III. THE SHORTAGE OF ORGANS

Symbolically, organ transplantation is such a powerful metaphor because of the true metamorphosis that takes place.<sup>21</sup> Transforming a deceased human being's body part into an implant for a living human being "implies the crossing of many boundaries, not only physiological, but also cultural, legal and ethical ones."<sup>22</sup> The issues that arise from organ transplantation limit the number of organs available and in turn increase the length of waiting time, which can have serious negative consequences.<sup>23</sup> From 1988 to 1995, the waiting time for a kidney increased 141%.<sup>24</sup> Increased waiting time has at least four substantial consequences: (1) patient suffering is prolonged; (2) expense of keeping patients alive is considerably increased; (3) patient health deteriorates and patients are less able to withstand an operation's physical stress as time passes; and (4) many patients die because they cannot get an organ within a reasonable time frame.<sup>25</sup> Statistics show that in 1997, a person waited on average 477 days for

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<sup>17</sup> Jensen, *supra* note 16, at 558.

<sup>18</sup> *Id.* at 569.

<sup>19</sup> *Id.* at 570. See discussion *infra* Part VI.A.

<sup>20</sup> *Id.* at 572.

<sup>21</sup> MACHADO, *supra* note 12, at 3.

<sup>22</sup> *Id.*

<sup>23</sup> KASERMAN & BARNETT, *supra* note 6, at 33.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

a liver;<sup>26</sup> imagine spending a year and a half of your life wondering if you are going to live a long and happy life, or if you are going to die waiting!

Indeed, an abundant supply of potential organ donors exists, but they do not donate for a variety of reasons.<sup>27</sup> In fact, one conservative review suggests that organ supply could more than double if all potential donations were available for harvest.<sup>28</sup> Consider that the following usable organs and tissue are available from a single person:

- Brain tissue
- 1 jaw bone for facial reconstruction
- Bone marrow to treat leukemia and other diseases
- 1 heart
- 4 separate valves
- 2 lungs
- 1 liver
- 2 kidneys
- Small and large intestines
- 206 separate bones, including long bones of the arms and legs for use in limb reconstruction and ribs used in spinal fusion and facial repair
- About 27 ligaments and cartilage used in rebuilding ankles, knee, hips elbows and shoulder joints
- 2 corneas: to restore sight
- 2 each of the inner ear, the hammer, anvil and stirrup: to ameliorate some forms of deafness
- 1 heart pericardium (can be used to cover the brain after surgery)
- 1 stomach (transplanted experimentally without much success)
- 1 pancreas (can restore insulin production in diabetes)
- 2 hip joints
- Over 600,000 miles of blood vessels, mostly veins that can be transplanted to re-route blood around blockages
- Approximately 20 square feet of skin which can be used as temporary cover for burn injuries<sup>29</sup>

Transplant recipients benefit from organ donation as do families of the deceased.<sup>30</sup> A

Spanish study and a study by the Partnership for Organ Donation showed that eighty-five to eighty-six percent of donor family members surveyed one year after the death of a loved one felt

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<sup>26</sup> *Id.*

<sup>27</sup> David Kaserman, *Markets for Organs: Myths and Misconceptions*, 18 J. Contemp. Health L. & Pol'y 567, 567-568 (2002) [hereinafter Kaserman].

<sup>28</sup> *Id.* at 568.

<sup>29</sup> MACHADO, *supra* note 12, at 2.

<sup>30</sup> Health and Quality of Life, *Meeting the Organ Shortage: Current Status and Strategies for Improvement of Organ Donation*, 1999, at <http://www.social.coe.int/en/qoflife/publi/donation.htm> (last visited Feb. 4, 2004) [hereinafter *Meeting the Organ Shortage*].

that the donation resulted as one positive outcome of the death, and eighty-nine to one hundred percent would donate again.<sup>31</sup> Of those family members who refused donation, thirty percent would have changed their mind.<sup>32</sup>

While an overwhelming majority of Americans approve of organ donation, reasons for not donating vary from religious purposes to personal reasons.<sup>33</sup> Although public opinion surveys indicate an overall willingness to authorize donation, most still refuse when actually confronted with the situation.<sup>34</sup> Grief or psychological and emotional stress may make the decision extremely difficult.<sup>35</sup> Deciding to donate means contemplating death in advance, something the young do not think about; and most useful organs come from the unexpected deaths of young accident victims.<sup>36</sup> Another long-standing myth is that the medical profession may terminate an organ donor's life early or not try as hard to save the donor's life so that doctors may harvest the donor's organs.<sup>37</sup> However, a different medical team conducts the transplant operation, as compared to the team that saves lives, and these doctors have no incentive to terminate life early.<sup>38</sup> Families of brain-dead patients also may not believe they are really dead because they might still have color, a heartbeat, or functioning systems.<sup>39</sup>

Another common concern that families have is that organ donation may interfere with funeral arrangements.<sup>40</sup> However, the funeral industry refutes this argument by stating that no matter what type of donation, customary burial arrangements are not interfered with, and open-casket

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Laurel R. Siegel, *Re-engineering the Laws of Organ Transplantation*, 49 *Emory L.J.* 917, 944 (2000).

<sup>34</sup> Melissa N. Kurnit, *Organ Donation in the United States: Can We Learn from Successes Abroad?*, 17 *B.C. Int'l & Comp. L. Rev.* 405, 429 (1994).

<sup>35</sup> *Id.*

<sup>36</sup> Siegel, *supra* note 33, at 944.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 944-945.

<sup>39</sup> Kurnit, *supra* note 34, at 429.

<sup>40</sup> Kelly Ann Keller, *The Bed of Life: A Discussion of Organ Donation, Its Legal and Scientific History, and a Recommended "Opt-Out" Solution to Organ Scarcity*, 32 *Stetson L. Rev.* 855, 878 (2003).

funerals are still possible.<sup>41</sup> The donation of hearts, lungs, kidneys, livers and pancreases actually makes embalming a body much easier.<sup>42</sup> When skin is donated, it comes from parts of the body that are clothed during a funeral service, such as the stomach, or the skin can be painted with a solution that restores the area.<sup>43</sup> Only every other rib is harvested during rib donation, so that the chest remains firm; large and small bones are typically replaced with prosthetics.<sup>44</sup> Be assured that there will be no complications surrounding the proper funeral and burial of an organ donor.

The media also has a negative impact on the supply of organs.<sup>45</sup> Transplant professionals feel that adverse publicity tarnishes the image of transplantation and therefore generates more refusals to consent.<sup>46</sup> In 1980, a United Kingdom prime-time current affairs program questioned the validity of brain-death criteria, and “it took 15 months for donor referral rates to recover.”<sup>47</sup> Due in part to such negative publicity, Belgium and France, known for traditionally high organ donation rates, have experienced decreased support.<sup>48</sup> A French story indicated a failure fully to inform family members of procurement procedures, and Belgium publicized the sizeable number of nonresidents on national transplant waiting lists.<sup>49</sup> In the United States, organ donation receives a bad reputation when celebrities, most notably Mickey Mantle, receive organs days after joining a waiting list, while others have waited for months, maybe even years.<sup>50</sup> When media coverage, which shapes the public’s perception of organ donation, publishes stories like

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<sup>41</sup> *Id.*

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

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Meeting the Organ Shortage*, *supra* note 30.

<sup>46</sup> *Id.*

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

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Siegel, *supra* note 33, at 945. *See also* KASERMAN & BARNETT, *supra* note 6 at 2.

this, people lose faith in the system.<sup>51</sup> Most recently, organ trafficking rumors (mainly false) have caused substantial damage to altruistic attitudes throughout the world because they embody very potent fears.<sup>52</sup>

Religious views also greatly impact attitudes towards organ donation.<sup>53</sup> However, most established religions accept donation.<sup>54</sup> While the Amish believe that God created the human body and is therefore the one who heals it, there is nothing in the Bible that forbids them from implementing modern medical services, such as surgery, blood transfusions, or hospitalizations.<sup>55</sup> Donation is highly supported by the Assemblies of God, the Pentecostal Church, and the Christian Church.<sup>56</sup> Baptists and Catholics support donation as an act of charity and love but leave the decision up to each individual.<sup>57</sup> Buddhists place high value on acts of compassion but believe donation is of individual conscience.<sup>58</sup> In addition, they honor those who donate because they believe donation is a noble act.<sup>59</sup> In 1982, the Episcopal Church passed a resolution that recognized the life-giving benefits and encouraged donation as part of the ministry to others.<sup>60</sup> The Greek Orthodox Church does not oppose donation as long as it is used to better human life.<sup>61</sup> Hindus, Evangelicals, Pentecostals, and Mormons are not prohibited by religious law, and the decision is left up to the individual.<sup>62</sup> The Muslims strongly believe in the

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<sup>51</sup> Siegel, *supra* note 33, at 945.

<sup>52</sup> *Meeting the Organ Shortage*, *supra* note 30.

<sup>53</sup> Jennifer M. Krueger, *Life Coming Bravely Out of Death: Organ Donation Legislation Across European Countries*, 18 Wis. Int'l L.J. 321, 335 (2000).

<sup>54</sup> *Id.* at 336.

<sup>55</sup> The Living Bank, *Religious Views on Organ/Tissue Donation and Transplantation*, at <http://www.livingbank.org/religiousviews.doc> (last visited March 25, 2004) [hereinafter *Religious Views*].

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Krueger, *supra* note 53, at 336.

<sup>60</sup> *Religious Views*, *supra* note 55.

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

<sup>62</sup> *Id.*

notion of saving human lives.<sup>63</sup> It is often assumed that Jehovah's Witnesses are opposed to donation because they do not believe in blood transfusions.<sup>64</sup> However, donations are accepted if the blood is removed from the organs or tissues before being transplanted; it would not be acceptable to receive blood during the organ recovery.<sup>65</sup> All four branches of Judaism encourage donation.<sup>66</sup> Although the burial of the dead should not be deferred or their bodies mutilated, organ donation is considered an exception.<sup>67</sup> In fact, Orthodox Rabbi Moses Tendler stated that it is obligatory to donate if one is in the position to save another's life, even if the donor never knows whose life he or she saved.<sup>68</sup> Lutherans describe donation as sacrificial love for neighbors in need.<sup>69</sup> In 1995 during their General Assembly, Presbyterians wrote for strong support of organ donations and encouraged members and friends to sign donor cards.<sup>70</sup> In 1984 and 1992, the United Methodist Church released donation policy statements encouraging Christians to sign donor cards and encourage pastoral-care persons to explore donation options in conversations with patients and their relatives.<sup>71</sup>

On the other hand, donation is not accepted by some religions.<sup>72</sup> Gypsies tend to oppose donation in connection with their beliefs about the afterlife: the soul retraces its steps for one year after death and therefore must remain intact so the soul can maintain its physical shape.<sup>73</sup>

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Religious Views, supra* note 55.

<sup>67</sup> Krueger, *supra* note 53, at 336.

<sup>68</sup> *Religious Views, supra* note 55.

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

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *See generally, Id.*

<sup>73</sup> *Id.*

The Shinto oppose donation because it injures the body, and Japanese are often worried about damaging the “itai.”<sup>74</sup>

#### IV. LEGISLATION IN AMERICA

In 1968, the Uniform Anatomical Gift Act (UAGA) was implemented in response to the need to reform transplantation and donation.<sup>75</sup> The UAGA was approved at the National Conference of Commissioners, followed by the American Medical Association (AMA) and the American Bar Association (ABA).<sup>76</sup> All fifty states and the District of Columbia adopted some form of it within five years.<sup>77</sup> Under the act, individuals have “a legal right to determine the disposition of their bodies,” which they can state in a number of ways.<sup>78</sup> Wills, other documents, or a signed driver’s license with two witnesses suffice as declarations.<sup>79</sup> The UAGA defined, clarified, and assisted the consent process by eliminating states’ inconsistencies.<sup>80</sup> However, despite the UAGA’s good intentions, doctors, procurement organizations, and hospitals generally reject these gifts without receiving approval from the decedent’s family, because participant harvesters do not want to be subject to liability.<sup>81</sup>

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<sup>74</sup> *Religious Views*, *supra* note 55. The “itai” is defined as the relationship between the bereaved and the dead. *Id.*

<sup>75</sup> Gorsline & Johnson, *supra* note 5, at 13. The UAGA authorizes the use of a deceased’s human body parts as gifts for specified purposes. PHILLIP G. WILLIAMS, LIFE FROM DEATH: THE ORGAN AND TISSUE DONATION AND TRANSPLANTATION SOURCE BOOK WITH FORMS 11, in *Contemporary Public Health Issues Volume 2* (The P. Gaines Co. 1989).

<sup>76</sup> Kurnit, *supra* note 34, at 410. The general purpose of the original UAGA was to make anatomical gift laws of the states more uniform. WILLIAMS, *supra* note 75, at 14. While most state variations are inconsequential, differences in definitions did occur. *Id.* For example, while donors had to be at least eighteen-years-old and of sound mind in most states, Alaska and Nebraska required donors to be at least nineteen years old and of sound mind. *Id.* Six states (Connecticut, Delaware, Minnesota, North Dakota, Utah, and Wisconsin) allowed minors to be donors with the written permission of their parents. *Id.* at 14-15.

<sup>77</sup> Kurnit, *supra* note 34, at 410.

<sup>78</sup> Gorsline & Johnson, *supra* note 5, at 14.

<sup>79</sup> *Id.* at 15.

<sup>80</sup> Kurnit, *supra* note 34, at 411.

<sup>81</sup> Gorsline & Johnson, *supra* note 5, at 15-16. Case law reveals a variety of actions brought against various entities. *See also*, Brotherton v. Cleveland, 923 F.2d 477, 484 (6th Cir. 1991) (where the Sixth Circuit Court of Appeals found that widow had legitimate claim of entitlement in husband’s body, including his corneas, where coroner had removed them without widow’s consent); Sattler v. Northwest Tissue Center, 42 P.3d 440, 446 (Wash. Ct. App. 2002) (precluding summary judgment where genuine issues of material fact exist in action against procuring organization where decedent’s surviving spouse claims he did not give consent to donation of wife’s corneas); Perry

In 1977, the United Network for Organ Sharing (UNOS), originated by the South-Eastern Organ Procurement Foundation, developed the first computerized system that matched donors with candidates.<sup>82</sup> UNOS has many tasks: increasing public awareness, maintaining the wait list, coordinating matches of donors and candidates, collecting and reporting transplantation data, providing a forum for policy creation to maximize the use of organs, establishing training and experience criteria for physicians, providing professional education, and producing transplantation information to everyone.<sup>83</sup> UNOS is under contract with the United States Department of Health and Human Services' Health Services & Resources Administration (HRSA) and links all transplant centers and organ procurement organizations to a centralized computer system.<sup>84</sup> Transplant centers evaluate referrals from other doctors by conducting tests, considering the physical and mental health of the patient, and viewing his or her social support system.<sup>85</sup> If the patient is deemed a transplant candidate, his or her name goes into the pool of waiting patients, but the patient does not yet achieve rank.<sup>86</sup> When an organ becomes available, a transplant coordinator from a procurement organization accesses the UNOS network via computer and enters donor characteristics, which are then compared to the patients in the pool.<sup>87</sup> The computer ranks patients from the pool according to organ allocation policies with each

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v. Saint Francis Hosp. & Med. Ctr., 886 F.Supp 1551, 1562 (D. Kan. 1995) (precluding summary judgment in favor of hospital where genuine issue of material fact exists after hospital allegedly removed the eyes and bones of decedent when family only consented to the removal of bone marrow and the corneas); Ramirez v. Health Partners of Southern Ariz., 972 P.2d 658, 669 (granting summary judgment in favor of hospital sued for allegedly harvesting bone which exceeded family members' consent to donation); Rahman v. Mayo Clinic, 578 N.W.2d 802, 807 (Minn. Ct. App. 1998) (granting summary judgment in favor of clinic sued for allegedly retaining decedent's pelvic block against mother's wishes).

<sup>82</sup> United Network for Organ Sharing, *Newsroom Fact Sheets*, at <http://www.unos.org/inTheNews/factSheets.asp> (last visited March 8, 2004) [hereinafter *Newsroom Fact Sheets*].

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

procured organ.<sup>88</sup> Blood type, tissue match, waiting time, distance between the donor and the patient, and the immune status are all considered.<sup>89</sup> For livers, hearts, and intestines, the patient's medical urgency is additionally considered.<sup>90</sup> The organ is then offered to the patient ranked first on the list; however, the top patient may not receive the organ.<sup>91</sup> Patients must be available immediately, willing, and healthy enough to undergo a major surgery.<sup>92</sup> As of March 16, 2004, the UNOS wait lists stands as follows:

57,053 registrations for a kidney transplant  
17,249 registrations for a liver transplant  
1,559 registrations for a pancreas transplant  
2,394 registrations for a kidney-pancreas transplant  
184 registrations for an intestine transplant  
3,460 registrations for a heart transplant  
185 registrations for a heart-lung transplant  
3,909 registrations for a lung transplant  
84,001 TOTAL PATIENTS<sup>93</sup>

(The number of total patients is less than the sum of all registrations because some patients are in need of more than one organ.)<sup>94</sup> Nonetheless, these figures represent an astronomical number of patients in tremendous need.

The 1968 UAGA's good-faith efforts to increase the supply of organs were not as effective as Congress had hoped, so it created a new national health policy, the National Organ Transplant Act (NOTA), in 1984.<sup>95</sup> NOTA was an effort to establish a more comprehensive network of organ procurement while raising public awareness of the great need.<sup>96</sup> NOTA implemented a

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<sup>88</sup> *Newsroom Fact Sheets*, *supra* note 82.

<sup>89</sup> *Id.*

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

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

<sup>92</sup> *Id.*

<sup>93</sup> The Living Bank, *Critical Data: The National Waiting List*, May 16, 2004, at <http://www.livingbank.org/criticaldata.html> (last visited March 24, 2004) [hereinafter *Critical Data*].

<sup>94</sup> *Id.*

<sup>95</sup> Gorsline & Johnson, *supra* note 5, at 16. The act itself, Public Law 98-507, states that it was enacted "to provide for the establishment of the Task Force on Organ Transplantation and the Organ Procurement and Transplantation Network, to authorize financial assistance for organ procurement organizations, and for other purposes." WILLIAMS, *supra* note 75, at 215.

<sup>96</sup> Kurnit, *supra* note 34, at 412.

number of tactics in Congress's second failed attempt at increasing organ supply.<sup>97</sup> These tactics included creating a procurement system (the National Organ Procurement and Transplantation Network), creating funding through federal grants to organ procurement agencies, implementing a national scientific registry of transplant recipients, establishing the Task Force on Organ Transplantation (Task Force), and prohibiting the purchase or sale of organs.<sup>98</sup> While Congress had good intentions, the organ shortage remains.<sup>99</sup>

The federal government passed the Omnibus Budget Reconciliation Act (OBRA) of 1986 in an effort to make all states uniform in requiring some kind of request, whether they had state statutes or not.<sup>100</sup> While the OBRA supersedes state law, states are allowed to establish harsher requirements; however, some states have not established any at all.<sup>101</sup> This response to the Task Force report in 1986 required routine inquiry protocols by hospitals with the minimum being to inform the patient or family member of the donation opportunity, to allow hospital personnel to waive this requirement when uncomfortable with the situation, and to identify possible donors and notify organ procurement agencies of these potentials.<sup>102</sup>

In 1987, a revamped Uniform Anatomical Gift Act was issued in a fourth effort to increase organ supply.<sup>103</sup> This UAGA prohibits the sale of organs, decreases the formal requirements on donation intent, eliminates the two-witness requirement, describes methods for refusing gifts,

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<sup>97</sup> Gorsline & Johnson, *supra* note 5, at 19.

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

<sup>99</sup> *Id.* See also Shelby E. Robinson, *Organs for Sale? An Analysis of Proposed Systems for Compensating Organ Providers*, 70 U. Colo. L. Rev. 1019, 1030 (1999).

<sup>100</sup> Kurnit, *supra* note 34, at 417.

<sup>101</sup> *Id.* See also Kathleen S. Andersen and Daniel M. Fox, *The Impact of Routine Inquiry laws on Organ Donation*, 7 Health Affairs, 65, 67 (1988). New York and Oregon requires that each request and its outcome be recorded on the death certificate and in the medical record. *Id.* at 68. New York additionally requires hospitals to submit certificates of request in addition to death certificates. *Id.* On the other hand, Utah, South Dakota, and South Carolina considered but did not pass required request laws in 1986 and 1987, and Wyoming and Idaho have not taken action at all. *Id.*

<sup>102</sup> Kurnit, *supra* note 34, at 417.

<sup>103</sup> Gorsline & Johnson, *supra* note 5, at 16.

and gives the donor's intent priority over any family objections.<sup>104</sup> This model also includes required request provisions and routine inquiry.<sup>105</sup>

Various problems in the United States that hinder organ donation have been noted in a recent study conducted by the Hastings Center.<sup>106</sup> Problems include but are not limited to failure to sign intent to donate directives, failure of police and emergency personnel to find directives at the site of accidents, public uncertainty about organ recovery, failure to approach family members systematically, and failure to obtain sufficient informed consent from the decedent's family.<sup>107</sup> In sum, "major flaws . . . include the lack of incentive for people to donate their organs and for attending physicians or nurses to perform the unpleasant task of soliciting organs from mourning families."<sup>108</sup> All organ procurers essentially have to rely on is "the appeal to the donors' (and their families') sense of community, altruism, and benevolence."<sup>109</sup>

## V. LEGISLATION ABROAD

The Council of Europe, comprised of forty members, attempts to harmonize members' laws by promoting the adoption of common practices and standards through bringing together ministers, parliamentarians, international organizations, and government experts to share their experiences and expertise with one another.<sup>110</sup> The Council of Europe commonly holds conventions on the health and human rights of the public.<sup>111</sup> The Council has made many efforts to coordinate organ donation and has narrowed the problem down to four main concerns: (1) ensuring the good quality of the organs; (2) promoting donation and reducing the black markets;

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<sup>104</sup> *Id.* at 16-17.

<sup>105</sup> Kurmit, *supra* note 34, at 418.

<sup>106</sup> Gorsline & Johnson, *supra* note 5, at 31.

<sup>107</sup> *Id.* at 31-32.

<sup>108</sup> *Id.* at 35.

<sup>109</sup> *Id.*

<sup>110</sup> Krueger, *supra* note 53, at 329.

<sup>111</sup> *Id.* at 330. The 160 European conventions this body has held have produced over 10,000 bilateral treaties, which assist in reforming and unifying Member States' legislation. *Id.*

(3) ensuring the fair allocation of the organs; and (4) funding research for future improvement.<sup>112</sup>

The Council of Europe continues attempting to coordinate organ donation, but has not yet implemented a system including all of its members.<sup>113</sup>

The European Union (EU) promotes social progress, a solid economy, and unity amongst its European member states.<sup>114</sup> The ability to coordinate organ donation legislation is important because the EU only has powers the European Union Constitution explicitly granted it.<sup>115</sup> Members demand that they retain their own identities, so the Union's powers to govern are viewed narrowly.<sup>116</sup> Therefore, the Union is constrained in passing legislation because it is not allowed to violate any individual state's laws in the process, making it extremely difficult to coordinate organ donation laws.<sup>117</sup>

There is now a "strong international consensus" that until alternatives such as xenotransplantation become available, every effort shall be made to maximize organ procurement.<sup>118</sup> However, the member states of the Council of Europe and the EU contradicted their efforts by prohibiting the use of body parts for financial gain in Articles 20 and 21 of the Convention on Human Rights and Biomedicine.<sup>119</sup> This statement was an attempt to eliminate the possibility of coercion and organ trafficking, which pose serious ethical dilemmas.<sup>120</sup> The statement also eliminates the possibility of a lawful and regulated market, which, if properly

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<sup>112</sup> Krueger, *supra* note 53, at 330.

<sup>113</sup> *Id.* at 328.

<sup>114</sup> *Id.* at 327.

<sup>115</sup> *Id.*

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

<sup>117</sup> *Id.* at 328.

<sup>118</sup> *Meeting the Organ Shortage*, *supra* note 30. Xenotransplantation is defined as the use of animal organs for transplant into human beings. DAVID PRICE, LEGAL AND ETHICAL ASPECTS OF ORGAN TRANSPLANTATION 5 (Cambridge University Press 2000).

<sup>119</sup> Health and Quality of Life, *International Figures on Organ Donation and Transplantation*, 1999, at <http://www.social.coe.int/en/qoflife/publi/steercom.htm> (last visited Feb. 4, 2004) [hereinafter Health and Quality of Life]. Article 20 states "The human body and its parts shall not, as such, give rise [to] financial gain or comparable advantage." *Id.* Article 21 merely states: "Organ and tissue trafficking shall be prohibited." *Id.*

<sup>120</sup> *Id.*

controlled, would help safely procure organs of better quality.<sup>121</sup> The World Health Organization (WHO) also condemned trading human organs by asking member nations to oppose organ trafficking.<sup>122</sup>

Uniformity is lacking in the worldwide legal situation of organ transplantation.<sup>123</sup> In fact, in some countries, including: Germany, Iceland, The Netherlands, Ireland, Malta, and Liechtenstein, no legal provisions exist whatsoever.<sup>124</sup> Where legislation does exist, substantial discrepancies are found, including the regulation of living and postmortem organ donation, organ trade and penalization, definitions of brain death, and cadaveric organ donation.<sup>125</sup>

Organ trading systems differ substantially throughout the world regarding centralization (working together with other countries in a regulated organ exchange effort).<sup>126</sup> Some reasons for these variations include the following factors: (1) scope (such as regional, national, or supranational); (2) number of people served; (3) type of management (such as by professionals, health administrators, or a mixture of both); (4) structure (such as non-profit foundations, state agencies, or private agencies); (5) a centralized or decentralized organization; (6) responsibilities and objectives (such as organ sharing, exchange, and procurement); and (7) activities (such as organs, tissues, bone marrow, or some combination).<sup>127</sup> Centralization is a key issue in a country's optimal goals for organ procurement. Eurotransplant, a highly centralized organization, consists of Austria, Belgium, Germany, Luxemburg, Slovenia, and the Netherlands.<sup>128</sup> This international collaborative foundation oversees more than 118 million

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<sup>121</sup> *Meeting the Organ Shortage*, *supra* note 30.

<sup>122</sup> Jensen, *supra* note 16, at 557.

<sup>123</sup> Gorsline & Johnson, *supra* note 5, at 21.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> MACHADO, *supra* note 12, at 66.

<sup>127</sup> *Meeting the Organ Shortage*, *supra* note 30

<sup>128</sup> MACHADO, *supra* note 12, at 66. *See also* Eurotransplant, *Key international role*, at [www.eurotransplant.nl/index.php?id=about](http://www.eurotransplant.nl/index.php?id=about) (last visited March 27, 2004) [hereinafter *Key international role*].

inhabitants.<sup>129</sup> More than 75 transplant hospitals are participating, and the joint international wait list is approximately 15,000 patients.<sup>130</sup> Eurotransplant's goal is to optimize the use of available organs by combining the countries' efforts.<sup>131</sup> Spain, on the other hand, features a decentralized system that procures and transplants most organs locally.<sup>132</sup> In between with mixed centralization are the United States (UNOS) and the Scandinavian countries (Scandiatransplant).<sup>133</sup> There is no single, universal model because of the struggle between two morally sound pro-and-con arguments: focusing on the "local community" versus considering "those who may be geographically disadvantaged."<sup>134</sup> While the universal goal is to optimize procurement of organs, no one system predominates.<sup>135</sup>

## VI. ALTERNATIVE PROCUREMENT SYSTEMS

While worldwide literature on organ procurement is extremely broad, a review of it offers at least six alternative policies: (1) express donation; (2) presumed consent; (3) conscription; (4) routine requests; (5) financial incentives; and (6) an organ market.<sup>136</sup> Of these six policies, four have already been used throughout the world and have done nothing to better the situation.<sup>137</sup> However, two policies (financial incentives and an organ market) have not been tested.<sup>138</sup>

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<sup>129</sup> *Key international role*, *supra* note 128.

<sup>130</sup> Eurotransplant, *History*, at [www.eurotransplant.nl/index.php?id=history](http://www.eurotransplant.nl/index.php?id=history) (last visited March 27, 2004) [hereinafter *History*].

<sup>131</sup> Eurotransplant, *Eurotransplant aims*, at [www.eurotransplant.nl/index.php?id=mission\\_statement](http://www.eurotransplant.nl/index.php?id=mission_statement) (last visited March 27, 2004) [hereinafter *Eurotransplant aims*]. The Eurotransplant mission statement defines Eurotransplant as "a service organization for transplant candidates through the collaborating transplant programs within the organization." *Id.* The Foundation's main goals include achieving optimal use of available donor organs, securing an objective selection system, assessing importance of facts with the most influence on transplant results, supporting donor procurement in an effect to increase the organ supply, conducting scientific research to further improve transplant results, and promoting, supporting and coordinating organ transplantation. *Id.*

<sup>132</sup> MACHADO, *supra* note 12, at 66.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 75.

<sup>135</sup> *Id.*

<sup>136</sup> KASERMAN & BARNETT, *supra* note 6, at 42-44.

<sup>137</sup> *See generally* KASERMAN & BARNETT, *supra* note 6.

<sup>138</sup> *Id.* at 51-52.

Analysis of these two systems shows encouraging possibilities and a possible direction for countries throughout the world.<sup>139</sup>

The United States National Conference of Commissioners on Uniform State Laws found these main competing interests in a decedent's body: (1) the deceased's wishes during his lifetime; (2) the wishes of the next of kin or surviving spouse; (3) the state's interest in determining the cause of death in crime or violence cases; (4) the ability to determine the cause of death where private legal rights are dependent upon it; and (5) medical education, therapy, research, and transplantation.<sup>140</sup> Attempts at balancing these interests have produced a variety of procurement systems, which are discussed below.

#### A. *Express Donation*

First, express donation, a method used in the United States, is founded on the concept of altruism.<sup>141</sup> Under this theory, organ sales are illegal and therefore there is no incentive for the doctors to request the organs, nor is there incentive for the donors to supply them, other than the selflessness of the donor.<sup>142</sup> Our current laws are codified in the National Organ Transplant Act (NOTA), making it a felony to sell or buy organs for transplantation purposes.<sup>143</sup> Many writers in the field of organ donation assume that our current altruistic system was chosen by a conscious, formal, policy selection process.<sup>144</sup> Rather, instead of being chosen by thorough evaluation and selection between competing choices, express donation was more of a "historical

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<sup>139</sup> See generally KASERMAN & BARNETT, *supra* note 6.

<sup>140</sup> PRICE, *supra* note 117, at 121.

<sup>141</sup> KASERMAN & BARNETT, *supra* note 6, at 44.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* Title III Section 301 of NOTA states: "It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce." WILLIAMS, *supra* note 75, at 222. Any person found violating this law could be fined up to \$50,000 or imprisoned up to 5 years, or both. *Id.*

<sup>144</sup> Kaserman, *supra* note 27, at 577.

accident.”<sup>145</sup> The earliest transplants were performed with live donors’ kidneys; cadaveric donation was not yet technologically advanced.<sup>146</sup> In essence, candidates would bring their donor with them to the hospital, and if he or she did not have a donor, there was no transplant operation.<sup>147</sup> Therefore, no waiting lists or shortages existed.<sup>148</sup> In this system, payment was unnecessary for cooperation because the kinship between donors and recipients was considered sufficient motivation.<sup>149</sup> If kinship was not enough, payment could be arranged behind closed doors.<sup>150</sup> In sum, altruism made sense in this setting because the system solely relied on living donors; however, with the advancement of medical technology came cadaveric organ donation and improved transplant success.<sup>151</sup> Waiting lists emerged in the 1970s when transplant candidates began hoping for cadaveric organs.<sup>152</sup> Despite drastic changes in the organ donation situation, the early-inherited altruism policy has never been systematically evaluated or even questioned.<sup>153</sup>

The altruistic system was secured without any serious inquiry regarding its effectiveness when NOTA was passed in 1984.<sup>154</sup> The act was actually passed in response to a specific situation: a physician attempted to broker live donor kidneys in an effort to alleviate the growing organ shortage.<sup>155</sup> The medical community was outraged and rebutted by adamantly defending

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

<sup>146</sup> *Id.*

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

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

<sup>149</sup> *Id.*

<sup>150</sup> Kaserman, *supra* note 27, at 577-578.

<sup>151</sup> *Id.* at 578.

<sup>152</sup> *Id.*

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

<sup>154</sup> *Id.* at 579.

<sup>155</sup> *Id.* See discussion *infra* Part VI.F.3.

altruism, which created political pressure that ultimately forced Congress to pass this legislation.<sup>156</sup>

In sum, while the situation has worsened, the policy remains the same as it was in the beginning: the “root cause” of our organ shortage.<sup>157</sup> It is important to note that this system has failed every year “for at least the past thirty years,” and expected waiting times for organs have increased from months to years.<sup>158</sup> The list continues to grow, but the amount of organs available does not.<sup>159</sup> Repeated miniscule changes, such as increasing spending to promote donor education, have subsequently failed, and extreme necessity calls for extreme reform.<sup>160</sup>

### *B. Presumed Consent*

Second, presumed consent provides that there is no objection to the removal of organs unless the potential donor or a family member objects.<sup>161</sup> This is a weak alternative for increased transplantation because it allows the donor or family to refuse organ donation merely by stating an objection.<sup>162</sup> It appears that presumed consent would not be acceptable to the American public because “silence mean[ing] consent is no longer universally accepted and is considered particularly loathsome.”<sup>163</sup> Presumed consent countries include: France, Spain, Italy, Belgium, Finland, Greece, Norway, and Sweden.<sup>164</sup>

Every country with presumed consent laws has its own standards. France passed the Law of France No. 76-1181, also known as the Caillavet Law, in 1976 after the French legislature

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<sup>156</sup> Kaserman, *supra* note 27, at 579.

<sup>157</sup> *Id.*

<sup>158</sup> KASERMAN & BARNETT, *supra* note 6, at 44-45.

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

<sup>160</sup> *Id.* at 45.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> Gorsline & Johnson, *supra* note 5, at 35.

<sup>164</sup> KASERMAN & BARNETT, *supra* note 6, at 46.

acknowledged a growing kidney shortage.<sup>165</sup> This law provides that organs can be removed from one who has not made known his refusal, but organ removal must be authorized by the legal representative of a minor or mentally defective person.<sup>166</sup> The Council of State, France's highest judicial advisory body, decided that a donor's family cannot stop the removal of the donor's organs where he or she did not object while alive.<sup>167</sup> Despite this decision, if families so object, physicians will rarely remove the organs.<sup>168</sup> Belgium has a central registry accessible to all transplant centers where objections can be registered and is connected to information campaigns that educate the public as well as health care professionals.<sup>169</sup> Belgium, like France, allows the removal of organs without familial consent, but Belgian doctors are allowed to inform families of the objection option and ask if they object.<sup>170</sup>

### *C. Conscription*

Third, conscription is simply “the strongest form of presumed consent,” where at best even the donor cannot object to organ removal.<sup>171</sup> James F. Childress was vice chair of the National Task Force on Organ Transplantation and has served on the UNOS Ethics Committee and the UNOS Board of Directors.<sup>172</sup> Childress, known for his alternative organ procurement policy ethics discussions, mentions four moral principles that should govern biomedical ethics: (1) respect for persons, their choices, and actions; (2) beneficence and maximizing good consequences; (3) one's obligation not to inflict harm (nonmaleficance); and (4) justice and the

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<sup>165</sup> Kurnit, *supra* note 34, at 421.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 422.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 422-423.

<sup>170</sup> *Id.* at 423.

<sup>171</sup> Gorsline & Johnson, *supra* note 6, at 47.

<sup>172</sup> University of Virginia Faculty, *Home Page for James F. Childress*, at <http://www.law.virginia.edu/lawweb/faculty.nsf/FHPbI/1840> (last visited March 7, 2004).

fair distribution of benefits and burdens.<sup>173</sup> Childress concludes that conscription violates individual autonomy and respect for persons' principles and is therefore ethically unacceptable.<sup>174</sup>

Indeed, while conscription could substantially increase organ collection rates, it receives the least support.<sup>175</sup> Where presumed consent with the right to object is highly problematic, surely no choice at all would meet extreme opposition.<sup>176</sup> In addition, the U.S. Constitution prohibits taking a person's property, which would include organs, without compensation.<sup>177</sup> Chaos could result where families with strong opposition refuse to take their loved ones off life support until the organs can no longer be used or even refuse to take terminally ill family members to the hospital.<sup>178</sup> These dodging strategies, accompanied with the costs of enforcement, "could make matters even worse."<sup>179</sup>

Austrian law provides that doctors may remove organs any time the deceased has not made their objection known, without consulting family members, and can even ignore a family member's objection.<sup>180</sup> The objection must also be in writing to be legal and, unlike in France, the doctor has no duty at all to reasonably try to find such writings.<sup>181</sup> As a result, Austria has twice the procurement rate the United States does.<sup>182</sup> However, opponents argue that the harsh laws are not the reason for the success, because if this were the case, procurement rates in

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<sup>173</sup> KASERMAN & BARNETT, *supra* note 6, at 70.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 48.

<sup>177</sup> *Id.* at 47.

<sup>178</sup> *Id.* at 48.

<sup>179</sup> KASERMAN & BARNETT, *supra* note 6, at 48.

<sup>180</sup> David E. Jefferies, *The Body as Commodity: The Use of Markets to Cure the Organ Deficit*, 5 *Ind. J. Global Legal Stud.* 621, 639 (1998).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* Austria retrieves sixty cadaveric kidneys per every one million persons. *Id.*

Austria would exceed other countries in all organ categories.<sup>183</sup> This is not the case; compared to France and Belgium (other presumed consent countries), Austria only has slightly higher liver harvest rates and actually has lower heart harvest rates.<sup>184</sup> Still, with the most stringent of requirements and a slightly increased harvest rate in some categories, Austria experiences an organ deficit despite its harsh presumed consent laws.<sup>185</sup>

#### *D. Routine Requests*

Fourth, routine requests require everyone to make his or her wishes known at some point, and then all preferences are recorded with a central registry.<sup>186</sup> It is not necessary for hospital personnel to seek permission from the donor or to consult the decedent's family during a time of mourning; this results in organ donation being "more widely known and accepted in society" because everyone must decide whether to donate.<sup>187</sup> While this theory seems like a good idea, almost ten years of data do not indicate any substantial impact on the situation, nor does it indicate that this policy has the capacity to eliminate our shortage.<sup>188</sup> In a similar sense, required referral provides that hospitals must notify associated procurement organizations of all deaths.<sup>189</sup> While this policy has deleted all failure to identify potential donors, it has not had any significant effect on organ collection.<sup>190</sup>

#### *E. Financial Incentives*

A fifth alternative procurement system is the use of financial incentives.<sup>191</sup> Unlike

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> KASERMAN & BARNETT, *supra* note 6, at 47.

<sup>186</sup> *Id.* at 48.

<sup>187</sup> *Id.* at 49.

<sup>188</sup> *Id.* By 1992, forty-six states had some form of routine request policy, generally done by requiring drivers to indicate their willingness to donate by marking the organ donor box. *Id.* Tracking the effectiveness of this policy has shown no substantial impact. *Id.*

<sup>189</sup> KASERMAN & BARNETT, *supra* note 6, at 49.

<sup>190</sup> *Id.* at 49-50.

<sup>191</sup> *Id.* at 50.

the previously mentioned systems, instead of alleviating the “failure-to-ask problem,” the compensation approach directly asks organ donors to agree by choice.<sup>192</sup> The appeals of altruism and human kindness can still apply, with some financial payment or compensation in addition.<sup>193</sup> Studies actually show that compensation has fairly widespread support among American citizens.<sup>194</sup> In a United Network for Organ Sharing survey, fifty-two percent of Americans were in favor of compensation, only five percent had reservations, and a miniscule two percent considered financial compensation “immoral or unethical.”<sup>195</sup> While no effective trials or tests have taken place, support for compensation has been evident since 1991, when a member of the medical community, Thomas Peters, produced an article in the Journal of the American Medical Association (JAMA) arguing for a sensitively offered compensation rate of \$1,000 per donor.<sup>196</sup> In 1994, the Council on Ethical and Judicial Affairs of the American Medical Association (AMA) created a pilot program that would evaluate the impact financial incentives had on organ supply, but the program was never implemented.<sup>197</sup>

In June 2003, members of the AMA testified before Congress regarding organ donation motivation and encouraged the study of financial incentives.<sup>198</sup> The AMA listed a number of possible motivations, including: future contracts allowing a tax credit of up to \$10,000 for the estate of the deceased donor, funeral expenses reimbursement, medals of honor, direct payment, and charitable donations.<sup>199</sup> The AMA hopes that this study will help it learn what motivates

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<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> KASERMAN & BARNETT, *supra* note 6, at 50.

<sup>196</sup> *Id.* at 50 51.

<sup>197</sup> *Id.* at 51.

<sup>198</sup> American Medical Association, *AMA Testifies Before Congress on Organ Donation Motivation*, June 3, 2003, at <http://www.ama-assn.org/ama/pub/article/1616-7726.html> (last visited Jan. 21, 2004) [hereinafter *AMA Testifies*].

<sup>199</sup> *Id.*

donors in an effort to increase organ supply.<sup>200</sup> However, the AMA does note that before this pilot study is implemented a few considerations should first be met: the population where the study is to take place should be consulted in advance and advice should be solicited; protocols regarding time frames, design, objectives, and strategies should be made available to the public and approved by authoritative bodies (such as the Institutional Review Boards); incentives should remain at the lowest level that would still increase organ donation; payment should not be part of this study; and incentives should not lead to the purchase of organs.<sup>201</sup> Needless to say, such an authoritative and respected association urging the financial incentives options truly shows what an appropriate option it is.

Other possible incentives include college education benefits or death benefit payments.<sup>202</sup> Dr. Thomas G. Peters proposed a pilot program in which UNOS would offer \$1,000 to the family of organ donors, a sum the family could refuse.<sup>203</sup> In these situations, the incentive would not be offered until the donor was declared brain dead, and the incentive would not be paid until after the harvest of the organ or organs.<sup>204</sup> This token offer would not violate the notion of altruism because \$1,000 is not enough to be coercive to grieving families.<sup>205</sup> While financial incentives would also involve a change in laws, this death benefits system does not involve the kind of compensation that Congress intended to prohibit by implementing NOTA's prohibition on organ sales, and therefore death benefits are not necessarily precluded.<sup>206</sup>

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<sup>200</sup> *Id.*

<sup>201</sup> American Medical Association, *E-2.151 Cadaveric Organ Donation: Encouraging the Study of Motivation*, at <http://www.ama-assn.org/ama/pub/category/10827.html> (last visited March 8, 2004).

<sup>202</sup> Robinson, *supra* note 99, at 1038.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 1039.

## F. *An Organ Market*

### 1. Introduction

The sixth system, a lawfully regulated organ market, has never been tested; however, much has been written in favor of this option. As noted earlier, NOTA, sponsored by U.S. Senator Al Gore, criminalized organ selling and purchasing.<sup>207</sup> While this seemingly harmless act was a valiant attempt at promoting altruism, prohibiting the use of the body as a commodity, and preventing exploitation and abuse of the system, these benefits were not accurately weighed “against the thousands of Americans dying on waiting lists who were sacrificed for these ideals.”<sup>208</sup> Within the parameters of this law, there will never be enough organs.<sup>209</sup> “Like it or not, our world is driven not by a common brotherhood or uninhibited desire to promote welfare of a fellow human, but by other motivations.”<sup>210</sup> As for the body being treated as a commodity, why not? Individuals can sell almost anything else legally so long as it can reproduce, including reproductive tissues and blood plasma.<sup>211</sup> These regulated systems have worked well and proved to be quite beneficial; they could be used as a leading example in the start of a free market. In essence, the possibility of exploitation is “overestimated.”<sup>212</sup> The United States’ attempt at the prohibition of alcohol is a prime example: discrimination, corruption, and exploitation are greatest in the realm of a black market, preventing capitalism from “equalizing certain barriers.”<sup>213</sup>

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<sup>207</sup> Michael Davis, *Market for Human Organs: How Much is that Kidney in the Window?*, THE VANDERBILT TORCH, February 13, 2002, at 1. See also WILLIAMS, *supra* note 75, at 222.

<sup>208</sup> Davis, *supra* note 207, at 1.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 7.

<sup>213</sup> *Id.* See discussion *infra* Part VI.F.5.a.

## 2. The Market Process

A minimum of five groups would be seriously affected by an organ market: (1) current and potential transplant candidates; (2) actual and potential organ donors and their families; (3) hospitals, physicians, and other transplant caregivers; (4) The United Network for Organ Sharing, the Organ Procurement and Transplantation Network, and other organ procurement organizations; and (5) taxpayers and those who finance patient care.<sup>214</sup> First, the organ supplier (potential donor or his or her surviving relatives) would be offered a market-determined price, which would fluctuate depending on supply and demand.<sup>215</sup> Price flexibility would eliminate surpluses or shortages automatically.<sup>216</sup> Organ procurement firms would then remove the organs at death and sell them to transplant centers that have put in an organ order.<sup>217</sup> In turn, the centers would include the price paid to the firm in the operation bill, with the resale price being the price paid to the donor plus the firm's collection and distribution cost.<sup>218</sup> From here, the center could allocate the organs in "precisely the same fashion they are allocated today" under the guidelines of the UNOS.<sup>219</sup> The firms acquiring the organs for sale would presumably operate competitively on a for-profit basis, resulting in powerful market incentives to create and use the best strategies in finding potential donors and encouraging them to donate.<sup>220</sup> Procurement agencies currently operate on a nonprofit basis, and while they may work diligently, it is doubtful they could match the performance of the competitive for-profit firms.<sup>221</sup>

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<sup>214</sup> KASERMAN & BARNETT, *supra* note 6, at 59-60.

<sup>215</sup> *Id.* at 52.

<sup>216</sup> *Id.* at 53.

<sup>217</sup> *Id.* at 52.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> KASERMAN & BARNETT, *supra* note 6, at 54.

<sup>221</sup> *Id.*

The procurement agencies would act as middlemen.<sup>222</sup> This middleman will use market incentives in order to obtain organs, and regulation of this entity will ensure rights are not violated.<sup>223</sup> The entity would have a valid license to purchase organs from willing organ sellers; only it would be able to buy organs.<sup>224</sup> The entity would also be the only source from which a patient could obtain organs, except in cases of altruistic gifts from one living donor to another.<sup>225</sup> Willing individuals would contract with the procurement agency allowing for the removal of his or her organs for a monetary fee.<sup>226</sup> Following the death of the contracting individual, the organs would be removed and the data would enter a central registry computer network in order to match the procured organs with potential donees.<sup>227</sup> The organs would be distributed accordingly, with distribution determined on need-based criteria, not monetary gain.<sup>228</sup> This theory would not allow the wealthy to outbid others, thus eliminating black market tendencies.<sup>229</sup>

### 3. Market Support

The human organ market debate is “emotionally charged” and often misunderstood, and therefore the proposal must be clarified.<sup>230</sup> Advocates do not propose allowing agents to bargain for organs on street corners or stand in hospitals waiting to badger the families of the recently deceased.<sup>231</sup> There would be no auction where desperate people bid against each other.<sup>232</sup> Instead of using prices to distribute organs, prices would be used merely to collect organs.<sup>233</sup>

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<sup>222</sup> Jefferies, *supra* note 180, at 646.

<sup>223</sup> *Id.* at 646-647.

<sup>224</sup> *Id.* at 647.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 648.

<sup>228</sup> Jefferies, *supra* note 180, at 648.

<sup>229</sup> *Id.*

<sup>230</sup> KASERMAN & BARNETT, *supra* note 6, at 123.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

Numerous proposals have been made and debates launched over the legalization of an organ market. Public awareness of the contemplated sale of organs began in 1983, when H. Barry Jacobs created the International Kidney Exchange Ltd, in which an indigent Third World resident would set a price for a kidney, Jacobs would sell it and collect a brokerage fee.<sup>234</sup> While this idea initially generated tremendous hostility,<sup>235</sup> more reasonable proposals have been made. In June 1998, the International Forum for Transplant Ethics, including physicians from the United States, England, Canada, and Oman, proposed that trade should not be banned, but regulated.<sup>236</sup> Reasons for regulation include the fact that the rich can play dangerous sports for pleasure and work dangerous jobs for high pay, so the poor should be able to take lesser risks in selling their kidneys (arguing that kidney removals have an extremely low medical risk) for even larger rewards than pleasure or money, such as saving a family member's life or removing themselves from poverty.<sup>237</sup> Doctors also argued that exploitation does not occur with the legal sale but from the abuse that occurs from desperately wanted goods being made illegal, and a central purchasing system would oversee the sales as well as counsel, screen, and provide other related services.<sup>238</sup> Regarding altruism, their argument is that if it is satisfactory for a father to give his child a kidney, it should be acceptable for him to sell his kidney to pay for a life-saving operation for his child.<sup>239</sup>

#### 4. Market Opposition

Prominent international bodies such as the Council of Europe, the Transplantation Society, the World Health Organization, and the World Health Assembly view commodification

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<sup>234</sup> Robinson, *supra* note 99, at 1036.

<sup>235</sup> *Id.*

<sup>236</sup> Virginia Baskerville, *Panel Encourages Debate on Legalizing Kidney Sales*, July 15, 1998, at <http://www.eamospromotions.co.uk/uk.html> (last visited Feb. 4, 2004).

<sup>237</sup> *Id.* See discussion *infra* Part VI.F.4.a.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

of body parts as “unacceptable.”<sup>240</sup> Italy was the first jurisdiction to regulate it in 1969, and an overwhelming number of countries have followed its lead.<sup>241</sup> The World Medical Association issued a statement condemning the purchase and sale of organs in 1985 and again in 2000.<sup>242</sup> Opposition arguments vary from moral and ethical notions to practical and procedural objections.<sup>243</sup> This portion of the comment discusses the following arguments: (1) organ sales subject organ vendors to harm; (2) sales would be damaging to altruism and social solidarity; (3) vendors’ consent would be invalid; (4) vendors would be coerced into selling their organs; (5) vendors would be exploited; and (6) there would be abuse of the system.<sup>244</sup>

a. Excessive Harm to Organ Vendors

Those who oppose organ sale argue that it is wrong because it subjects organ vendors to risk and pain; it is harmful.<sup>245</sup> If performed under good conditions, organ removal is not terribly dangerous.<sup>246</sup> In fact, studies show a mortality rate after kidney removal of about 0.03%, which could be reduced even more by carefully choosing donors and taking thorough prophylactic measures.<sup>247</sup> The best way to avoid harm to vendors is also to accept and regulate organ sale instead of criminalizing it and driving sales underground.<sup>248</sup> This argument is based on previous debates regarding the prohibition of drugs, abortion, and prostitution.<sup>249</sup> Next, paying for organ donation does not make it any more dangerous than unpaid donation; the mere fact of payment is

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<sup>240</sup> AUSTEN GARWOOD-GOWERS, *LIVING DONOR ORGAN TRANSPLANTATION: KEY LEGAL AND ETHICAL ISSUES* 167 (Dartmouth Publishing Company Limited, Ashgate Publishing Company 1999).

<sup>241</sup> *Id.* at 167-168.

<sup>242</sup> STEPHEN WILKINSON, *BODIES FOR SALE: ETHICS AND EXPLOITATION IN THE HUMAN BODY TRADE* 104-105 (Routledge 2003).

<sup>243</sup> *See generally Id.*

<sup>244</sup> *See generally Id.*

<sup>245</sup> *Id.* at 107.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> WILKINSON, *supra* note 242, at 108.

<sup>249</sup> *Id.*

irrelevant in this sense.<sup>250</sup> In addition, with a mortality rate estimated at 0.03%, the harm factor is considerably less for a kidney donation than numerous dangerous and high-risk occupations, such as: mining, construction work, or deep sea diving.<sup>251</sup> For these reasons, the harm argument must fail.

#### b. The Damage of Altruism and Social Solidarity

Altruism is defined as “acting out of disinterested concern for the well-being of others.”<sup>252</sup> Acting beneficently and promoting others’ welfare is inherently good and should be contrasted with bad motivations such as selfishness.<sup>253</sup> Altruism has positive effects on individuals as well as a society, and certainly a society with more altruistic acts would be superior.<sup>254</sup> The blatant conclusion here, though, is that altruism alone has failed miserably at producing enough organs.<sup>255</sup> Paid and unpaid donation could actually peacefully coexist, and therefore organ sale may not reduce the amount of altruism in the world.<sup>256</sup> Indeed, in the United Kingdom (U.K.) where the free blood donation service is extremely successful, altruism is a strong argument.<sup>257</sup> As for successful free donation, there is no “substantial pre-existing system to be undermined.”<sup>258</sup> Even if promoting altruism is good, it does not justify the killing of patients who need transplants or depriving the vendors of money they so desperately need.<sup>259</sup>

#### c. The Organ Vendor’s Consent Would be Invalid

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<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 110.

<sup>253</sup> *Id.*

<sup>254</sup> WILKINSON, *supra* note 242, at 110.

<sup>255</sup> *Id.* at 113.

<sup>256</sup> *Id.* at 112.

<sup>257</sup> *Id.* at 133.

<sup>258</sup> *Id.* at 113.

<sup>259</sup> *Id.* at 115.

Three crucial elements must be present for consent to be considered valid: information, competence, and voluntariness.<sup>260</sup> The main issue in organ sales is voluntariness versus financial gain.<sup>261</sup> The opposition argues that financial incentives persuade people to do things they would not voluntarily do; however, this still does not create a consent problem.<sup>262</sup> This is the whole point: to encourage people to donate who would not otherwise.<sup>263</sup> If consent problems arose every time someone was encouraged financially, then these problems would be “endemic.”<sup>264</sup> Consent problems could arise in instances such as India’s black market, where there is undue influence against one’s autonomy and freedom.<sup>265</sup> However, legalizing the sale of organs would most likely decrease if not eliminate this Indian black market coercion.<sup>266</sup> People still have the choice to pass up the money; autonomy is defined by the ability to make a choice.<sup>267</sup>

#### d. Organ Vendors Would Be Coerced into Selling their Organs

As mentioned earlier, there are some cases in which individuals are coerced, by threats of violence or death, into selling their organs.<sup>268</sup> “Coercion worries are by no means confined to commercial transplantation,” making it hard to make a coercion argument that does not entail the condemnation of not only sale but also free donation.<sup>269</sup> A properly regulated commercial market would not involve any more coercion than free donation does.<sup>270</sup> Coercive sales could also be screened out by decriminalizing organ sale and implementing a regulatory body.<sup>271</sup> A prime example is the U.K.’s Unrelated Live Transplant Regulatory Authority (ULTRA), which

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<sup>260</sup> WILKINSON, *supra* note 242, at 116.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 117.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 117-118. See discussion *infra* Part VI.F.5.a.

<sup>266</sup> See generally Kaserman, *supra* note 27. See discussion *infra* Part VI.F.5.a.

<sup>267</sup> WILKINSON, *supra* note 242, at 120.

<sup>268</sup> *Id.* at 126.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 133.

<sup>271</sup> *Id.* at 126.

requires that doctors explain in-depth the risks and procedures, and a qualified person thoroughly interviews both the donor and the recipient separately to ensure there is no coercion and everything is understood.<sup>272</sup> While the U.K. uses this process to screen out inducement cases, certainly this regulation would be appropriate in a commercial market.<sup>273</sup>

e. Organ Vendors Would be Exploited

Exploitation is “the single most important and widely deployed moral concept in the body commodification debate.”<sup>274</sup> Many commercial practices, in addition to organ sale, such as prostitution and paid surrogacy, have been subject to attack by this moral concept.<sup>275</sup> Exploitation, in this sense, would occur when organ purchasers wrongfully take advantage of organ sellers (mainly the poor).<sup>276</sup> However, exploitation in organ sales could be eliminated by one small gesture: setting a minimum fee.<sup>277</sup> The purchasers would not be able to take unfair advantage of the poor and many benefits could result for some of the poorest people worldwide.<sup>278</sup> Exploitation is not only limited to the sale of organs, it also occurs in any event in which treatment is unfair.<sup>279</sup> Common situations, such as roadside vehicle-repair services or emergency-room doctor care, could be considered exploitative if customers were overcharged or received unsatisfactory service.<sup>280</sup> The key element is the unfairness imposed; setting a minimum fee would neutralize the exploitation by eliminating unfairness.<sup>281</sup>

f. Practical and Procedural Objections

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<sup>272</sup> *Id.* at 126-127.

<sup>273</sup> WILKINSON, *supra* note 242, at 127.

<sup>274</sup> *Id.* at 1. Exploitation is defined as deriving personal benefit from taking advantage of the misfortune of another. *Id.* at 130.

<sup>275</sup> *Id.* at 1.

<sup>276</sup> *Id.* at 130.

<sup>277</sup> *Id.* at 131.

<sup>278</sup> WILKINSON, *supra* note 242, at 131.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at 131-132.

The opposition believes compensation could be wasted when organs are not suitable for transplantation, especially in a futures market since many cadaver organs are not suitable for transplant.<sup>282</sup> Wasting compensation could be avoided, however, by conducting extensive tests to ensure the organs would be suitable for transplantation.<sup>283</sup> In addition, organ buyers could reserve payment until the person died and the organs were determined transplantable.<sup>284</sup> Another argument is that the organs would be of poorer quality; for example, persons with health, alcohol, or drug problems will be those most likely to be willing to sell their organs.<sup>285</sup> Again, extensive testing to determine the quality of organs and to prohibit the sale of low-quality organs is a solution.<sup>286</sup> Abuse of the system has also posed a dilemma: organ sellers could be tempted to try to sell their organs more than once by using different names.<sup>287</sup> However, a centralized system used worldwide would remedy this abuse.<sup>288</sup>

## 5. Types of Organ Sales

### a. The Black Market

This form of organ sale is certainly the most disturbing.<sup>289</sup> Markets are a place to trade commodities, and when the government bans goods being traded (or the sale of organs in this case), the supplies of products are limited, the prices are high, and the demand is even higher.<sup>290</sup> Several countries, including India, Israel, Brazil, and the Philippines, have reported stolen body parts from living hospital patients and cadavers.<sup>291</sup> India's black market is infamously known for

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<sup>282</sup> Robinson, *supra* note 99, at 1043.

<sup>283</sup> *Id.* at 1047.

<sup>284</sup> *Id.* at 1047-1048.

<sup>285</sup> *Id.* at 1043.

<sup>286</sup> *Id.* at 1048.

<sup>287</sup> *Id.* at 1044.

<sup>288</sup> Robinson, *supra* note 99, at 1044.

<sup>289</sup> WILKINSON, *supra* note 242, at 101.

<sup>290</sup> MaoSheng Liu & PeiDa Guo, *The Black Market and Health*, at <http://68.198.125.9:8383/elfrank/ECO/studentwork> (last visited Feb. 4, 2004).

<sup>291</sup> WILKINSON, *supra* note 242, at 101.

the sale of kidneys, although organ sale was made illegal in 1995.<sup>292</sup> Live donors sell their kidneys for less than \$2,000, “a bargain for a rich American or European, but a sizeable sum considered from the perspective of a slum dweller living in poverty.”<sup>293</sup> Amritsar (northern India), a major center for organ trade, is where local government colludes with traffickers, and victims are subject to torture sometimes if they do not comply.<sup>294</sup> Also, moneylenders have reportedly forced debt-ridden people into selling organs.<sup>295</sup> Consent issues include coercion, misleading, under-informing, and being forced by poverty to surrender kidneys.<sup>296</sup> However, India is not alone; organ trafficking from Moldova (eastern Europe) to Israel through Turkey is extensive.<sup>297</sup>

Much can be learned from the alcohol Prohibition era from 1919 to 1933 in the United States.<sup>298</sup> After the government banned exporting, importing, producing, and selling alcohol, underground trading of alcohol began, resulting in the increase of crime and violence.<sup>299</sup> Gangs became involved in the sale and benefited richly, and, as with any money-making business, the great profit created competition.<sup>300</sup> Obviously, the gang members showed a blatant disregard for the laws of the nation and did whatever was necessary to get rid of their competition.<sup>301</sup>

With the sale of alcohol already illegal, sales were no longer limited to adults only, and prices skyrocketed with such great demand while the safety and quality of the alcohol diminished.<sup>302</sup> People secretly manufactured alcohol in their homes, and without the assistance

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<sup>292</sup> *Id.* at 105.

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> WILKINSON, *supra* note 242, at 105.

<sup>298</sup> Liu & Guo, *supra* note 290.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

and inspection by the government, the number of deaths caused by alcohol poisoning increased dramatically.<sup>303</sup> It was not until the government repealed Prohibition that the black market finally disappeared.<sup>304</sup> With the forbidding of organ sales in every nation in the world, similar to the forbidding of alcohol sales, a black market has erupted.<sup>305</sup> While the rumors of events occurring as a result of the black market are terrifying, a possible solution to destroy the black market is to legalize the sale of organs and increase the supply, as was accomplished with the legalization of alcohol sales.<sup>306</sup>

b. Commercial Market of a Deceased's Organs

Cadaver organs (taken from a deceased donor) are the largest source of organs.<sup>307</sup> These donors have to be dead, and issues arise because definitions of death differ. In addition, while someone may be deceased, they may artificially appear to still be alive, which creates uncertainty for the family members.<sup>308</sup> The Uniform Determination of Death Act recognizes two determinations of death: (1) when circulatory and respiratory functions cease; and (2) when the brain ceases to function.<sup>309</sup> Although the brain dies, the person may still appear to be alive; however, the body cannot function as a whole and will perish without some means of life support.<sup>310</sup> These distinctions are important when it comes to the donation of organs. A brain-dead donor's organs can be maintained artificially for hours or days if necessary before being harvested, thus increasing the opportunity for acceptable donation organs.<sup>311</sup>

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<sup>303</sup> *Id.*

<sup>304</sup> Liu & Guo, *supra* note 290.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> Keller, *supra* note 40, at 873.

<sup>308</sup> *Id.*

<sup>309</sup> *Id.* at 874.

<sup>310</sup> *Id.* at 875-876.

<sup>311</sup> *Id.* at 877.

On the other hand, when the respiratory and circulatory functions cease, there are two scenarios: (1) a controlled setting where the donor is terminally ill and the decision is made to turn off the life support; (2) an uncontrolled setting, such as when the donor goes into cardiac arrest during surgery and dies.<sup>312</sup> In the first scenario, organ donation is premeditated and can be carried out in a regulated and planned procedure.<sup>313</sup> In the second instance, events may be chaotic and rushed, leaving the physician with barely any time to organize an organ donation.<sup>314</sup>

In either scenario, the organs must be harvested immediately because the organs will die soon after the blood stops circulating and the heart stops beating.<sup>315</sup> This small window inhibits the opportunity to arrange for donation,<sup>316</sup> but if the donor had already sold his or her organs during his or her lifetime, the only step left in organizing the donation would be to find a suitable donee. The process of inquiring whether the deceased was a donor or not, or asking the family to make such an important decision, would already be completed, thus creating more time to harvest and donate the organ. This notion, also known as the futures market, allows a person to sell, during his life, the right to remove his organs upon death.<sup>317</sup> The organ provider would enter into a contractual relationship with an organ buyer, whether it be a single private entity, a governmental agency, or competing government and private entities.<sup>318</sup> Issues in this proposed system are the timing of the payments (paying the donor during his life or after his death) and the price of the organs (if the market forces will be determinative).<sup>319</sup> This system would allow only

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<sup>312</sup> *Id.* at 876.

<sup>313</sup> Keller, *supra* note 40, at 876.

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> *Id.* at 877.

<sup>317</sup> Robinson, *supra* note 99, at 1037.

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

the donor to sell his own organs, upholding the notion of individual bodily autonomy while preventing reliance on live organ bearers.<sup>320</sup>

c. Commercial Market of a Living Donor

In 1999, *eBay* discovered and immediately removed from its website the offer of a kidney for sale.<sup>321</sup> The Florida seller offered a functioning kidney and by the time *eBay* intervened, “bidding had already started at \$25,000 and risen dramatically to more than \$5,700,000.”<sup>322</sup> This evidence only promotes the notion that United States citizens may be willing to accept a commercial market.<sup>323</sup>

Most often, living donors choose to donate to family members or close friends in need.<sup>324</sup> When there are few matches, pressure may overcome the potential donor and affect his or her autonomous decision.<sup>325</sup> With autonomy gone already and pressure weighing heavily, financial incentives or organ sales should do nothing but help move along the decision-to-donate process. No matter what scenario, the harvesting of living donors’ organs has saved numerous precious lives.<sup>326</sup> The doctor’s job is to act in the patient’s best interest, and critics note that taking the organ out of a healthy donor and putting him or her at harm is not in the patient’s best interests.<sup>327</sup> However, this argument can be refuted in a couple of ways: (1) as stated earlier, due to advancements in medical technology, risks are extremely low, especially if a donor enters the operation in good health; and (2) even arguments of pain, possible injury, or negative

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<sup>320</sup> *Id.*

<sup>321</sup> WILKINSON, *supra* note 242, at 106.

<sup>322</sup> *Id.* at 107.

<sup>323</sup> *Id.* at 106.

<sup>324</sup> Keller, *supra* note 40, at 869.

<sup>325</sup> *Id.*

<sup>326</sup> *Id.* at 870.

<sup>327</sup> *Id.* at 871-872.

psychological consequences can be refuted by the donor's awareness that organ donation is an heroic act and such generosity may save one or more lives.<sup>328</sup>

## 6. International Cooperation

There is a common interest throughout the world in organ procurement.<sup>329</sup> For example, patients might attempt to get put on waiting lists in multiple different countries.<sup>330</sup> No matter what organ procurement system is implemented, achieving common standards is a desirable approach in order to be productive and cost effective.<sup>331</sup> While most organs will be used in the same country, if not the same region, some international exchange would be useful for urgent cases or difficult tissue matches.<sup>332</sup> Clinicians need to be confident in the screening and retrieval systems from other countries, and for these reasons, cooperation should be established internationally, either by agreement or some type of international organization.<sup>333</sup> Such organization would improve training standards, allow for the exchange of experience, and establish the ethical standards and safety of the organs, thus making organ donation an improved process overall.<sup>334</sup>

As stated earlier, UNOS functions to facilitate organ donation and transplantation while keeping a national waiting list in the United States.<sup>335</sup> International organization would take on some form of UNOS, but at an international level. Mirroring Eurotransplant's efforts in maintaining an international wait list would also prove beneficial. For example, the wait lists would be separated by region, but one large database would hold all of the names and profiles. This one enormous entity would help ensure that each and every organ is put to good use.

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<sup>328</sup> *Id.* at 871.

<sup>329</sup> *Meeting the Organ Shortage*, *supra* note 30.

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> *Newsroom Fact Sheets*, *supra* note 82.

## VII. CONCLUSION

In 1994, the Green family was vacationing in Italy when the world stopped turning.<sup>336</sup> Seven-year-old Nicholas was shot by a gang of bandits and two days later was declared brain dead.<sup>337</sup> Despite such a terrible ordeal, the Green family chose to give life by donating their little boy's organs and consequently saved seven lives:

a mother who had never seen her baby's face clearly; a diabetic who had been repeatedly in comas; a boy of 15, wasting away with a heart disease, who was only the same size as a seven year old; a keen sportsman whose vision was gradually darkening; and two children hooked up to dialysis machines several hours a week. Then there was Maria Pia, a vivacious 19-year old girl who the night Nicholas was shot was dying too. Now, against all odds, she's healthy, is married and has two children, one of whom is called Nicholas.<sup>338</sup>

Reg, Nicholas's father, states that few potential donors realize what a powerful gift they have to give: they can save others from the devastation they face themselves.<sup>339</sup> While this does not take away the pain of the loss, donor families are proud of their loved ones, who so bravely saved someone when no one else in the world could.<sup>340</sup> "Donor families often wonder how there could be any other choice."<sup>341</sup>

In the United States alone, 200,000 useful organs "are consigned to the maggots for ready conversion to swill" each year.<sup>342</sup> Even more perverse is the reality that the law indulges us in this way of life while thousands, if not millions, beg for these wasted parts.<sup>343</sup> Organ donation progress will depend more on legal aspects than medical advances.<sup>344</sup> Due to the rapid development of medical technologies, organ transplantation has progressed so much that today

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<sup>336</sup> Krueger, *supra* note 53, at 321.

<sup>337</sup> *Id.* at 322.

<sup>338</sup> The Nicholas Green Foundation, *A Message from Reg Green: The Recipients*, at [http://www.nicholasgreen.org/reg\\_message.html](http://www.nicholasgreen.org/reg_message.html) (last visited Feb. 22, 2004).

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> Robinson, *supra* note 99, at 1019.

<sup>343</sup> *Id.*

<sup>344</sup> Jefferies, *supra* note 180, at 648-649.

transplants are considered “more of a matter of public expectation than a medical marvel.”<sup>345</sup> In 1980, 685 transplants were conducted in France; twelve years later there 3,221 transplants were conducted.<sup>346</sup> While the transplant process itself is basically mastered, the task before us is to find the organs and put the amazing technology to use. Any organ procurement system must fulfill two primary goals: (1) maximizing procurement to such a degree that no shortage of organs exists, and (2) avoiding encroachment on human rights and individual autonomy.<sup>347</sup> A fair and efficient system will only be achieved by reaching these goals simultaneously.<sup>348</sup>

Throughout the entire world, no organ procurement policy has been successful in supplying the amount of organs that we need to save precious lives. Every piece of legislation that has been tested and tried has blatantly failed. While society worries that selling organs or providing financial incentives is unethical, society should consider how ethical it is to watch innocent people die in their hospital beds and do nothing to remedy the situation when there are remedies available. Providing financial incentives can be done in a positive and ethical manner. A regulated organ market would increase the supply while eliminating the black market that society fears so much. The laws of all countries need reform. In addition, all countries need to unite and work together to be most efficient in matching donors and recipients and being most cost effective. Most notably, the UAGA and NOTA need to be revamped here in the United States, as do the attitudes of the Council of Europe and the World Health Organization abroad. In addition, an international form of UNOS or Eurotransplant needs to be implemented to facilitate the most successful organ donations. While we have tried alternative procurement

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<sup>345</sup> *Id.* at 644-645.

<sup>346</sup> *Id.* at 645.

<sup>347</sup> *Id.* at 649.

<sup>348</sup> *Id.*

systems, such as presumed consent and conscription, they have failed. The world needs to try something new; anything new. Reform is overdue.