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SHOULD IT BE ILLICIT TO SOLICIT? A LEGAL ANALYSIS OF POLICY OPTIONS TO REGULATE SOLICITATION OF ORGANS FOR TRANSPLANT

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INTRODUCTION

The idea of a patient in need of a transplant using the media to secure an organ is not novel—potential recipients and their advocates have been appealing directly to the public for specific organ donations as far back as the early 1980s.¹ However, recently there have been several well-publicized cases in which a potential recipient has solicited an organ for transplantation through the use of commercial advertising. In August 2004, Todd Krampitz received a liver donation after advertising through billboards, e-mails, the Internet, and by launching an extensive media campaign.² A donor family had responded to these

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¹ Lainie Friedman Ross, *Media Appeals for Directed Altruistic Living Liver Donations: Lessons from Camilo Sandoval Ewen*, 45 *PERSP. BIOLOGY & MED.* 329, 330-31 (2002) (stating that in 1982, Charles Fiske, a health care executive, pleaded to a ballroom full of doctors to help him find a liver for his infant daughter, and in 1983, President Reagan made a public appeal on his weekly radio address on behalf of Ashley Bailey, an infant). However, these early cases do not raise the same ethical concerns that exist today as discussed below, in part because transplants were rare and in part because Congress did not create the national organ allocation system until 1984. In fact, some would say that the national system was created as a result of Charles Fiske's public appeals. See *infra* text accompanying notes 136-39.

² Christopher Snowbeck, *Publicity Campaigns Seeking Organ Donations*

efforts by requesting that their deceased relative's liver go to Krampitz.³ On October 20, 2004, the first known organ donation in the U.S. to be arranged through a commercial website took place when Robert Smitty donated a kidney to Robert Hickey, whom Smitty had found through MatchingDonors.com.⁴ Hickey had paid the website a monthly fee of \$295 to advertise for a donor.⁵ In July of 2005, a highly publicized media campaign was launched on behalf of Shari Kurzrok, a gravely ill New York public relations executive in need of a liver transplant.⁶ Although Kurzrok ultimately received a liver transplant through the established national system, this case, together with the Krampitz and Hickey cases, heightened public attention about organ solicitation and raised significant concerns about fairness, utility, and the adequacy of the current donation and transplant system.

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

In both the living and deceased donor contexts, directed donations to strangers are uncommon. In fact, the overwhelming majority of deceased donations are not directed donations. Instead, donated deceased organs are allocated to anonymous recipients through the United Network for Organ Sharing (UNOS) system.⁷ In those rare

Raise Ethics Questions, HEADLINES & DEADLINES, Aug. 27, 2004, http://www.headlinesanddeadlines.org/2004/Aug_27_04/organ_donors.html.

³ *Id.*

⁴ Arthur Caplan, *Organs.com: New Commercially Brokered Organ Transfers Raise Questions*, HASTINGS CENTER REP., Nov.-Dec. 2004, at 8, 8.

⁵ *Id.* But see MatchingDonors.com, Membership Plan (Organ Registration Fees), <http://www.matchingdonors.com/life/index.cfm?page=services> (last visited Jan. 28, 2007) (requesting that those who cannot afford membership call to discuss options). About seventy percent of the patients with active profiles are being listed without charge. Robert Steinbrook, *Public Solicitation of Organ Donors*, 353 NEW ENG. J. MED. 441, 442 (2005).

⁶ Maggie Haberman & Jordan Lite, *Donor Group Blasts Blitz to Land Liver for Shari*, DAILY NEWS, July 27, 2005, at 7; Deborah L. Shelton, *Debate over Appeals for Organs Heats Up*, ST. LOUIS POST-DISPATCH, Aug. 21, 2005, at A10.

⁷ ORGAN PROCUREMENT & TRANSPLANTATION NETWORK, OPTN/UNOS FACILITATION OF LIVING UNRELATED KIDNEY DONATION-EXHIBITS DOCUMENT app. B (2004) [hereinafter OPTN, UNRELATED KIDNEY DONATION], available at <http://www>

cases when a deceased donor's family directs a donation, it is usually to another family member or an individual with which the donor or family has a personal bond.⁸ In comparison, directed donations are the norm among living donors. Two-thirds of living donations are directed to biological relatives, and many of the rest donate to a spouse.⁹ Still, only a handful of living donations have been publicly reported in which the donor and recipient met solely for the purpose of donation and had no preexisting relationship before the recipient's need for a transplant was first identified.¹⁰

Over the past couple of years, however, public donor solicitations resulting in directed donations to strangers are increasing. MatchingDonors.com alone has facilitated more than a dozen transplant surgeries between living donors and recipients who were strangers before the donation. Dozens more are reportedly in the pre-surgery stage, and Matchingdonors.com has over 3,700 potential donors registered on its website to whom potential recipients can appeal.¹¹ The intensity of donor solicitations may be increasing as well, as evidenced by the Kurzrok campaign, which allegedly resorted to posting flyers in hospitals asking families to direct a liver donation to Kurzrok, tracking trauma patients in emergency rooms, and urging police and emergency medical workers to identify accident victims who might serve as donors.¹² Another interesting development is the increasingly complex forms that organ solicitations are taking. One website (with over 8,300 members) offers a reciprocal sharing agreement whereby members pledge to direct donation of their organs in the event of their death first to other members if a suitable match can be found before donating to the UNOS waiting list.¹³

Federal law does not prohibit directed donation to an individual and most states expressly permit it by statute under the Uniform Anatomical Gift Act, which governs organ donation.¹⁴ Federal regulations promulgated by the Department of Health and Human Services (HHS)

.optn.org/PublicComment/pubcommentPropExhibit_21.pdf.

⁸ *Id.*

⁹ *Id.* at app. A.

¹⁰ *Id.* (noting that OPTN does not collect data on how often this occurs).

¹¹ Rob Stein, *Search for Transplant Organs Becomes a Web Free-for-All*, WASH. POST, Sept. 23, 2005, at A1; MatchingDonors.com, *supra* note 5 (declaring 3,709 potential donors as of Jan. 28, 2007).

¹² Shelton, *supra* note 6; *see generally* Stein, *supra* note 11 (discussing solicitation of organs on the Internet).

¹³ LifeSharers, <http://lifesharers.org> (last visited Apr. 8, 2007).

¹⁴ *See* 42 U.S.C. §§ 273-74 (2005); UNIF. ANATOMICAL GIFT ACT § 6(a)(3) (amended 1987) or § 11(a)(2) (amended 2006). *But see* VT. STAT. ANN. tit. 18 § 5242(a), (d) (2000) (allowing only living donors to make a directed donation).

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

Solicitations for deceased donor directed donations bypass this system and may, therefore, unfairly give preference to “attractive” patients with greater means of purchasing advertising or drawing media attention.¹⁹ There is, however, a recognized competing autonomy interest in allowing a donor or donor family to choose who will receive their anatomical gift by directing the donation.²⁰ Some have argued that donor solicitations are consistent with utility principles because they may increase total donations (especially in the context of

¹⁵ 42 C.F.R. § 121.8(h) (2000).

¹⁶ Douglas W. Hanto, *Ethical Challenges Posed by the Solicitation of Deceased and Living Organ Donors*, 356 NEW ENG. J. MED. 1062-66, (2007) (arguing that solicitation of organs potentially may circumvent the principles of justice and utility that are the building blocks of the national allocation system); Geoff Drushel, *Directed Organ Donation Is Legal, but Is It Right?*, HEPATITIS, Jan.–Mar. 2005, at 18, 18-20 (quoting Dr. Arthur L. Caplan, “a leading ethicist and chairman of the department of medical ethics at the University of Pennsylvania”), available at <http://www.hepatitismag.com/storydetail.asp?storyid=133>.

¹⁷ ORGAN PROCUREMENT & TRANSPLANTATION NETWORK, POLICIES §§ 3.2.1.7-3.2.1.7.9, 3.5.5, <http://www.optn.org/policiesAndBylaws/policies.asp> (follow “3.2: Organ Distribution: UNOS Patient Waiting List” hyperlink for 3.2.1.7-3.2.1.9; and follow “3.5: Organ Distribution: Allocation of Deceased Kidneys” hyperlink for 3.5.5) (last visited Jan. 23, 2007). In evaluating the allocation of kidneys, OPTN considers whether the potential recipient has been a living organ donor in the past. *Id.* at § 3.5.5.2.

¹⁸ See, e.g., *id.* at 3.5.3.3.1 (listing the criteria for matching kidney donors to kidney recipients).

¹⁹ Caplan, *supra* note 4, at 8.

²⁰ Mark D. Fox, *When an Organ Donor Names the Recipient*, AM. J. NURSING, July 1996, at 68, 68.

living donor solicitation), thereby benefiting all potential recipients by moving successful solicitors off of the national waiting list.²¹

This Article analyzes the legality of four possible policy options to resolve the ethical dilemma raised by solicitation of organs for transplant. Part I considers whether public organ donor solicitations should be restricted at all and concludes that the answer is yes for solicitations of deceased organ donations. Part II examines why the First Amendment right to free speech prevents policymakers from banning outright organ solicitations. Finally, Part III provides a legal analysis of the following policy options to address solicitation of directed deceased organ donations: (1) the government prohibiting deceased organ donor solicitations as speech that incites illegal activity; (2) transplant centers refusing to transplant directed donations of deceased organs that resulted from solicitation; (3) Organ Procurement Organizations refusing to coordinate directed deceased donations made in the absence of a preexisting relationship; and (4) statutory ban of deceased directed donations made in the absence of a preexisting relationship. Expedient resolution of this issue is ripe given the increased public, government, and media attention on scarcity of organ donation for transplant and the fact that over 6,000 patients from the UNOS waiting list died in 2006 while awaiting an organ for transplant and there are currently over 96,000 potential recipients listed on this list.²²

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

²² ORGAN PROCUREMENT & TRANSPLANTATION NETWORK, VIEW DATA REPORTS: NATIONAL DATA, <http://www.optn.org/latestData/step2.asp> (select "Waiting List" for "Choose Category" under "Step 1"; then select "Candidates" for "Count" under "Step 1"; then follow "Overall by Organ" under "Step 2") (last visited Apr. 8, 2007) (noting that 96,027 candidates are on a waiting list for an organ); ORGAN PROCUREMENT & TRANSPLANTATION NETWORK, VIEW DATA REPORTS: NATIONAL DATA, <http://www.optn.org/latestData/step2.asp> (select "Waiting List Removals" for "Choose Category" under "Step 1"; then select "All" for "Choose Organ" under "Step 1"; then select "Candidates" for "Count" under "Step 1"; then follow "Removals by Reason by Year" under "Step 2") (last visited Apr. 8, 2007) (noting that 6,038 candidates died while on the organ donor waiting list in 2006).

I. SHOULD PUBLIC ORGAN DONOR SOLICITATIONS BE RESTRICTED AT ALL?

A. Solicitation of Deceased Organ Donations Should Be Restricted to Maintain Equity and Medical Utility in the Organ Allocation System

Directed donation creates a conflict between distributive justice and donor autonomy.²³ The UNOS allocation policies serve principles of distributive justice by balancing equitable factors such as time spent on the waiting list and medical urgency with medical utility factors that measure which potential recipients will realize the greatest clinical benefit from a particular organ.²⁴ This system “levels the playing field” and allows potential recipients of deceased organ donations to compete equally under the same set of preferences. Solicitations bypass this carefully crafted system because they encourage selection of potential recipients outside of the established equity and utility factors. However, solicitations for directed donations serve to maximize a competing interest, donor autonomy.

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

²³ Fox, *supra* note 20, at 68.

²⁴ See *supra* notes 18-19.

²⁵ Dan Brock, Dir., Div. of Med. Ethics, Harvard Med. Sch., Speech at the Harvard Medical School of Medical Ethics Forum: Soliciting Organs on the Internet (May 12, 2005); see also Klaus D. Teichmann, *Letters to the Editor: Directed Tissue Donations*, 33 CLINICAL & EXPERIMENTAL OPHTHALMOLOGY 112, 112 (2005).

²⁶ See Robertson, *supra* note 21, at 172.

²⁷ See Aaron Spital, *Must Kidney Donation by Living Strangers be Non-directed?*, 72 TRANSPLANTATION 966, 966 (2001).

ceased donor usually donates multiple organs, resulting in multiple recipients receiving transplants.²⁸

It is doubtful, however, that the autonomy interest in donating to a solicitor is what motivated state legislators to pass the Uniform Anatomical Gift Act (UAGA). The framers of the UAGA did not contemplate directed donations arranged through solicitations and made in the absence of any preexisting relationship between the donor and the designated recipient.²⁹ Instead, the directed donation provision in the UAGA was designed to permit families to donate needed organs to another family member awaiting transplant.³⁰ The autonomy interest at stake in directing a donation to a stranger is clearly distinguishable from and not nearly as great as the interest that one has in directing a donation to a family member or friend where a close relationship exists.

Furthermore, a donated organ may be distinguishable from a private gift, *e.g.*, wealth devised through a will, because transplantation requires greater cooperation from people and resources beyond the donor and intended recipient in order to effectuate the gift.³¹ In this way, organ donations may be characterized as social gifts, and, therefore, society may be justified in limiting a donor's autonomy in order to promote equity among potential recipients and ensure that the full utility of the gift is realized.³²

The likely outcome of continuing to allow public solicitations of deceased organs is that deceased organs that might otherwise be made available would be withheld from those patients ranked higher than the solicitor on the UNOS waiting list.³³ It is unknown whether organ

²⁸ The national average in 2006 was 3.049 organs transplanted per deceased organ donor. See OPTN, Donors Recovered in the U.S. by Donor Type, <http://www.optn.org/latestData/viewDataReports.asp> (select "National Data" then "Donor" for "Choose Category" under "Step 1"; select "All Donors by Type" under "Step 2"; then select "All Transplanted" under "Change Report" option) (last visited Apr. 8, 2007) (stating that there were 8,022 deceased donors and resulting in 24,461 organs transplanted in 2006).

²⁹ E-mail from Blair L. Sadler, President and CEO, Children's Hosp. and Health Ctr., to author (Dec. 13, 2005, 14:40:00 EST) (on file with author); Drushel, *supra* note 16, at 19-20 (citing Dr. R. Patrick Wood, "a transplant surgeon at St. Luke's Episcopal Hospital"); Sheldon Zink et al., *Examining the Potential Exploitation of UNOS Policies*, AM. J. BIOETHICS, July-Aug. 2005, at 6, 8.

³⁰ Zink et al., *supra* note 29, at 8.

³¹ See Eike-Henner W. Kluge, *Designated Organ Donation: Private Choice in Social Context*, HASTINGS CENTER REP., Sept.-Oct. 1989, at 10, 11.

³² See *id.* at 11-13. But see Brock, *supra* note 25 (noting that organ donation should be regulated to prevent abuse, but allowing directed donation might increase the total number of organs donated).

³³ Drushel, *supra* note 16, at 18-19 (citing Dr. Arthur L. Caplan).

solicitations increase total donations, but we do know that donors of deceased organs who direct donations to solicitors are likely to have donated anyway.³⁴ Thus, solicitors may move ahead of those who have waited longer, would benefit more, or have more critical need.³⁵ Case in point, Todd Krampitz did not meet the UNOS listing criteria because he had metastatic cancer and died just eight months after receiving transplantation of the liver he solicited.³⁶

Also, not all policies that might increase total donations are necessarily desirable, as is shown by the fact that most nations ban the purchase and sale of organs.³⁷ Organ solicitations could undermine public support for the entire procurement and allocation system because this practice inequitably favors those patients with “attractiveness” and the means to purchase advertising or draw media attention.³⁸ An appeal for a six-month-old infant in need of a liver donation tugs on potential donors’ heartstrings, while the same appeal from a middle-aged alcoholic may not.³⁹ Organ solicitations convey a message that the solicitor is ethically special compared to other potential recipients. Solicitations request that donors donate specifically to the *solicitor* instead of generally to potential recipients as a class. This invites donors to choose recipients that appear more deserving rather than those in greater need or who may benefit the most medically.⁴⁰

For these reasons, public solicitations for directed donation of deceased organs are likely to reduce both the equity and efficiency (as measured by medical utility and net benefit) of the organ allocation system. Lawmakers, UNOS, and health care providers should, there-

³⁴ See Alvin Powell, *HMS Examines Ethics of Internet Organ Donation*, HARV. U. GAZETTE, May 19, 2005, at 9, available at <http://www.news.harvard.edu/gazette/2005/05.19/09-organ.html>.

³⁵ Drushel, *supra* note 16, at 18-19 (citing Dr. Arthur L. Caplan).

³⁶ Zink et al., *supra* note 29, at 6; Sheldon Zink & Stacey L. Wertlieb, *Response to Commentators on “Examining the Potential Exploitation of UNOS Policies,”* Am. J. Bioethics, Sept.-Oct. 2005, at W15, available at http://www.bioethics.net/journal/j_articles.php?aid=842.

³⁷ See generally Michele Goodwin, BLACK MARKETS: THE SUPPLY AND DEMAND OF BODY PARTS (2006) (arguing a market approach would increase the supply of transplantable deceased organs); see also Andrew H. Barnett et al., *Improving Organ Donation: Compensation Versus Markets*, 2 INQUIRY 372 (1993), reprinted in THE ETHICS OF ORGAN TRANSPLANTS: THE CURRENT DEBATE 209-12 (Arthur L. Caplan & Daniel H. Coelho eds., 1998) (arguing that donor compensation would increase total donations); Ross, *supra* note 1, at 333.

³⁸ Caplan, *supra* note 4, at 8.

³⁹ However, a middle-aged alcoholic may have the same appeal if the individual happens to be a national hero. Ross, *supra* note 1, at 333 (citing R. Newhan, & D.P. Shuit, *Gravely Ill Mantle Gets New Liver*, L.A. TIMES, June 9, 1995, at A1).

⁴⁰ See Kluge, *supra* note 31, at 11-12.

fore, consider what options are available to restrict or regulate directed deceased donor solicitations.

B. Solicitation of Living Donations Should Be Permitted Because They Increase Total Donations Without Sacrificing Equity and Medical Utility

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

Living donors do sometimes donate without specifying a recipient. In those instances, the donated organ goes through a local matching system to a patient on the UNOS waiting list.⁴⁶ Accordingly,

⁴¹ Drushel, *supra* note 16, at 18-19 (citing Dr. Arthur L. Caplan). *But see* OPTN/UNOS KIDNEY TRANSPLANTATION COMM., REPORT FROM OPTN/UNOS KIDNEY TRANSPLANTATION COMMITTEE TO BOARD OF DIRECTORS ON KIDNEY PAIRED DONATION (2006), available at http://www.unos.org/CommitteeReports/board_main_KidneyTransplantationCommittee_6_28_2006_13_30.pdf (recent proposal being consideration by UNOS to increase living donation by investigating the potential for a national system to "match" pairs of living donors and their intended but incompatible recipients with other similar pairs in an organized organ swap).

⁴² *Id.*

⁴³ *See* OPTN, UNRELATED KIDNEY DONATION, *supra* note 7, at app. A; *see also* Jacob M. Appel & Mark D. Fox, *Organ Solicitation on the Internet: Every Man for Himself?*, HASTINGS CENTER REP., May-June 2005, at 14, 14-15.

⁴⁴ *See* Appel & Fox, *supra* note 43, at 15.

⁴⁵ Ross, *supra* note 1, at 332.

⁴⁶ *See, e.g.*, New England Program for Kidney Exchange, <http://www.nepke.org> (last visited Feb. 18, 2007); OPTN, UNRELATED KIDNEY DONATION, *supra* note 7, at app. A.

it is possible that a solicitor may receive an organ from living donors that would have been allocated to a different recipient on the UNOS list. However, anonymous, non-directed donations to the waiting list from living donors are rare. Only eighty-seven transplants of organs from these so-called “Good Samaritan” donors were performed nationwide in 2004.⁴⁷

Good Samaritan donations are rare because of an important distinction between donation in the living and deceased contexts: the living donor’s significant personal sacrifice. Unlike a deceased donor or a deceased donor’s family, a living donor must bear the personal health risks of invasive surgery and living without the donated organ. Most solicited living donors would likely not have donated unless they could direct their donation to the solicitor recipient. For this reason, permitting the solicitation of living donors is more likely to increase total organ donations, which is a clear benefit to the entire organ donation and transplantation system. This is in contrast to solicitation of deceased organs, which is not likely to increase total donations but, rather, divert donated organs to solicitors rather than to potential recipients identified by the national allocation system.

The serious sacrifice made by living donors is also significant in evaluating the donor’s autonomy interest in directing a donation. A living donor makes a far greater personal sacrifice than a deceased donor (who makes no personal sacrifice because the donation occurs after death). Also, unlike the deceased donor, a living donor may also experience some benefit through forming a personal bond with the recipient after transplantation or by knowing that a life has been saved by the donation. As a result, it is reasonable to conclude that society should give the donor’s autonomy interest more weight in the living context than in the deceased context.

It remains true that “attractive patients” and those with greater means of purchasing advertising or drawing media attention will inevitably be more successful at soliciting living donors.⁴⁸ Also, there is a possible added inequity in the living context because federal law permits payment of reasonable compensation for the living donor’s travel expenses and lost wages associated with living donation.⁴⁹ A solicitor who has the financial means to reimburse a living donor for these costs may be more likely to successfully solicit a living donor.

⁴⁷ OPTN, UNRELATED KIDNEY DONATION, *supra* note 7, at app. A.

⁴⁸ Caplan, *supra* note 4, at 8.

⁴⁹ 42 U.S.C. § 274e(c)(2) (2005). Although the deceased donor does not incur travel costs or lost wages, the costs associated with a deceased donation are never born by the donor family.

In one recent case, these expenses included a stay in a luxury hotel and totaled \$5,000, a sum that not all solicitors can afford.⁵⁰

The existence of possible inequities may not, however, justify prohibiting living donations directed to solicitors as it does in the case of deceased donation. Increasing the total number of living organ donations is more likely to benefit other potential recipients rather than to deprive them of organs that they otherwise might have received. With no national system in place for living donation carefully crafted to maximize equity and efficiency that donor solicitations would disrupt, it seems reasonable to conclude that the living donor's autonomy interest in directing a donation deserves more significant weight. Thus, the overriding consideration is that solicitations of living donors are more likely to increase total organ donations in a manner that remains fair in the balance. Lawmakers, UNOS, and health care providers should, therefore, continue to permit and encourage solicitations of living donors and directed donations made by living donors to solicitors.⁵¹

II. LEGAL ANALYSIS OF ORGAN DONOR SOLICITATIONS AS CONSTITUTIONALLY PROTECTED SPEECH

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

A. Protection for Charitable Solicitations: Strict Scrutiny Review

It is settled law that charitable organizations that solicit gifts or financial contributions are protected under the First Amendment.⁵² Charitable appeals are protected free speech because they involve a variety of speech interests such as communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes.⁵³ Additionally, charitable "solicitation is characteristically intertwined with informative . . . speech [promoting] economic, politi-

⁵⁰ Appel & Fox, *supra* note 43, at 14.

⁵¹ See OPTN/UNOS KIDNEY TRANSPLANTATION COMM., *supra* note 41.

⁵² Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980).

⁵³ *Id.*

cal, [and] social issues.”⁵⁴ Although the Supreme Court has not specifically considered whether an individual solicitor seeking private charity is protected under the First Amendment, circuit courts have found no meaningful distinction between soliciting for oneself versus soliciting for a charitable organization because both forms of speech contain social messages.⁵⁵

The Supreme Court applies the most exacting level of analysis, strict scrutiny, to any regulation that restricts protected speech on the basis of its content.⁵⁶ To meet strict scrutiny, any regulation must be “necessary to serve a compelling state interest and [must be] narrowly drawn to achieve that end.”⁵⁷

In contrast, commercial speech receives only intermediate protection under the First Amendment. Speech is considered commercial when it is primarily related to the economic interests of the speaker or is primarily concerned with providing information about the costs of goods and services or proposing a commercial transaction.⁵⁸ For example, a contraceptive manufacturer that mails advertisements for its products engages in commercial speech despite the fact that the communication contains information on issues such as venereal disease and family planning.⁵⁹ Here it can be inferred that the manufacturer’s primary purpose was not disseminating information on venereal disease and family planning. This is because the communication took the form of an advertisement for a specific product and was motivated by an economic interest (soliciting a commercial transaction).⁶⁰

Applying this test to charitable solicitation, the Supreme Court has found that charitable solicitations are not commercial speech.⁶¹ This is because charitable solicitations are concerned with more than just the economic interests of the speaker, providing cost information

⁵⁴ *Id.*

⁵⁵ See *Gresham v. Peterson*, 225 F.3d 899, 903-04 (7th Cir. 2000) (holding that even panhandling is protected free speech because it may contain social messages on the issue of poverty).

⁵⁶ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994).

⁵⁷ *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987) (citing *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 591-92 (1983)).

⁵⁸ *Schaumburg*, 444 U.S. at 632; see also *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561-62 (1980). The government may only restrict commercial speech if the speech presents deceptive information or if the restriction directly advances a substantial government interest and is not excessive. *Hudson*, 447 U.S. at 564-565. *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770-71 (1976).

⁵⁹ See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67-69 (1983).

⁶⁰ *Id.*

⁶¹ *Schaumburg*, 444 U.S. at 632.

about goods and services, or proposing a commercial transaction. They are “intertwined with informative . . . speech [advancing] economic, political, [and] social issues.”⁶²

Courts distinguish between commercial and noncommercial speech on the basis of the content of the message itself, not the mode in which the speaker transmits it. Speech that is otherwise considered noncommercial does not become commercial merely because its speaker delivers the message in a paid advertisement.⁶³ For example, in considering whether a newspaper committed libel for running a paid advertisement, the Supreme Court held that whether the newspaper was paid for the advertisement was irrelevant in determining whether it had engaged in commercial speech.⁶⁴ “To hold otherwise would convert virtually all books, newspapers, and magazines into commercial speech [merely because the printer was paid], and call into question the traditional protections afforded these types of publications.”⁶⁵ In fact, the Supreme Court has clarified that a speaker may even hire canvassers to promote a noncommercial message without engaging in commercial speech.⁶⁶ In this manner, the First Amendment protects the right not only to advocate a cause but also to select the most effective means for doing so.⁶⁷

B. Intrusive Charitable Solicitations: Reasonableness Standard

More intrusive charitable solicitations (such as those requesting money) are subject to reasonable regulation.⁶⁸ For example, courts have reasoned that solicitations of funds on a public street are intrusive because the solicitor and others watch and may exert social pressure on the person solicited, who may then have to stop on a busy street and open his wallet.⁶⁹ This type of solicitation is considered more intrusive than solicitations that merely involve the distribution

⁶² *Id.*

⁶³ *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 514-15 (1981) (The court treated messages conveyed on billboards as noncommercial on the basis of their content even though they were paid advertisements.).

⁶⁴ *See New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964).

⁶⁵ *U.S. Olympic Comm. v. Am. Media, Inc.*, 156 F. Supp. 2d 1200, 1208 (D. Colo. 2001).

⁶⁶ *See Meyer v. Grant*, 486 U.S. 414, 425 (1988) (finding that paid petition circulators engaged in noncommercial speech because the content of the speech itself was noncommercial).

⁶⁷ *Id.*

⁶⁸ *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980).

⁶⁹ *U.S. v. Kokinda*, 497 U.S. 720, 735 (1990).

of literature.⁷⁰ Of course, even the most benign solicitations can be considered intrusive and, therefore, subject to reasonable regulation in certain circumstances; the First Amendment does not require a city to permit a man with a communicable disease to distribute leaflets on public streets.⁷¹

The reasonableness standard is considerably easier for the government to meet than the strict scrutiny standard. To be reasonable, a regulation must appropriately balance legitimate government interests against the right to free speech and cannot be overly broad.⁷² For example, the Supreme Court has held that the government's legitimate interest in preventing fraudulent solicitations (such as burglars posing as canvassers) justifies the reasonable requirement that canvassers register with a town prior to canvassing and establish their identities and affiliation with the organization they represent.⁷³

C. Organ Donor Solicitations are Charitable Solicitations

Nonprofit organizations (such as MatchingDonors.com) that solicit donors are likely to be considered protected under the First Amendment as charitable solicitors because their services promote the social issue of organ donation by encouraging organ donations in the broader context.⁷⁴ An individual organ solicitor is also likely to be protected under the First Amendment because the solicitation promotes the social issue of organ donation. For example, the appeals on behalf of Todd Krampitz always contained broader requests for people to donate organs, and, after he received a directed donation, the family put up a new billboard that said "Thank You" and encouraged more people to donate organs for transplant.⁷⁵

Deceased organ donor solicitations are also likely to be considered noncommercial speech because they are not primarily concerned with providing information about the costs of goods and services or proposing a commercial transaction, nor are they primarily related to the economic interests of the organ solicitor. They are primarily con-

⁷⁰ *Id.*

⁷¹ *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 143 (1943).

⁷² *See Watchtower Bible and Tract Soc'y v. Vill. of Stratton*, 536 U.S. 150, 165-66 (2002).

⁷³ *Id.* at 162-63 (citing *Cantwell v. Conn.*, 310 U.S. 296, 306 (1940)).

⁷⁴ MatchingDonors.com is now a nonprofit organization. Secretary of Massachusetts, Corporate Database Listing for "MATCHINGDONORS.ORG, INC.," <http://corp.sec.state.ma.us/corp/corpsearch/CorpSearchSummary.asp?ReadFromDB=True&UpdateAllowed=&FEIN=000891332> (last visited Jan. 4, 2007) (listing MATCHINGDONORS.ORG, INC. as a nonprofit organization).

⁷⁵ Drushel, *supra* note 16, at 18-19; Snowbeck, *supra* note 2.

cerned with obtaining a life-saving gift from potential deceased donors and promoting the social message that more people should donate life-saving organs. Although made in the form of an advertisement, these solicitations make no reference to a specific product or to the costs of goods or services and, at least on their face, do not propose a commercial transaction.

A for-profit corporation that posts paid solicitations for organ donors may not be considered to have engaged in commercial speech either because the content of the solicitor's message itself is not commercial. Such a corporation would be treated and protected like a newspaper that is paid to print constitutionally protected advertisements.⁷⁶ Even if a corporation were actively soliciting organ donors on behalf of its clients, it would still not be engaging in commercial speech because the clients' noncommercial messages are not made commercial merely because they took the form of a paid advertisement or because the clients paid others to present them.⁷⁷ Here, the corporation would likely be treated and protected like canvassers paid to promote a speaker's political message.⁷⁸ Again, the First Amendment protects not only the solicitor's right to communicate his message, but also the right to select the most effective means for doing so.⁷⁹

D. Reasonable Regulation of Intrusive Deceased Organ Donor Solicitations

Whether a court subjects regulations of deceased organ donor solicitations to the strict scrutiny standard or the reasonableness standard of review might depend on how intrusive the particular solicitations involved are. If a particular method of solicitation is found not to be intrusive, any regulation of it would have to satisfy strict scrutiny by being necessary to serve a compelling state interest and narrowly drawn to achieve that end. Examples of less intrusive solicitations may include informative media reports, the general posting of an or-

⁷⁶ *Cf.* *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (“[The fact] [t]hat the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold. Any other conclusion would discourage newspapers from carrying ‘editorial advertisements’ of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities – who wish to exercise their freedom of speech even though they are not members of the press.” (citations omitted)).

⁷⁷ *See* *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 514-15 (1981).

⁷⁸ *Cf.* *Meyer v. Grant*, 486 U.S. 414, 425-26 (1988).

⁷⁹ *Id.* at 425.

gan donation request in a public place or on the Internet, or the LifeSharers website, which invites members to agree to direct their organs in the event of their death first to other members if a suitable match can be found (a reciprocal sharing agreement).⁸⁰ In these cases, the solicitor does not physically approach anyone, and the person solicited is free to ignore the solicitation without consequence. Then again, in the case of posting requests in a public place or on the Internet, it is possible to argue that the intrusive part of the solicitation occurs later, after the person solicited makes initial contact with the solicitor to discuss the details.

If a particular type of solicitation is not considered intrusive, an outright government ban is unlikely to satisfy the strict scrutiny standard of review. The government might argue that banning deceased organ donation solicitations is necessary to achieve its primary objects of preserving equity and medical utility through the current system. However, despite the fact that this conclusion seems well reasoned, there is no empirical data to show that deceased organ solicitations will harm the national organ allocation system or to refute the counter-argument that solicitations may increase total donations.⁸¹ Thus, it would be difficult for the government to adequately show that an outright ban on deceased organ donation solicitations is “necessary” to accomplish those goals. Other less restrictive measures may be possible as discussed below.

In comparison, deceased directed donation solicitations characterized as intrusive could be subject to reasonable regulation.⁸² Because

⁸⁰ LifeSharers, *supra* note 13. Membership in an organization such as LifeSharers is also protected by the First Amendment right to freedom of association. See *Scales v. U.S.*, 367 U.S. 203, 229 (1961) (explaining that the government can only prohibit membership in a group if there is specific intent to further a group’s illegal activities). However, there is no statutory right to direct a donation to a class of people because directed donation is statutorily defined as donation to a “designated individual.” UNIF. ANATOMICAL GIFT ACT § 6(a)(3) (amended 1987). Thus, it is unclear whether a court would uphold the right to direct a donation to members of the organization (“designate as donee that LifeSharers member who is the most suitable match”) rather than to a specific named individual. Although LifeSharers states on its website that at the time of a LifeSharers member’s death they provide the next of kin with the names of LifeSharers members, it is uncertain whether a list of members who are awaiting organ transplants constitutes a designated individual for purposes of directed donation laws.

⁸¹ See Powell, *supra* note 34.

⁸² In fact, there are existing federal regulations on “soliciting” consent for donation within the established national organ donation system. These federal hospital and organ procurement organization (OPO) regulations specify that families of potential organ donors that meet certain clinical criteria are to be approached for consent by OPO professionals or by “designated requestors” trained by an OPO. 42

society values donated organs for transplant as a scarce national resource and because of the personal and physical nature of an organ donation, deceased organ solicitations are likely to be considered at least as intrusive as solicitations for funds.⁸³ Certainly deceased directed donation solicitations involving contact with emergency workers or hospital staff or where there is an in-person solicitation of a potential donor or donor family are likely to be considered intrusive.⁸⁴ Moreover, the government has several legitimate interests in regulating deceased organ solicitations. First, it has an interest in promoting deceased organ donation and the equitable and efficient allocation of donated organs. Second, while it has an interest in increasing donations, it also has an interest in preventing solicitors from putting undue emotional pressure on potential donors or donor families or misrepresenting their condition.⁸⁵ Finally, it has an interest in preventing solicitors from inappropriately offering to purchase organs from donors, which is a federal offense.⁸⁶

To be reasonable, any restriction must balance the right to free speech with these legitimate interests. Reasonable restrictions may include requirements that deceased organ solicitors establish their identity, present only truthful information regarding the potential recipient's condition, and use non-coercive language. Restrictions on the time, place, and manner of deceased organ solicitation (such as a prohibition on directed donation solicitations in a hospital) are likely to be considered reasonable. It may even be reasonable to require deceased directed donation solicitations to carry a disclaimer that UNOS does not support deceased directed donations to solicitors and to require the URL for a website containing information on the issue. All of these restrictions on deceased directed donation solicitation are likely to be considered reasonable if such a standard applies. How-

CFR § 482.45(a)(3) (2005).

⁸³ There are, however, neither health risks nor benefits to the deceased donor because the donation occurs after the donor's death, whereas a living donor makes an extreme sacrifice. See discussion *supra* Part I.B.

⁸⁴ Of course, restrictions against such extreme forms of donor solicitation would probably meet the strict scrutiny standard as well. Nevertheless, the reasonableness standard is likely to be applied to any restriction on solicitations in hospitals even without a showing that the solicitation is intrusive because a hospital is not a traditional public forum intended to promote the free exchange of ideas. See *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 680 (1992). This distinction could be important for a solicitation such as a flyer posted in a hospital, which might not be considered intrusive, and its regulation, therefore, might otherwise be subject to strict scrutiny rather than the reasonableness standard of review.

⁸⁵ Caplan, *supra* note 4, at 8.

⁸⁶ See *infra* note 104 (stating that the sale of organs is illegal as provided in 42 U.S.C. § 274e(a) (2005)).

ever, an outright ban on deceased donor solicitation is unlikely to withstand a constitutional challenge that it is an unreasonable restriction because it would not adequately balance government interests with the right to free speech. Thus, while Congress and states cannot ban outright deceased directed donation solicitations, they may be able to pass reasonable regulations on intrusive deceased directed donation solicitations.

E. Organ Donor Solicitations Are Protected Even if Characterized as Commercial Speech

Although commercial speech receives less protection than other forms of speech, it remains protected under the First Amendment.⁸⁷ The government may only restrict commercial speech if the speech presents deceptive information or if the restriction directly advances a substantial government interest and is not excessive.⁸⁸ To assert that a restriction advances a substantial interest, the government must show that there are real harms that the restriction will alleviate to a material degree.⁸⁹

For commercial solicitations, the government can meet its burden if it is reasonable to presume that, more often than not, the solicitations are injurious to the person solicited.⁹⁰ For example, the Supreme Court has held that a state may prohibit lawyers from soliciting clients in person because lawyers are trained in the art of persuasion and are capable of convincing an injured and distressed layperson to place trust in the lawyer regardless of the lawyer's qualifications or the individual's actual need for legal representation.⁹¹ Also, the Court stated that the lawyer's solicitation itself may cause distress to the layperson at the time of injury.⁹² Thus, the Supreme Court found that it is reasonable to presume that, more often than not, in person solicitations by lawyers are "injurious to the person solicited."⁹³ In contrast, the Supreme Court struck down a state ban on personal solicitations by certified public accountants because it is not reasonable to presume that such solicitations are injurious to the person solicited more often

⁸⁷ See *Edenfield v. Fane*, 507 U.S. 761, 765-67 (1993).

⁸⁸ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564-65 (1980).

⁸⁹ *Edenfield*, 507 U.S. at 770-71.

⁹⁰ See *id.* at 775-76; *Ohralik v. Ohio St. Bar Ass'n*, 436 U.S. 447, 466 (1978).

⁹¹ *Ohralik*, 436 U.S. at 464-65.

⁹² *Id.* at 465-66.

⁹³ *Id.* at 466.

than not.⁹⁴ The Court reasoned that accountants are not trained in the art of persuasion, and the clients they solicit are sophisticated business executives who can choose when and where to meet them.⁹⁵

In the case of commercial deceased directed donation solicitation, it is unlikely that the government could show that a flat ban advances a substantial interest and is not excessive. The government has legitimate interests such as preventing solicitors from coercing donors and donor families, preventing them from presenting deceptive information, and preventing them from offering payment for organs (a federal offense).⁹⁶ It may be difficult, however, for the government to show that the solicitations are injurious to the person solicited more often than not. In the deceased context, the primary harm of organ solicitations for directed donations is to other potential transplant recipients. This possible harm to other potential recipients results from donors exercising their statutory right to direct organ donations and not directly from the solicitation itself. There may also be some emotional harm to the donor's family if the solicitation is insensitive, offensive, or intrusive. A deceased organ solicitation made by one skilled in the art of persuasion at a hospital or at the donor's time of death may be injurious in the same way a lawyer's solicitation of an injured and distressed client is. Still, an outright ban would likely be considered excessive because, in most other contexts, these solicitations will not be injurious to donors or donor families more often than not.⁹⁷

The government has a legitimate interest in preventing the harm to other potential recipients that would occur if deceased directed donation solicitations prevent the equitable and efficient allocation of organs. Nevertheless, the government is unlikely to meet its burden of showing that a ban would alleviate a real harm to the national allocation system because there is no direct evidence to refute the counterargument that solicitations will increase total donations.⁹⁸ Thus, at least at the present time, it would be difficult for the government to

⁹⁴ *Edenfield*, 507 U.S. at 775-76.

⁹⁵ *Id.*

⁹⁶ See *supra* text accompanying notes 81-84 (discussing these legitimate government interests).

⁹⁷ In the living context, there is an argument that living donors are always harmed when they donate an organ. Yet this is balanced by the argument that living donors may benefit by knowing that they have saved or improved a life. Thus, it is not reasonable to presume that living donor solicitations will harm living donors more often than not, and, therefore, it is also unlikely that the government could show that a ban would alleviate a real harm to living donors. Also, a ban on living donor solicitations would be considered excessive because living donors can be protected through the informed consent process. See *infra* note 124 and accompanying text.

⁹⁸ See Powell, *supra* note 34.

show that a ban would advance the substantial interest of preventing harm to the national organ allocation system.

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

III. POLICY OPTIONS TO RESTRICT DECEASED DIRECTED DONATION SOLICITATIONS

A. Prohibiting Deceased Directed Donation Solicitations as Speech that Incites Illegal Activity

The government may ban speech that incites illegal activity if the speech is directed toward producing imminent illegal action and is likely to succeed.⁹⁹ To show that speech is directed toward producing illegal action, the government must show that the speaker had intent to produce illegal action.¹⁰⁰ A ban on speech that incites illegal activity must only apply to speech that satisfies this intent requirement.¹⁰¹ Otherwise, courts will consider the ban overly broad because it will apply to constitutionally protected speech as well and will cause individuals to refrain from protected speech for fear of criminal sanctions.¹⁰² Thus, a ban on speech that incites illegal activity must be narrowly drawn to apply only to cases where the speaker intended to produce illegal activity.¹⁰³

Although directed organ donation is legal, federal law and most state laws prohibit the purchase and sale of human organs.¹⁰⁴ Even where state law does not prohibit selling organs, federal law is con-

⁹⁹ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

¹⁰⁰ *Id.*

¹⁰¹ *Gooding v. Wilson*, 405 U.S. 518, 520-21 (1972); *Brandenburg*, 395 U.S. at 447-48.

¹⁰² *Gooding*, 405 U.S. at 520-21.

¹⁰³ *Id.* at 520-21; *Brandenburg*, 395 U.S. at 447-48.

¹⁰⁴ 42 U.S.C. § 274e(a) (2005) (providing that it is illegal to sell an organ for valuable consideration); *see, e.g.*, N.Y. PUB. HEALTH LAW § 4307 (Consol. 2007) (it is illegal to knowingly transfer any human organ for use in transplantation for valuable consideration). *But see* UNIF. ANATOMICAL GIFT ACT § 10 (amended 1987) (prohibiting payment only for deceased organs); MASS. GEN. LAWS ANN. ch. 113, §§ 1-14 (West 2003) (lacking any prohibition on payment).

trolling.¹⁰⁵ After Robert Hickey's transplant, suspicions ran high that he paid Robert Smitty for his kidney. This was based on the fact that "Smitty was arrested [days after the transplant] for failure to pay . . . child support, [and] anonymous benefactors posted the necessary funds for his release."¹⁰⁶ Additionally, websites like MatchingDonors.com admit that their clients have been barraged with requests for cash from potential donors.¹⁰⁷

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

B. Transplant Centers Restricting Transplants for Solicitors of Directed Deceased Donations

After Robert Hickey received his transplant, St. Luke's, the University of Colorado hospital that performed the transplant, issued a moratorium on transplants for Internet-matched living donation pairs.¹⁰⁸ Since then, hundreds of other hospitals nationwide have followed suit.¹⁰⁹ If legally permissible, these policies could effectively prevent directed donations made to solicitors in both the living and deceased contexts. Such policies raise the potential issue of common law liability for patient abandonment, but transplant centers can likely take steps to protect themselves from such a claim.

Transplant centers and surgeons owe a common law duty to their patients to continue providing care until their services are no longer

¹⁰⁵ Roderick T. Chen, *Organ Allocation and the States: Can the States Restrict Broader Organ Sharing?*, 49 *Duke L.J.* 261, 281-83, 287-88 (1999) (explaining that Congress validly enacted the National Organ Transplant Act (NOTA) under its power to regulate interstate commerce because organ procurement, allocation, and transplantation necessarily involve interstate commerce).

¹⁰⁶ Robertson, *supra* note 21, at 170.

¹⁰⁷ Stein, *supra* note 11.

¹⁰⁸ Bill Scanlon, *Kidney Transplant a 'Success,'* ROCKY MOUNTAIN NEWS, June 10, 2005, http://www.rockymountainnews.com/drmn/local/article/0,1299,DRMN_15_3847091,00.html.

¹⁰⁹ *Id.*

needed or are dispensed with by the patient.¹¹⁰ Once a physician/patient relationship is initiated, a health care provider is liable for abandonment if it withdraws from providing care without giving reasonable notice so that the patient may secure other medical care and if an injury results.¹¹¹ Patient abandonment gives rise to liability for both negligence and breach of contract claims.¹¹²

Patient abandonment liability exists for breach of contract because the provider has unilaterally terminated the physician/patient relationship.¹¹³ Patient abandonment liability for negligence exists because the provider has breached its duty by choosing not to provide the patient with professional services at the pertinent standard of care.¹¹⁴ This differs from ordinary negligence in that the provider consciously chooses not to provide appropriate services rather than fails to meet the standard due to carelessness.¹¹⁵ An abandonment claim fails if the provider gives reasonable notice of withdrawing services or if the physician/patient relationship is terminated by mutual consent.¹¹⁶

Additionally, an abandonment claim should fail if the provider has not assumed a duty of care for the patient. Thus, it may be possible to forestall an abandonment claim by limiting the scope of the physician/patient relationship before the provider assumes a duty of care for the patient. The physician/patient relationship is essentially a contractual one, and providers have the right to contractually limit the

¹¹⁰ See, e.g., *Tierney v. Univ. of Mich. Regents*, 669 N.W.2d 575, 577 (Mich. Ct. App. 2003) ("Generally speaking, a person who engages a physician to treat his case impliedly engages him to attend throughout the illness or until his services are dispensed with . . . [However,] the physician has a definite right to withdraw from the case provided he gives the patient reasonable notice so as to enable him to secure other medical attendance.").

¹¹¹ *Id.*

¹¹² *Smith v. Lerner*, 387 N.W.2d 576, 579 (Iowa 1986) (citing A. HOLDER, *MEDICAL MALPRACTICE LAW* 374 (1978)).

¹¹³ *Id.*

¹¹⁴ *Id.* (citing HOLDER, *supra* note 112, at 376-77 (1978)). The pertinent standard of care is met when a physician renders professional services consistent with that objectively ascertained minimally acceptable competence he may be expected to apply given the qualifications and level of expertise he holds himself out as possessing and given the circumstances of the particular case. See *Hall v. Hilbun*, 466 So. 2d 856, 871 (Miss. 1985).

¹¹⁵ *Smith*, 387 N.W.2d at 579 (citing HOLDER, *supra* note 112 at 376-77 (1978)).

¹¹⁶ See *Dicke v. Graves*, 668 P.2d 189, 191 (Kan. Ct. App. 1983); see also *RESTATEMENT (SECOND) OF TORTS* § 323(a), (b) cmt. c (1965) (commenting that, in tort, an actor is not liable for terminating services unless his failure to provide services increases the risk of harm or the harm is suffered because of the other's reliance; noting also that this is not met if the provider gives reasonable notice for the patient to find care elsewhere or if the patient agrees to termination).

scope of services that they will provide patients with when they assume care.¹¹⁷ Although such a contract might appear to be an adhesion contract at first blush (because the provider presents it on a “take it or leave it basis” and the patient may lack bargaining power), courts have distinguished between contracts limiting the scope of services to be provided and contracts limiting the patient’s right to sue for negligence and have only voided the latter as adhesion contracts contrary to public policy.¹¹⁸

There are no provisions in the National Organ Transplant Act (NOTA) or state anatomical gift statutes that abrogate a provider’s common law duty not to abandon.¹¹⁹ Nevertheless, it is likely that transplant surgeons could establish a policy of refusing to perform a transplant for a solicitor of deceased directed donation without exposing itself to abandonment liability. A provider can discharge a patient from care and give reasonable notice for the patient to obtain care at another transplant center if it discovers that a patient is soliciting for a deceased directed donation.

However, if the transplant surgeon does not discover that the patient has solicited until a directed donation of an organ from a deceased donor is made, it is unlikely that reasonable notice could be given because deceased organs must be transplanted within hours.¹²⁰ Still, transplant surgeons who object to performing such transplants may be able to protect themselves from liability even in this situation by informing potential recipients of their policies against facilitating transplants of deceased organs that have been directed through solicitation. Appropriate notice of such a policy must occur before a physician/patient relationship is established and should be acknowledged and consented to by prospective patients.¹²¹ This could be accomplished by having prospective patients agree up front that the transplant surgeon is not accepting a duty to transplant deceased organs that are directed as a result of solicitation and consent to termination of care if the center discovers that the patient has solicited in violation

¹¹⁷ See *Emory Univ. v. Porubiansky*, 282 S.E.2d 903, 904-06 (Ga. 1981) (finding that a teaching clinic can require patients to waive their right to insist on complete treatment, but cannot require them to waive their right to sue for negligence if the clinic fails to meet the standard of care required by statute).

¹¹⁸ See *id.*

¹¹⁹ See Daniel G. Jardine, *Liability Issues Arising out of Hospitals’ and Organ Procurement Organizations’ Rejection of Valid Anatomical Gifts*, 1990 WIS. L. REV. 1655, 1669-91 (1990) (arguing that there is negligence liability for rejecting donations because doing so will foreseeably result in harm to potential recipients).

¹²⁰ See ROBERT M. VEATCH, *TRANSPLANTATION ETHICS* 367 (2000).

¹²¹ Assuming that the transplant center feels strongly enough against donor solicitation to refuse care and allow the directed organ to go to waste.

of the center's policy. Such a policy would likely be considered consistent with a provider's right to contractually limit the scope of care provided. Faced with a breach of contract claim or a negligence claim, a provider would argue that it never accepted a contract or assumed a duty to treat the patient under these circumstances and that there was mutual consent to termination because the patient agreed in advance to termination of care in the event that the patient solicited directed deceased organ donations.

There is legal precedent establishing that agreements limiting the scope of care to be provided are not adhesion contracts.¹²² Also, such policies are not likely to increase organ wastage because Organ Procurement Organizations (OPOs) might effectively dissuade directed donations to solicitors by informing donor families of such policies against transplanting solicited deceased organs.¹²³

C. OPOs Refusing to Facilitate Certain Directed Donations

OPOs are defined by federal regulation as nonprofit entities that coordinate the consent, recovery, and allocation of organs from deceased donors through the UNOS system.¹²⁴ All parties involved in organ transplantations from deceased donors depend on OPO personnel to facilitate donation. Since the federal government designates only one OPO per geographical region with no overlap, an OPO policy of refusing to facilitate deceased directed donations made to solicitors would effectively prevent deceased donors and their families within that OPO's region from making such donations.¹²⁵

¹²² See *Emory Univ.*, 282 S.E.2d at 904-06. Even in the face of such a challenge, a provider could argue that such contracts support rather than undermine public policy by preserving the integrity of the national organ allocation system.

¹²³ Interestingly, if the OPTN or Congress decided to ban these moratoriums on the grounds that refusing these transplants wastes organs, this would likely be a valid exercise of authority under either Congress's power to regulate interstate commerce or its spending power. However, it is unlikely that the federal government would enact such a policy given the fact that the OPTN publicly opposes directed donation to solicitors. See *infra* text accompanying notes 136-42. It would appear also that state legislatures could amend their anatomical gift statutes to ban such moratoriums under their police power. However, such a law might be overturned for infringing on a physician's due process right to not enter a physician/patient relationship, a right that courts have generally upheld outside of the emergency care context. See *Hiser v. Randolph*, 617 P.2d 774, 776 (Ariz. Ct. App. 1980) (stating that "a medical [provider] is free to contract for his services as he sees fit and . . . can refuse to treat a patient, even under emergency situations"), *overruled by* *Thompson v. Sun City Cmty. Hosp.*, 688 P.2d 605, 611 (Ariz. 1984) (holding that hospitals cannot deny emergency care without a valid cause).

¹²⁴ 42 C.F.R. §§ 486.302, 486.306 (2002).

¹²⁵ 42 C.F.R. § 486.316 (2002).

In order to avoid any appearance that the federal government is somehow indirectly prohibiting protected free speech (OPOs are not government entities but do receive Medicare funding), such a policy could be written as a refusal to accept and procure donations directed to any recipient with whom the deceased donor has not had a preexisting relationship before the recipient's need for a transplant was first identified.¹²⁶ Such a policy may reduce any potential OPO exposure because there is no established duty in statute or common law for an OPO to facilitate any particular directed donation.¹²⁷

Laws that permit directed donation allow a donor or donor family to designate an individual recipient for donation; they do not require the donee (often the OPO) to accept the donation and facilitate its allocation for transplant.¹²⁸ In fact, state anatomical gift statutes expressly preserve a donee's right to reject an anatomical gift.¹²⁹ Thus, these laws do not grant either the donor or the designated recipient the right to conscript an OPO to aid him in removing a donated organ.¹³⁰

It is true that federal regulations require OPOs to conduct systematic efforts to acquire all usable organs from potential deceased donors and avoid organ wastage.¹³¹ However, federal regulations also require OPOs to have a system for equitably allocating donated organs among transplant patients.¹³² Thus, an OPO may argue that by refusing to facilitate deceased donations directed in the absence of a preexisting relationship, it is fulfilling its statutory duty to equitably allocate do-

¹²⁶ See discussion *infra* Part III.D.3.

¹²⁷ *But see* Colavito v. N.Y. Organ Donor Network, Inc., 438 F.3d 214, 220-26 (2d Cir. 2006) (if the OPO undertakes to coordinate a directed donation, it may later face liability for the placement of the donated organs).

¹²⁸ See UNIF. ANATOMICAL GIFT ACT § 8(a) (amended 1987).

¹²⁹ *Id.* ("A donee may accept or reject an anatomical gift.")

¹³⁰ See Colavito v. N.Y. Organ Donor Network, Inc., 356 F. Supp. 2d 237, 245-46, 248 (E.D.N.Y. 2005) (holding that a designated recipient of a deceased directed donation did not have an action against an OPO that allocated one of the donor's kidneys to another recipient, leaving the plaintiff with only one donated kidney, which was not transplantable). The court found that the state anatomical gift statute was ambiguous with respect to a designated recipient's rights. It then weighed the OPO's interests in equitably and efficiently allocating organs against the interest of a designated recipient of a directed donation and found that the OPO's interest precluded a private right of recovery for damages for the designated recipient. On appeal, however, the Second Circuit found that the intended recipient of a directed donation may have a property right to the donated organ. *Colavito*, 438 F.3d at 222-32. On appeal, the Court of Appeals of New York answered that the plaintiff, as a directed donee of an incompatible kidney, had no common law right to possess the organ and, therefore, his cause of action for conversion must fail. *Colavito v. N.Y. Organ Donor Network, Inc.*, No. 09320, slip op. (N.Y. Dec. 14, 2006).

¹³¹ 42 C.F.R. § 486.306(g)(2) (2002).

¹³² *Id.* at § 486.306(i).

nated organs. It may also argue that such a policy fulfills its duty to acquire all usable organs more broadly by protecting the integrity of the entire national allocation system.

Under common law, the conclusion is the same. Assuming the OPO undertakes no steps to coordinate a particular directed donation, an OPO owes no legal duty to designated recipients of a directed donation because it never initiates or enters into a relationship with these potential recipients and never assumes a duty of care toward them.¹³³ In spite of this, some have argued that an OPO assumes a duty to procure deceased organs for potential recipients by rendering services that it should recognize as necessary for the protection of potential recipients (a gratuitous undertaking).¹³⁴

An entity only assumes a duty of care through a gratuitous undertaking if its failure to exercise care increases the risk of the harm or if the harm suffered is because of the other's reliance.¹³⁵ An OPO that refuses to facilitate a solicited directed donation does not increase the designated recipient's risk beyond the risk that would exist if the OPO had not rendered any services at all. Also, the harm suffered by the designated recipient cannot be caused by reliance on the OPO if the OPO policy is publicly stated. Moreover, even if a common law duty could be found, it is possible to argue that federal regulations and state anatomical gift statutes abrogate this duty by preserving a donee's right to reject any anatomical gift and by requiring OPOs to equitably allocate organs.¹³⁶ Under this analysis, there is no legal duty for OPOs to facilitate solicited directed donations, and, therefore, OPOs may choose to limit their role in coordinating directed donations made in the absence of a preexisting relationship between the donor and the designated recipient.

D. An OPTN Policy Limiting Facilitation of Certain Directed Donations

In 1984, Congress authorized the Organ Procurement and Transplantation Network (OPTN) to set national organ allocation policies through NOTA.¹³⁷ This broad grant of authority is supported by Con-

¹³³ See discussion *supra* Part III.B.

¹³⁴ See Jardine, *supra* note 119, at 1669-91 (citing RESTATEMENT (SECOND) OF TORTS § 323 (1965) (arguing that there is negligence liability for rejecting donations because doing so will foreseeably result in harm to potential recipients)).

¹³⁵ RESTATEMENT (SECOND) OF TORTS § 323.

¹³⁶ Note, however, that if an OPO does endeavor to coordinate a directed donation, it may be held liable for fulfilling that undertaking. See *Colavito v. N.Y. Organ Donor Network, Inc.*, 438 F.3d 214, 222-32 (2d Cir. 2006).

¹³⁷ 42 U.S.C. § 274(b)(2) (2005) ("The [OPTN] shall - (A) establish in one

gress's spending power and its power to regulate interstate commerce.¹³⁸ NOTA requires the Secretary of HHS to contract with a private nonprofit organization to maintain the OPTN but leaves the authority to set allocation policies with the OPTN.¹³⁹ UNOS has held this contract and maintained the OPTN since 1986.¹⁴⁰

Hospitals that perform organ transplants must maintain membership with the OPTN in order to receive access to organs from the OPTN/UNOS system and receive federal Medicare funding for transplant procedures.¹⁴¹ Thus, the OPTN ultimately has authority to enforce its policies by denying membership and access to organs from its system to transplant centers that do not comply. The Secretary of HHS can support OPTN policies by cutting federal Medicare funding for transplant centers and OPOs that do not comply.¹⁴² Because the OPTN has broad congressional authority to set national allocation policies and the power to set policies that transplant centers and OPOs in all fifty states must abide by, an OPTN policy limiting solicitations of deceased directed donation may be the most efficient solution to the issue. So far, the OPTN Board of Directors has adopted a statement opposing public solicitations of deceased organs and has established a committee to examine the issue in both the living and deceased contexts but has not taken any action with respect to its allocation policies.¹⁴³

It may appear that the OPTN could have the authority to adopt a policy prohibiting its members from facilitating directed donations

location or through regional centers -- (i) a national list of individuals who need organs, and (ii) a national system, through the use of computers and in accordance with established medical criteria, to match organs and individuals included in the list . . . (B) establish membership criteria and medical criteria for allocating organs.”)

¹³⁸ 42 U.S.C. § 273(a) (2005) (granting the Secretary of HHS the authority to make grants to organ procurement organizations); *see also* Chen, *supra* note 105, at 287-88 (explaining that Congress validly enacted NOTA under its power to regulate interstate commerce because organ procurement, allocation, and transplantation necessarily involve interstate commerce).

¹³⁹ Chen, *supra* note 105, at 280.

¹⁴⁰ *Id.* at 266.

¹⁴¹ 42 C.F.R. § 482.45(b) (2002) (membership with the OPTN is a Medicare condition of participation for hospitals that perform organ transplants); 42 C.F.R. § 121.9(a)(1) (2002) (participation in Medicare is required in order to receive organs from the OPTN); *see supra* note 136 (the OPTN has authority to set national allocation policies).

¹⁴² *See* discussion *supra* notes 138, 141.

¹⁴³ OPTN, UNRELATED KIDNEY DONATION, *supra* note 7, at app. A; *see also* Press Release, UNOS News Bureau, Organ Procurement & Transplantation Network, OPTN/UNOS Board Opposes Solicitation for Deceased Organ Donation (Nov. 19, 2004) (noting that the OPTN has created an ad hoc committee on public solicitation), <http://www.optn.org/news/newsDetail.asp?id=374>.

and transplants that resulted from solicitation of deceased organs. There are two potential ways to consider creating such a policy. The first option would limit members from facilitating transplants for any recipient that has solicited deceased organ donations, regardless of whether or not the recipient obtained a directed donation. The second possibility would be to only limit members from transplanting or procuring deceased donor organs that were directed to the recipient as a result of a solicitation. However, neither policy is likely to pass a constitutional challenge based on infringement of protected free speech.

1. The Unconstitutional Condition Doctrine

Under the unconstitutional condition doctrine, the government may not withhold valuable government benefits that would otherwise be available because an individual has exercised a constitutionally protected right, such as the right to free speech.¹⁴⁴ The government may not condition a benefit on the abstention from a protected right even if the individual has no fundamental right to receive the benefit.¹⁴⁵ For example, a state university cannot deny a non-tenured professor continued employment because he exercised his constitutional right to publicly criticize the university, even though the professor has no fundamental right to employment at the university.¹⁴⁶ The government may not use conditional benefits to indirectly restrict a constitutional right that it could not directly restrict.¹⁴⁷

Of course, the government can selectively choose which programs to subsidize and does not infringe a constitutional right merely by choosing not to subsidize the exercise of that right.¹⁴⁸ For example, in *Rust v. Sullivan*,¹⁴⁹ the Supreme Court upheld a federal regulation that prohibited recipients of federal funds for family planning services from providing counseling concerning the use of abortion as a method for family planning.¹⁵⁰ The Supreme Court found that the government was not conditioning funds that would otherwise be available on the funding recipients forgoing a constitutional right; it was merely choosing to subsidize certain forms of counseling at the exclusion of others.¹⁵¹

¹⁴⁴ *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 597-98.

¹⁴⁷ *Id.*

¹⁴⁸ *Rust v. Sullivan*, 500 U.S. 173, 192 (1991).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 179-80.

¹⁵¹ *Id.* at 193-94.

However, government funding decisions based on abstentions from protected speech are only upheld in situations where the government is itself the speaker or has used private speakers to transmit information pertaining to its own program.¹⁵² “When the government disburses public funds to private entities to convey a governmental message, it may take . . . appropriate steps to ensure that its message is . . . [not] distorted by the grantee.”¹⁵³ This was the case in *Rust* because the Court characterized the recipients of the funding as entities chosen by the government to transmit the government’s chosen family planning message.¹⁵⁴

2. Directing OPTN Members to Prohibit Solicitation Creates an Unconstitutional Condition

OPTN policy prohibiting its members from facilitating transplants for any recipient that has solicited directed deceased donations creates an unconstitutional condition because the government (acting through the OPTN) would be conditioning valuable government benefits that would otherwise be available to potential recipients on the condition that potential recipients forgo their constitutional rights. Potential recipients would have to abstain from exercising their First Amendment free speech right to solicit organ donations in order to receive access to organs from the OPTN/UNOS system and transplantations from Medicare funded centers.¹⁵⁵ If constitutional, such a policy would essentially allow the government to indirectly do what it cannot do directly: prohibit speech that solicits directed organ donations.¹⁵⁶

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

¹⁵² *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541-42 (2001).

¹⁵³ *Id.* at 542 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)).

¹⁵⁴ *Id.* at 541-42; *Rust*, 500 U.S. at 179-80.

¹⁵⁵ See discussion *supra* Part II.A-D (discussing the First Amendment right to solicit).

¹⁵⁶ *Id.*

Similarly, in the case of the more narrow policy of prohibiting members from transplanting or procuring solicited deceased organs, the government would be acting through the OPTN to condition valuable government benefits on the condition that potential recipients forgo their constitutional right to speech. The OPTN would be denying recipients the ability to receive transplantation of directed organs at Medicare funded centers that would otherwise be available on the basis of whether the recipient has exercised its free speech right to solicit.

On the other hand, recipients would not be directly penalized for exercising their free speech right to solicit because they would still have access to non-solicited organs from the OPTN/UNOS system and transplantations of these organs at Medicare funded centers, regardless of whether they have ever solicited for deceased directed donations. Additionally, it is possible to argue that the speech itself is not being directly or indirectly regulated because patients are not coerced to forgo their constitutional right to solicit. Instead, they are denied a potential benefit that they may not have even if they remained silent.

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

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

3. The OPTN May Be Able to Limit Its Members from Facilitating Donations Directed Toward Solicitors on the Basis of the Relationship Between the Donor and the Designated Recipient

In contrast to an OPTN policy that focuses on the actions of the designated recipient, an OPTN policy limiting *donors* from directing deceased donations to solicitors, if carefully drafted, may withstand a constitutional challenge. Such a policy might, for example, state that member transplant centers and OPOs cannot facilitate deceased directed donations to individuals with whom the deceased donor had no preexisting relationship before the recipient's need for a transplant was first identified. This may effectively prevent the allocation of organs to individuals whom the donor or donor family came into contact with solely for the purpose of facilitating an organ donation without infringing on the ability to make directed donations to family members, friends, and others with whom the donor had previous emotional ties to.¹⁵⁷ The OPTN may be able to condition transplant center and OPO membership on compliance with such a policy. There is certainly a potential enforcement issue given that it may be difficult to define or discern a "preexisting relationship." But it should be clear in cases of pure directed donation based on solicitation that there is no "preexisting relationship." Thus, such a policy may effectively prevent directed donations that result from deceased organ solicitation.

This policy would likely not violate the unconstitutional condition doctrine because the OPTN would not be conditioning benefits on a recipient's exercise of the right to free speech.¹⁵⁸ Regardless of whether the patient solicited, access to organs and transplantations through the OPTN or from a directed donation made in the presence of a preexisting relationship would remain available. The OPTN would, therefore, not be directly or indirectly regulating protected speech because recipients who solicit would not lose any benefits that they otherwise would have had based on the solicitation.

Similarly, OPOs and transplant centers could make a policy distinction on the basis of whether there was a preexisting relationship between a directed donor (or donor family) and the recipient and not on whether the recipient exercised the constitutional right to free speech. Such a policy would not limit a recipient's right to engage in solicitation as protected free speech. Instead, it would limit a donor's

¹⁵⁷ One recent proposal would allow directed donations made within blood relationships and marriage but would require OPTN approval on a case by case basis for all other directed donations. Zink et al., *supra* note 29, at 9.

¹⁵⁸ See *supra* text accompanying notes 144-54 (discussing the unconstitutional condition doctrine).

ability to direct a donation. A donor's right to direct a donation to a stranger can hardly be considered a valuable government benefit in the same way that access to organs and transplants from the OPTN system centers can be. For these reasons, such a policy would likely pass an unconstitutional condition challenge.

4. An OPTN Policy Limiting Its Members from Facilitating Deceased Directed Donations Made in the Absence of a Preexisting Relationship Would Not Fatally Conflict with State or Federal Law

Federal regulations and many state anatomical gift statutes expressly authorize directed organ donations from both living and deceased donors.¹⁵⁹ For example, the UAGA states that an anatomical gift may be made to "a designated individual for transplantation or therapy needed by that individual."¹⁶⁰ Nonetheless, there would be no true conflict between these laws and an OPTN policy prohibiting member transplant centers and OPOs from facilitating directed donations made in the absence of a preexisting relationship between the deceased donor and the designated recipient.

Federal regulations and state anatomical gift statutes that permit directed donation do not create any legal duty for transplant centers or OPOs to agree to facilitate any particular directed donation.¹⁶¹ These laws specify what entities a donor may name as the donee of an anatomical gift but do grant either the donor or the designated recipient the right to conscript transplant centers and OPOs into their services to effectuate the gift.¹⁶² A transplant center or OPO does not violate laws or regulations permitting directed donations by refusing to facilitate any particular directed donation. Therefore, transplant centers and OPOs should be able to comply with an OPTN policy limiting facilitation of directed deceased donation in the absence of a preexisting relationship without violating federal or state laws that permit directed donations generally.

Such an OPTN policy, would clearly limit the ability to direct a donation. This limitation may be appropriate and consistent with the legislative history of organ donation laws; permitting directed donations to strangers was not the intention behind the UAGA directed

¹⁵⁹ See *supra* notes 14-15 and accompanying text.

¹⁶⁰ UNIF. ANATOMICAL GIFT ACT § 6(a)(3) (amended 1987) and § 11(a)(2)(amended 2006).

¹⁶¹ See discussion *supra* Part III.B. But if an OPO undertakes coordination of a directed donation, the directed recipient may have an enforceable right to receive such organ. See *Colavito v. N.Y. Organ Donor Network, Inc.*, 438 F.3d 214, 222-32 (2d Cir. 2006).

¹⁶² See *Colavito*, 438 F.3d at 222-32.

donation provision. The drafters of the UAGA never contemplated directed donations arranged through solicitations and made in the absence of any preexisting relationship.¹⁶³ An OPTN policy prohibiting facilitation of deceased directed donation to strangers would only limit the right to direct a deceased donation in a way that the more general right was never intended to be exercised. Thus, it is unlikely that a court would find that such a policy conflicts with the letter or the purpose of federal regulations and state laws that permit directed donation.¹⁶⁴

E. Legislatively Restricting Directed Donations

A carefully drafted amendment to NOTA or to state anatomical gift statutes could effectively prevent directed donations to deceased directed donation solicitors and withstand a constitutional challenge. Such a restriction could be written to limit directed donation to an individual with whom the deceased donor (or donor family) had a preexisting relationship before the recipient's need for a transplant was first identified. This would prevent deceased directed donations to individuals with whom the donor or donor family came into contact solely for the purpose of facilitating a transplant without affecting directed donation to family members or friends.¹⁶⁵ Such a law might be challenged on the grounds of infringement of free speech, state/federal conflict of law principles, or substantive due process.

¹⁶³ See *supra* note 29 and accompanying text.

¹⁶⁴ Nevertheless, even if there was a perceived conflict, such an OPTN policy would likely be enforceable. Although federal regulations expressly permit directed donation and require the Secretary of HHS to approve all OPTN policies, this HHS final rule may be unconstitutional to the extent that it conflicts with OPTN allocation policies because Congress granted the OPTN and not HHS the authority to set allocation policies. See 42 C.F.R. §§ 121.4, 121.8(h) (2000); Chen, *supra* note 105, at 280. Also, given that such a policy would not conflict with the purpose of the regulation permitting directed donation, there is little reason to think the Secretary would not approve it. With regard to state law, if there was a conflict, the OPTN policy would preempt the state law through either conflict or field preemption to the extent that state laws permit directed donation in the absence of a preexisting relationship because Congress has authorized the OPTN to set national allocation policies under NOTA. See *supra* note 136. NOTA was validly enacted under Congress's spending power and its power to regulate interstate commerce. See *supra* notes 136-41 and accompanying text. But see Chen, *supra* note 105, at 281-82 (arguing that courts are reluctant to find that a private organization's policies preempt state law and reluctant to find that a federal interest preempts an entire field of law).

¹⁶⁵ It is possible to draft the law more broadly to prohibit all deceased directed donations. See VT. STAT. ANN. tit. 18 § 5242(a), (d) (2000) (allowing only living donors to make a directed donation). However, such a law would prohibit even deceased directed donations to family members and friends, which may be undesirable as a policy matter.

However, neither the free speech argument nor a conflict of laws challenge is likely to be successful, as discussed above. The substantive due process challenge merits further consideration.

Generally, courts defer to legislatures and will only invalidate a law on substantive due process grounds if the law infringes a fundamental right.¹⁶⁶ If a right is not enumerated in the Constitution, the Supreme Court often will only consider it fundamental if it "is deeply rooted in [the] [n]ation's history and tradition."¹⁶⁷ An important factor for determining whether a right is rooted in tradition is how broadly the right can be defined.

The right to direct an organ donation is clearly not deeply rooted in the history and tradition of the nation. Traditionally at common law, courts have found that, at most, one has only a quasi-property right in one's own tissues and only a limited right to direct burial and disposition in the body of a deceased family member.¹⁶⁸ Also, most courts have refused to apply the traditional legal frameworks of property and contract law to organ transplantation cases when there is an applicable statute that has balanced the moral and social issues.¹⁶⁹ Thus, the legal right to direct a donation as either a fundamental property or contract right is not likely to be considered deeply founded in our nation's history and tradition. It is statutory and was created by state legislatures following the adoption of the UAGA in 1968.¹⁷⁰ And, in fact, at least one state prohibits directed deceased donation entirely.¹⁷¹

It may be possible to characterize directed donation as a traditional right by more broadly defining it as the right to control the disposition of one's body parts or remains.¹⁷² In *Brotherton v. Cleveland*,¹⁷³ the Sixth Circuit and, in *Newman v. Sathyavaglswaran*,¹⁷⁴ the Ninth Circuit found a fundamental right to control the final disposition of one's body that extended to property interests of possession and transfer and that was protected by the due process clause of the Fourteenth Amendment.¹⁷⁵ Defined this broadly,

¹⁶⁶ *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

¹⁶⁷ *See Moore v. City of East Cleveland*, 431 U.S. 494, 504 (1977).

¹⁶⁸ *Perry v. St. Francis Hosp.*, 886 F. Supp. 1551, 1563 (D. Kan. 1995). *See also Colavito v. N.Y. Organ Donor Network, Inc.*, No. 09320, slip op. (N.Y. Dec. 14, 2006) (finding no common law property right to donated organs).

¹⁶⁹ *Wilson v. Adkins*, 941 S.W.2d 440, 442 (Ark. Ct. App. 1997).

¹⁷⁰ UNIF. ANATOMICAL GIFT ACT § 3 (amended 1987).

¹⁷¹ *See VT. STAT. ANN. tit. 18 § 5242(a), (d)* (2000).

¹⁷² *Venner v. State*, 354 A.2d 483, 498-99 (Md. Ct. Spec. App. 1976).

¹⁷³ 923 F.2d 477, 482 (6th Cir. 1991).

¹⁷⁴ 287 F.3d 786, 796-97 (9th Cir. 2002).

¹⁷⁵ *Brotherton*, 923 F.2d at 482; *Newman*, 287 F.3d at 796-97.

such a constitutional right would seem to prevent legislatures from limiting one's ability to transfer an anatomical gift to an individual of one's choosing.

Nevertheless, both the *Brotherton* and *Newman* cases related to a situation in which the state interfered with the rights of the next-of-kin by statutorily authorizing coroners to remove a deceased's corneas without consent or even providing the next-of-kin with notice.¹⁷⁶ Thus, the more narrow reading of these holdings is simply that the state cannot violate the next-of-kin's property interest in a deceased's body by taking a body part without obtaining consent. Framed this way, the protected right seems to be a negative right to be free from interference with possession of a body, not a positive right to demand specific transfer of body parts.

Although the Second Circuit in *Colavito v. New York Donor Network*¹⁷⁷ raised the question of whether the designated recipient of a directed donation has a property right in the directed organ, a subsequent opinion from the New York Court of Appeals in the case concluded that there is no such common law right, and no court has found a fundamental legal right to transfer a body part to a specific person of one's choosing.¹⁷⁸ Defining the right to control the disposition of the body broadly enough to encompass such a right may have undesirable consequences. For example, one would be able to argue that an organ donor has a fundamental legal right to place categorical restrictions on a donation so that only certain races or classes of people could be recipients. State laws such as the Florida statute that prohibits donors from placing discriminatory restrictions on potential recipients of an anatomical gift on the basis of race, color, religion, sex, national origin, age, physical handicap, health status, marital status, or economic status might be invalid.¹⁷⁹ A right to place such discriminatory restrictions on an organ donation is not traditional and has never been recognized as such at common law or in statute.¹⁸⁰

Congress and the states adopted NOTA and the UAGA before patients were publicly soliciting directed donations, and legislators

¹⁷⁶ *Brotherton*, 923 F.2d at 482; *Newman*, 287 F.3d at 798.

¹⁷⁷ 438 F.3d 214, 222-32 (2d Cir. 2006); *Colavito v. N.Y. Organ Donor Network, Inc.*, No. 09320, slip op. (N.Y. Dec. 14, 2006).

¹⁷⁸ *Colavito*, 438 F.3d at 222-32 (certifying questions back to the Court of Appeals of the State of New York, including whether New York law vests directed donation recipients with a property right in the directed organ); *Colavito*, No. 09320, slip op.

¹⁷⁹ FLA. STAT. § 765.513(4) (2005).

¹⁸⁰ There has never been a right to direct a donation to a class of people because statutes define directed donation as donation to a "designated individual." UNIF. ANATOMICAL GIFT ACT § 6(a)(3) (amended 1987).

likely only contemplated deceased directed donations made to family members, close friends, or others with whom the donor had emotional ties.¹⁸¹ With this background, the existing legal precedent, and the undesirable consequences of drawing the right more broadly, a court is likely to find that if there is a traditional legal right at all, it is defined only as the right to direct a donation to a family member or friend. Even if the right to direct a deceased donation could be construed as rooted in the nation's history and tradition and, therefore, be considered fundamental, the right to direct a donation to a stranger would likely fall outside of any such right. A federal or state law that prohibits directed donation in the absence of a preexisting relationship would, therefore, likely withstand a legal challenge.

CONCLUSION

Lawmakers and health care providers should continue to permit and encourage solicitations of directed donations from living organ donors because this practice will serve to increase total organ donations without depriving potential recipients of organs they otherwise would have received or compromising the principles of an established allocation system. In contrast, solicitations of directed donations from deceased donors should be restricted because such donations unjustifiably sacrifice medical utility and are inequitable in that they favor patients with "attractiveness," wealth, and the ability to draw media attention. Public solicitations for directed deceased donation threaten to undermine the national system, which is carefully established to equitably and efficiently allocate deceased organs.

An outright ban on deceased organ solicitations may not be desirable and is not likely to withstand a constitutional challenge because charitable solicitations are protected under the First Amendment as free speech. However, intrusive organ solicitations for a directed deceased donation can and should be subject to reasonable regulations, such as restrictions on the information contained in organ solicitations and the time, place, and manner in which directed donation solicitations are made. Additionally, transplant centers should carefully consider whether they wish to adopt a policy restricting transplants on recipients who solicit directed deceased organ donations. OPOs should also carefully consider adoption of a policy limiting facilitation of directed deceased organ donations in the absence of a preexisting relationship. Importantly, the OPTN is in a position of authority to efficiently achieve uniform policy on this issue by limiting member

¹⁸¹ See *supra* note 29 and accompanying text.

OPOs and transplant centers from facilitating deceased directed donations made in the absence of a preexisting relationship between the donor and the designated recipient. Congress and states also have the power to enact a statutory ban on deceased directed donations made in the absence of a preexisting relationship, although this would seem to be a politically less expedient route. All of these options to limit deceased directed organ donations to solicitors should be considered. The integrity of the national organ allocation system as a mechanism to maximize equity and utility of a scarce resource and the thousands of people awaiting a fair chance at receiving life-saving transplants are at stake.

