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# Organ Conscription: How the Dead Can Save the Living

David Schwark

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# ORGAN CONSCRIPTION: HOW THE DEAD CAN SAVE THE LIVING

DAVID SCHWARK\*

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## I. INTRODUCTION

On his third tour of duty in Afghanistan, just two weeks before he was scheduled to return home, Army Ranger Corporal Ben Kopp was mortally wounded while fighting the Taliban.<sup>1</sup> His heroic actions saved the lives of at least six of his fellow Rangers.<sup>2</sup> However, his heroism did not end there. Because he was an organ donor, Corporal Kopp may save, improve, or prolong the lives of seventy-five more

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<sup>1</sup> *Hero Soldier's Heart Keeps Giving*, CBSNEWS.COM (Aug. 10, 2009), <http://cbs5.com/health/solider.heart.transplant.2.1121263.html>.

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

people.<sup>3</sup> One of those fortunate people, Judy Meikle, was desperately in need of a heart transplant.<sup>4</sup> Now, because of Corporal Kopp's heroism, Judy says that everything has improved since the transplant.<sup>5</sup> "I don't think there can be a better tribute to Jill's [Ben's mother] generosity and Ben's -- literally in my case -- Ben's big brave heart, than to have his heart keep beating inside me."<sup>6</sup> Corporal Kopp's mother explained, "To experience that joy along with my sorrow -- that's got to be what a miracle feels like."<sup>7</sup>

Although many Americans are not capable of the heroism required to risk their lives in the military, anyone can be a hero by donating his or her organs when he or she passes away. Unfortunately, very few Americans donate their organs.<sup>8</sup> According to the U.S. Department of Health and Human Services, only 8,019 people who died in 2006 donated their organs.<sup>9</sup> That represents only 0.33%, or three in 1,000, of the people who died in 2006.<sup>10</sup> This low number has led to a current organ waiting list of 110,127 people.<sup>11</sup> On average, eighteen people die each day while waiting for an organ.<sup>12</sup> Often, after waiting on a list for an organ, people are removed from the waiting lists because their conditions have deteriorated to the point where

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

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

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

<sup>8</sup> Press Release, Donate Life America, Number of Americans Willing to Donate Organs Rises, But Still Not Keeping Pace with Need (Apr. 5, 2010), available at [http://www.donatelife.net/pdfs/DLA\\_Survey\\_Press\\_Release\\_FINAL.pdf](http://www.donatelife.net/pdfs/DLA_Survey_Press_Release_FINAL.pdf); *25 Facts About Organ Donation and Transplantation*, NATIONAL KIDNEY FOUNDATION, [http://www.kidney.org/news/newsroom/fs\\_new/25factsorgdon&trans.cfm](http://www.kidney.org/news/newsroom/fs_new/25factsorgdon&trans.cfm) (last visited Jan. 27, 2011).

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

<sup>10</sup> Melonie Heron et. al., *Deaths: Final Data for 2006*, 57 NAT'L VITAL STATISTICS REPORT 14, 18 (2009), available at [http://www.cdc.gov/nchs/data/nvsr/nvsr57/nvsr57\\_14.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr57/nvsr57_14.pdf).

<sup>11</sup> U.S. Department of Health and Human Services, *Organ Procurement and Transplantation Network*, <http://optn.transplant.hrsa.gov> (last visited Jan. 20, 2011) (on file with author). This number only reflects national patient waiting lists. *Id.* See also *Statistics*, DONATE LIFE AMERICA, <http://www.donatelife.net/UnderstandingDonation/Statistics.php> [hereinafter *Donate*] (last visited Dec. 10, 2009) (noting that more than 100,000 individuals currently need life-saving organ transplants).

<sup>12</sup> DONATE, *supra* note 11. See also Alexander Tabarrok, *Life-Saving Incentives: Consequences, Costs and Solutions to the Organ Shortage*, LIBR. OF ECON. & LIBERTY para 1 (Apr. 5, 2004), available at <http://www.econlib.org/library/Columns/y2004/Tabarrokorgans.html> (noting that the number of individuals who die while on the waiting list is often understated because usually it fails to include the hundreds of Americans who die after they have become too sick to be candidates for a transplant).

organ transplantation would not save them.<sup>13</sup> In 2010, new entrants on the waitlist are likely to wait ten years for that organ.<sup>14</sup>

This deficit is the result of two factors. First, the Uniform Anatomical Gift Act and the National Organ Transplant Act prohibit the sale and purchase of any organ or tissue for valuable consideration.<sup>15</sup> Not only does this discourage donation, but it also takes away a crucial property right from individuals, the right to exchange for valuable consideration.<sup>16</sup> Second, some estimate that 30% of Americans do not even know how to become organ donors.<sup>17</sup> These facts indicate that the current system of voluntary, altruistic donation has failed.

Recently, Israel, another country struggling with organ deficits, decided that its voluntary, altruistic system was not working and changed it.<sup>18</sup> Now, the families of the deceased organ donors are permitted to receive up to \$13,400 that can be used to memorialize the deceased.<sup>19</sup> In doing so, Israel has become the first country in the world to allow deceased organ donors to be rewarded.<sup>20</sup> This plan, however, may not go far enough towards alerting the problem of organ shortages.<sup>21</sup>

A mandated organ donation system that compensates the families of the donors is the best way to ensure that people waiting for organs do not die needlessly, and also ensures that individuals' Fifth Amendment rights are not violated. Mandating donation would guarantee the availability of organs, which could prevent hundreds of deaths each year.

Although mandatory donation may seem like an extreme government measure, without it, people will continue to die because of a lack of organs. Therefore, to ensure that individuals are not unduly burdened by the taking of their organs, there must be just compensation. For these reasons, a successful system of organ donation needs to be both mandatory and compensatory.

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<sup>13</sup> See Tabarrok, *supra* note 12 para 1.

<sup>14</sup> Robert S. Gaston et al., *The Report of a National Conference on the Wait List for Kidney Transplantation*, 3 AM. J. TRANSPLANTATION 775, 775 (2003), available at <http://www.interscience.wiley.com/cgi-bin/fulltext/118901784/PDFSTART> (report on a 2002 meeting with over 100 transplant community members that addressed individuals' access to kidney transplantation).

<sup>15</sup> UNIF. ANATOMICAL GIFT ACT § 10 (1987) (amended 2006); 42 U.S.C. § 274e (2010).

<sup>16</sup> Cf. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 500 (1987) (stating that a property's value is part of the property owner's bundle of rights).

<sup>17</sup> DONATE, *supra* note 11.

<sup>18</sup> Sally Satel, *Kidney Mitzvah: Israel's Remarkable New Steps to Solve Its Organ Shortage*, SLATE (Jan. 27, 2010), <http://www.slate.com/id/2242791/pagenum/all/#p2>. Any comparison between the organ donation laws in Israel and the United States is outside the scope of this note and will not be addressed.

<sup>19</sup> *Id.*

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

<sup>21</sup> See *Id.* The author of the article suggests that the plan would work better if the funds could be used for anything that the families wanted. *Id.* This note argues that a more effective step would be to mandate donation.

This Note will examine the failures of uncompensated and voluntary donation and argue that the only way to meet our country's organ needs is to make donation mandatory. However, because the deceased's organs are property, the Fifth Amendment requires any taking for public use to be compensated. Thus, the only way to ensure that mandatory donation is constitutional is to provide compensation to donors.

Part II of this Note examines the history of voluntary organ donation in the United States. This history describes the evolution of organ donation laws from the first transplant until the present day. Part II also details the consequences and shortcomings of the current system.

Part III examines three other proposed solutions to the organ deficit. These possible solutions include routine requests, an organ market, and presumed consent. However, none of these solutions would increase the organ supply as effectively as a mandatory donation system.

Part IV discusses how a mandatory donation program is the most effective way to ensure a sufficient organ supply. Part IV also argues that once an individual dies, the organs become the property of the deceased's heirs. Finally, Part IV discusses why a mandatory donation system would be unconstitutional unless donor's families are compensated for the taking of the deceased's organs.

## II. HISTORY OF ORGAN DONATION IN THE UNITED STATES

In 1954,<sup>22</sup> doctors successfully transplanted a kidney from one twin to the other in one of the most important medical procedures in the past century.<sup>23</sup> By 1967, experimental heart and liver transplantation were performed successfully.<sup>24</sup> These medical breakthroughs required individual states to begin passing legislation in an attempt to control the new developments.<sup>25</sup> Finally, nationwide regulations were deemed necessary, and in 1968, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") drafted the Uniform Anatomical Gift Act ("UAGA"), which provided for uniform regulation of anatomical gifts and defined persons who could gift their organs.<sup>26</sup> The goal of the UAGA was not only to

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<sup>22</sup> Organ transplantations had been performed prior to this date. The first recorded human organ transplantation was a 1911 testis allograft, performed by surgeons in the United States. Laurel R. Siegel, Comment, *Re-Engineering the Laws of Organ Transplantation*, 49 EMORY L.J. 917, 920 (2000).

<sup>23</sup> Susan J. Landers, *Transplants: 50 Years of Saving Lives*, AMEDNEWS.COM (Feb. 16, 2004), <http://www.ama-assn.org/amednews/2004/02/16/hll20216.htm>.

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

<sup>25</sup> Lloyd R. Cohen, *Organ Transplant Market Would Save Lives*, NAT'L L.J., Jan. 29, 1996, at A19 (Californians to donate their organs through any written instrument and provided that the heirs and executors of the decedent's estate be obligated to abide by the bequeathal). *Id.*

<sup>26</sup> National Conference on Commissioners on Uniform State Laws, *Prefatory Note*, PENN LAW (1987), <http://www.law.upenn.edu/bll/archives/ulc/fnact99/uaga87.pdf>; UAGA § 2. The UAGA provided that an individual of at least eighteen years of age and of sound mind may donate his organs upon death. UAGA § 2.

regulate, but also to encourage donation.<sup>27</sup> In 1984, Congress passed the National Organ Transplant Act ("NOTA"), which made receiving "valuable consideration" for an organ a federal offense, punishable by up to \$50,000 and five years in prison.<sup>28</sup>

A. *The Uniform Anatomical Gift Act*

The 1968 UAGA allowed individuals to donate organs, eyes, and tissue as gifts to a known donee or to any donee that might need an organ to survive.<sup>29</sup> Though it did not explicitly state that organs could not be given for compensation, it was interpreted to restrict donation only to "gifts."<sup>30</sup> The UAGA made a variety of advances in the law of organ donation, standardizing the process in each state and enabled individuals to donate organs, eyes and tissue to any donee that needed an organ to survive.<sup>31</sup> The significant provisions expressly allow donations for medical, research, and educational purposes;<sup>32</sup> give priority to the wishes of the deceased;<sup>33</sup>

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<sup>27</sup> See The National Conference of Commissioners on Uniform State Laws, *UAGA Summary, ANATOMICAL GIFT ACT*, available at <http://www.anatomicalgiftact.org/DesktopDefault.aspx?tabindex=1&tabid=67> (last visited Nov. 24, 2009) [hereinafter NCCUSL]. "The National Conference of Commissioners on Uniform State Laws . . . has promulgated the Uniform Anatomical Gift Act (2006) to further improve the system for allocating organs to transplant recipients." *Id.*

<sup>28</sup> *Policy Management: National Organ Transplant Act*, U.S. DEP'T OF HEALTH & HUMAN SERVICES, <http://optn.transplant.hrsa.gov/policiesAndBylaws/nota.asp> (last visited Jan. 28, 2011); 42 U.S.C. § 274e. State officials were concerned that a market in human kidneys was about to emerge. See Walter Sullivan, *Buying of Kidneys of Poor Attacked*, N.Y. TIMES, Sept. 24, 1983, § 1, at 9. "Penalties. Any person who violates subsection (a) shall be fined not more than \$ 50,000 or imprisoned not more than five years, or both." 42 U.S.C. § 274e(b).

<sup>29</sup> NCCUSL, *supra* note 27.

<sup>30</sup> Cohen, *supra* note 25. The chairman of the drafting committee was not clear on whether the UAGA banned organ sales and thought that the matter should be "left to the decency of intelligent human beings." Henry Hansmann, *The Economics and Ethics of Markets for Human Organs*, 14 J. HEALTH POL. POL'Y & L. 57, 58 (1989).

<sup>31</sup> See NCCUSL, *supra* note 27.

<sup>32</sup> UNIF. ANATOMICAL GIFT ACT § 3 (1968) (amended 1987 and 2006), available at [http://www2.sunysuffolk.edu/pecorip/scccweb/etexts/deathandddying\\_text/uaga.htm](http://www2.sunysuffolk.edu/pecorip/scccweb/etexts/deathandddying_text/uaga.htm). Section 3 provides:

The following persons may become donees of gifts of bodies or parts thereof for the purposes stated:

- (1) any hospital, surgeon, or physician, for medical or dental education, research, advancement of medical or dental science, therapy, or transplantation; or
- (2) any accredited medical or dental school, college or university for education, research, advancement of medical or dental science, or therapy; or
- (3) any bank or storage facility, for medical or dental education, research, advancement of medical or dental science, therapy, or transplantation; or

and set out a prioritized list of the next of kin authorized to donate where the wishes of the deceased are unknown.<sup>34</sup>

It was assumed no organs could be removed for transplant absent an explicit consent to donate.<sup>35</sup> Soon after, all fifty states had adopted some form of the Uniform Anatomical Gift Act.<sup>36</sup> Unfortunately, the 1968 UAGA did not achieve its goal of significantly increasing donation.<sup>37</sup> This fact, combined with the explosion of organ transplantation that occurred beginning in the 1980's, the recent passing of NOTA and the fear of a market for kidneys,<sup>38</sup> led the NCCUSL to amend the UAGA in 1987.<sup>39</sup>

The 1987 amendment addressed the changes in organ donation caused by the increase in organ transplantation.<sup>40</sup> Some of the changes included prohibiting the sale of organs at death,<sup>41</sup> reducing formalities of executing the donative document,<sup>42</sup> prioritizing donor consent over family objection,<sup>43</sup> and allowing medical examiners to release any usable organ for transplantation.<sup>44</sup> Furthermore, the 1987 UAGA

(4) any specified individual for therapy or transplantation needed by him.

*Id.*

<sup>33</sup> UAGA § 2(a) (1968) (“[a]ny individual of sound mind and 18 years of age or more may give all or any part of his body for any purposes specified in section 3, the gift to take effect upon death.”). The following subsection, however, only allows the next of kin to authorize a donation “in the absence of actual notice of contrary indications by the decedent.” *Id.* § 2(b).

<sup>34</sup> *Id.* § 2(b). Section 2 provides:

Any of the following persons, in order of priority stated . . . may give all or any part of the decedent's body for any purpose specified in section 3.

- (1) The spouse,
- (2) An adult son or daughter,
- (3) Either parent,
- (4) An adult brother or sister,
- (5) The guardian of the person of the decedent at the time of his death,
- (6) Any other person authorized or under obligation to dispose of the body.

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

<sup>36</sup> Hansmann, *supra* note 30, at 58.

<sup>37</sup> *Id.* at 9.

<sup>38</sup> Sullivan, *supra* note 28.

<sup>39</sup> NCCUSL, *supra* note 27. “In the late 1970s, the invention of cyclosporin, an immunosuppressive drug, revolutionized organ transplantation, advancing it from an experimental operation to a legitimate mode of treatment.” Siegel, *supra* note 22, at 920-21.

<sup>40</sup> Siegel, *supra* note 22, at 933

<sup>41</sup> UNIF. ANATOMICAL GIFT ACT (1987) § 10.

<sup>42</sup> *Id.* § 2.

<sup>43</sup> *Id.* § 2(h).

<sup>44</sup> *Id.* § 4.

reinforced a trend in presumed consent statutes when it recommended presumed consent for the donation of any organ or tissue from cadavers under the custody of coroners or medical examiners.<sup>45</sup> Unlike the original act, which was swiftly adopted by all states, the amendment faced stiff resistance.<sup>46</sup> Eventually, twenty six-states adopted the 1987 revisions.<sup>47</sup> This resulted in non-uniformity of state laws, which was only increased by subsequent changes by individual states.<sup>48</sup>

More recently, the NCCUSL decided to make amendments in order to resolve any inconsistencies and hopefully encourage more organ donation.<sup>49</sup> One of the revisions was the elimination of presumed consent.<sup>50</sup> The NCCUSL made clear that “[o]rgan donation is a purely voluntary decision that must be clearly conveyed before an individual’s organs are available for transplant.”<sup>51</sup> As of November 1, 2009, the 2006 UAGA has been enacted in thirty-six states and the District of Columbia, and has been introduced as currently pending bills in three other states.<sup>52</sup> Although more states have adopted the 2006 amendments, its goal of increasing organ donation has not been met.<sup>53</sup>

The UAGA has also been used by plaintiffs to argue that a personal property right exists “in the body organs of a decedent . . . giving relatives the right to consent to organ donation.”<sup>54</sup> Although the “right to consent to organ donation” is not

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<sup>45</sup> *Id.* States were much more inclined to use presumed consent in relation to corneal or eye tissue. Michele Goodwin, *Rethinking Legislative Consent Law?*, 5 DEPAUL J. HEALTH CARE L. 257, 266 (2002).

<sup>46</sup> Ann McIntosh, *Regulating the “Gift of Life” — The 1987 Uniform Anatomical Gift Act*, 65 WASH. L. REV. 171, 176 (1990). The debate focused on the authorization provisions and the routine inquiry requirement. The prohibition on organ sale was also criticized. *Id.*

<sup>47</sup> NCCUSL, *supra* note 27.

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

<sup>49</sup> *Id.* “The 2006 Act further simplifies the document of gift and accommodates the forms commonly found on the backs of driver’s licenses in the United States. It also strengthens the power of an individual not to donate his or her parts by permitting the individual to sign a refusal that also bars others from making a gift of the individual’s parts after the individual’s death.” *Id.*

<sup>50</sup> UNIF. ANATOMICAL GIFT ACT (amended 2006) § 8.

<sup>51</sup> NCCUSL, *supra* note 27.

<sup>52</sup> NCCUSL, *Enactment Status Map*, <http://www.anatomicalgiftact.org/DesktopDefault.aspx?tabindex=2&tabid=72> (last visited Dec. 10, 2009).

<sup>53</sup> Press Release, Donate Life America, Number of Americans Willing to Donate Organs Rises, But Still Not keeping Pace with need (Apr. 5 2010), *available at*, [http://www.donatelife.net/pdfs/DLA\\_Survey\\_Press\\_Release\\_FINAL.pdf](http://www.donatelife.net/pdfs/DLA_Survey_Press_Release_FINAL.pdf). Deceased donors have decreased each year after 2006. In 2007, 8,085 deceased people donated. Milton R. Benjamin, *The Miracle of Transplantation*, VERO BEACHSIDE, Oct. 15, 2009). By 2008, the number dropped to 7,990. Organ Procurement and Transplantation Network, *At-a-Glance* (Mar. 18, 2010) [http://optn.transplant.hrsa.gov/PublicComment/pubcommentPropSub\\_259.pdf](http://optn.transplant.hrsa.gov/PublicComment/pubcommentPropSub_259.pdf).

<sup>54</sup> Kathryn E. Peterson, Note, *My Father's Eyes and My Mother's Heart: The Due Process Rights of the Next of Kin in Organ Donation*, 40 VAL. U. L. REV. 169, 188 (2005).



“synonymous with a personal property right,” it does open the door to the assertion.<sup>55</sup> Furthermore, the UAGA allows a decedent to direct donation of a body part or organ to a specific named individual.<sup>56</sup> This gives added weight to the claim that the heirs inherit a personal property right in the organs of the deceased.<sup>57</sup>

### B. *The National Organ Transplantation Act*

In 1984, Congress passed the National Organ Transplantation Act amid fears of a commercial market in kidneys.<sup>58</sup> Congress also hoped the legislation would alleviate the shortage of transplantable organs.<sup>59</sup> NOTA is an important piece of transplant legislation for several reasons. First, it firmly rejected the idea of an organ market by forbidding the sale of human organs in interstate commerce.<sup>60</sup> Lawmakers were worried that a market system would prey upon the poor as a source for organs.<sup>61</sup>

Another important part of NOTA was the creation of the Task Force on Organ Transplantation (“Task Force”), which was charged with “conduct[ing] comprehensive examinations of the medical, legal, ethical, economic, and social issues presented by human organ procurement and transplantation.”<sup>62</sup> The Task Force recommended that hospitals “adopt routine inquiry/required request policies and procedures for identifying potential organ and tissue donors and for providing next-of-kin with appropriate opportunities for donation.”<sup>63</sup> Congress adopted the

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<sup>55</sup> *Id.*

<sup>56</sup> UNIF. ANATOMICAL GIFT ACT (amended 2006) § 11(a)(2).

<sup>57</sup> *See, e.g.*, Peterson, *supra* note 54.

<sup>58</sup> *See* Cohen, *supra* note 25; *see also* S. REP. NO. 98-382, at 2-3 (1984), *reprinted in* U.S.C.C.A.N. 3974, 3976-77.

<sup>59</sup> H.R. REP. NO. 98-769 (2d Sess. 1984); S. REP. NO. 98-382 (1984).

<sup>60</sup> *See* 42 U.S.C. § 274e (a) (1984). This section provides:

(a) It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce.

(b) Any person who violates subsection (a) shall be fined not more than \$50,000 or imprisoned not more than five years, or both.

*Id.* § 274e(a). Congress has the power to legislate on organ transplantation through the commerce clause. Since the Supreme Court has held that activity is commerce if it has a “substantial economic effect” on interstate commerce or if the “cumulative effect” of one act could have an effect on such commerce, *Wickard v. Filburn*, 317 U.S. 111 (1942), organ transplantation would probably be considered in interstate commerce. Susan H. Denise, *Regulating the Sale of Human Organs*, 71 VA. L. REV. 1015, 1025 (1985). Regardless, whether or not organ transplantation can be regulated under the commerce clause is beyond the scope of this Note and will not be discussed.

<sup>61</sup> John A. Sten, *Rethinking the National Organ Transplant Program: When Push Comes to Shove*, 11 J. CONTEMP. HEALTH L. & POL’Y 197, 208-09 (1994).

<sup>62</sup> Act of Oct. 19, 1984, Pub. L. No. 98-507, 98 Stat. 2339.

<sup>63</sup> Shelby E. Robinson, Comment, *Organs for Sale? An Analysis of Proposed Systems*, 70 U. Col. L. Rev. 1019, 1029 (1999), citing Task Force on Organ Transplantation, U.S. Dep’t of Health & Human Serv., *Organ Transplantation: Issues and Recommendations* 3 (1986).

recommendation, and as a result, hospitals can forfeit Medicaid and Medicare funding if they fail to establish “written protocols for the identification of potential organ donors.”<sup>64</sup>

NOTA also established the system of organ procurement and distribution that currently operates in the United States. NOTA delegated power to the Secretary of the Department of Health and Human Services to provide for the establishment and operation of the Organ Procurement and Transplantation Network (“OPTN”), which oversees and coordinates the allocation of organs throughout the country.<sup>65</sup> Some of the OPTN's other duties include: maintaining a national list of individuals who need organs;<sup>66</sup> maintaining a national system to match people on the waiting list with available organs;<sup>67</sup> establishing a nationwide procurement and allocation system;<sup>68</sup> working actively on ways to “increase the supply of organs;”<sup>69</sup> and coordinating for the transportation of organs from organ procurement organizations (“OPOs”) to transplant centers.<sup>70</sup>

NOTA allows the Secretary to make grants for the planning of qualified OPOs.<sup>71</sup> The duties of the OPOs include arranging the acquisition and preservation of all donated organs, identifying potential donors, providing or arranging for the

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<sup>64</sup> 42 U.S.C. § 1320b-8(a)(1)(A) (1994). The statute provides that these protocols should:

- (i) assure that families of potential organ donors are made aware of the option of organ or tissue donation and their option to decline,
- (ii) encourage discretion and sensitivity with respect to the circumstances, views, and beliefs of such families, and
- (iii) require that such hospital's designated organ procurement agency... is notified of potential organ donors.

§ 1320b-8(a)(1)(A)(i)-(iii). Although the provision gives the federal government substantial power to control hospitals and increase the number of harvested cadaver organs, the system is not closely monitored and has not lived up to its potential to increase the organ supply. See Lisa E. Douglass, *Organ Donation, Procurement and Transplantation: The Process, the Problems, the Law*, 65 UMKC L. REV. 201, 211 (1996).

<sup>65</sup> Gail L. Daubert, *Politics, Policies and Problems with Organ Transplantation: Government Regulations Needed to Ration Organs Equitably*, 50 ADM. L. R. 459 (1998). “The U.S. Congress established the Organ Procurement and Transplantation Network (OPTN) when it enacted the National Organ Transplant Act (NOTA) of 1984. The Act called for a unified transplant network to be operated by a private, non-profit organization under federal contract.” U.S. Department of Health and Human Services, *supra* note 11.

<sup>66</sup> 42 U.S.C. § 274(b)(2)(A)(i).

<sup>67</sup> 42 U.S.C. § 274(b)(2)(A)(ii). The OPTN maintains a nationwide system through the use of computers to match individuals with the organs they need. *Id.*

<sup>68</sup> 42 U.S.C. § 274(b) (laying out the general functions that the OPTN partakes in to procure organs). This section establishes some methods to allocate organs to people on the waiting list, including the requirement that the OPTN “maintain a twenty-four-hour telephone service to facilitate matching organs with individuals included in the list.” § 274(b)(C).

<sup>69</sup> 42 U.S.C. § 274(b)(2)(K).

<sup>70</sup> 42 U.S.C. § 274(b)(2)(G).

<sup>71</sup> 42 U.S.C. § 273(a)(1) (2006).

transportation of donated organs to transplant centers that participate in the OPTN, and determining the quality standards for the acquisition of organs.<sup>72</sup>

The nation is divided into sixty-three areas composed of eleven regions under the current system, with huge disparities in waiting times from region to region.<sup>73</sup> In 2006 alone, 7,191 candidates died while waiting for an organ.<sup>74</sup> This figure demonstrates that almost twenty people on the national waiting list die each day while waiting for an organ.

Congress chose the United Network for Organ Sharing ("UNOS"), an existing central registry of potential kidney recipients, to administer the OPTN.<sup>75</sup> The U.S. Department of Health and Human Services ("HHS") contracted with UNOS in 1986 and has renewed the contract four times.<sup>76</sup> In 1998, the HHS released what it called the "Final Rule," which established that "human organs donated for transplantation are a public trust."<sup>77</sup> The Final Rule's stated purpose is "encouraging organ donation; developing an organ allocation system that functions as much as technologically feasible on a nationwide basis; providing the bases for effective Federal oversight of the OPTN . . . and, providing better information about transplantation to patients, families and health care providers."<sup>78</sup> The three main performance goals of the Final Rule are "objective and measurable medical criteria to be used by all transplant centers" to ensure that patients within similar states of illness are listed at the same time; standardized "medical status" categories to group transplant candidates by medical urgency; and allocation policies that ensure equitable "organ distribution to those with the greatest medical urgency, in accordance with sound medical judgment," without regard to their geographic location.<sup>79</sup> Though these goals appear noble, they have unfortunately been unable to cure the most pressing issue – a lack of transplantable organs.

### C. Consequences of the Acts

Although the 1968, 1987, and 2006 UAGAs, NOTA, and America's current altruistic system of organ procurement were designed to increase the supply of transplantable organs, none have cured America's organ shortage.<sup>80</sup> This shortage has

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<sup>72</sup> 42 U.S.C. § 273(b)(3).

<sup>73</sup> Sheryl G. Stolberg, *Fight over Organs Shifts to States from Washington*, N.Y. TIMES, Mar. 11, 1999, <http://www.nytimes.com/1999/03/11/us/fight-over-organs-shifts-to-states-from-washington.html>.

<sup>74</sup> Health Resources and Services Administration, 2007 *OPTN/SRTR Ann. Rep.*, tbl.1.3, available at <http://optn.transplant.hrsa.gov/data/annualReport.asp>.

<sup>75</sup> Daubert, *supra* note 65.

<sup>76</sup> UNITED NETWORK FOR ORGAN SHARING, *Newsroom: UNOS Again Receives Federal Contract for Transplant Allocation Network*, (Sept. 28, 2000), [www.unos.org](http://www.unos.org) (search "UNOS again Receives Federal Contract"; then follow "Newsroom September 28, 2000" hyperlink.)

<sup>77</sup> Organ Procurement and Transplantation Network, 63 Fed. Reg. 16,296, 16,298 (Apr. 2, 1998) (to be codified at 42 C.F.R. pt. 121).

<sup>78</sup> *Id.* at 16,296.

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

<sup>80</sup> DONATE, *supra* note 11.

unfortunately led to a global black market in organ sales and transplant tourism.<sup>81</sup> These adverse outcomes demonstrate the failure of the current organ donation system.

### 1. Organ Shortage

The disparity between people in need of organs and the number of organs actually donated has been well documented.<sup>82</sup> Disturbingly, over 100,000 people are on waiting lists for organs.<sup>83</sup> Of those, around 82,000 are waiting for a kidney.<sup>84</sup> The size of the waiting list is only an approximate measure of the shortage because it fails to account for the deaths of patients on the lists.<sup>85</sup> It also does not account for patients who are turned down for listing due to age, blood type, or illness.<sup>86</sup> The lack of supply of organs is also evidenced by the median waiting period a person must wait on the waiting list before the transplantation procedure occurs. According to the latest information available, in 2006, the median waiting period for a liver was 306 days, and in 2003, the median waiting period for a kidney was a staggering 1,152 days.<sup>87</sup> As organ transplant waiting lists grow longer, the death rates for individuals waiting for an available organ increase.<sup>88</sup>

Although over two million people die each year in the United States,<sup>89</sup> most of their cadaveric organs are not suitable for transplant. This is because almost all suitable organs come from brain-dead patients whose breathing and cardiac activity

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<sup>81</sup> Robyn S. Shapiro, *Legal Issues in Payment of Living Donors for Solid Organs*, HUM. RIGHTS MAG., Spring 2003, at 19; Joanna Geary, *Illegal Live Organ Surgery Reopens Donor Debate*, BIRMINGHAM POST, Sept. 24, 2003, at 2; Vidya Ram, *International Traffic in Human Organs*, 19 FRONTLINE, Issue 7, Mar. 30 - Apr. 12, 2002, at 61, available at <http://www.flonnet.com/fl1907/19070730.htm> (last visited Dec. 10, 2009).

<sup>82</sup> See DONATE, *supra* note 11; U.S. Department of Health and Human Services, *supra* note 8; Daubert, *supra* note 65. See also, Liliana M. Kalogjera, *New Means of Increasing the Transplant Organ Supply: Ethical and Legal Issues*, 34 HUM. RTS. Q. 19 (2007). "The organ shortage continues to grow despite multifaceted efforts to increase the transplant organ supply." *Id.* at 20.

<sup>83</sup> U.S. Department of Health and Human Services, *supra* note 8.

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

<sup>85</sup> See David L. Kaserman, *Markets for Organs: Myths and Misconceptions*, 18 J. CONTEMP. HEALTH L. POL'Y 567, 567-81 (2002). See also, Tabarrok, *supra* note 7.

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

<sup>87</sup> Health Resources and Services Administration, *supra* note 74 at tbl.1.5.

<sup>88</sup> *Organ Procurement and Transplantation Network Amendments of 1999: Hearing on H.R. 2418 Before the H. Comm. on Commerce and the Subcomm. on Health and Environment*, 105th Cong. (1999) (statement of William F. Raub, Deputy Assistant for Science Policy, U.S. Department of Health and Human Services). In 1998, more than 4,000 potential donor recipients died waiting for an organ transplant. *Id.* "As these [waiting] lists grow, many more will die as the system continues to strain under the demand for organs." *Id.*

<sup>89</sup> Heron et al., *Deaths: Preliminary Data for 2006*, 56 NVSR Number 16, available at <http://www.cdc.gov/nchs/PRESSROOM/08newsreleases/mortality2006.htm> (last visited Dec. 10, 2009).

have been artificially maintained.<sup>90</sup> For this reason, normally organs can only be collected from individuals who died in hospitals. In any given year, about half of those who die in the United States die in hospitals.<sup>91</sup> Furthermore, organ donors who meet the criteria for donation after brain death are usually 59 years of age or younger.<sup>92</sup> These factors also contribute to the lack of organs. However, studies have indicated that the number of potential cadaveric organs would meet or exceed the demand.<sup>93</sup>

A 1999 study showed that 81% of Americans support organ donation.<sup>94</sup> Unfortunately, nowhere near that percentage of people agree to donate their organs.<sup>95</sup> This deficiency adds approximately 48,000 people to the organ waiting list each year.<sup>96</sup> However, in the past three years, less than 15,000 people donated organs.<sup>97</sup> Without an increase in the supply of organs, the waiting list will continue to grow, leading to more deaths and providing more clients for the black market.

## 2. Black Market

Throughout history, whenever laws were designed to regulate or eliminate certain exchanges, an underground market would appear.<sup>98</sup> For example, when the Eighteenth Amendment was ratified,<sup>99</sup> an immediate black market sprung up and led

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<sup>90</sup> Ellen Sheehy et al., *Estimating the Number of Potential Organ Donors in the United States*, 349 NEW ENG. J. MED. 667 (2003).

<sup>91</sup> Bart, Macon, Whittier, Baldwin & Blount, *Cadaveric Kidneys For Transplantation: A Paradox of Shortage in the Face of Plenty*, 31 TRANSPLANTATION 379-81 (1982) (indicating that 60% of people who die in the United States die in hospitals).

<sup>92</sup> Robert Steinbrook, *Organ Donation after Cardiac Death*, 357 NEW ENGL. J. MED. 209, 213 (2007).

<sup>93</sup> McIntosh, *supra* note 46, at 185.

<sup>94</sup> PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, *Organ Donor Topline*, <http://people-press.org/reports/print.php3?PageID=298> (last visited Dec. 10, 2004). In the same survey 42% of respondents reported that they signed a donor card. *Id.*

<sup>95</sup> See DONATE, *supra* note 11. Only 30% of people even know the steps to be taken in order to donate. *Id.*

<sup>96</sup> U.S. Department of Health and Human Services, *supra* note 8.

<sup>97</sup> *Id.*

<sup>98</sup> HANS F. SENNHOLZ, *THE UNDERGROUND ECONOMY* 3-4 (1984), available at <http://www.hacer.org/pdf/Sennholz01.pdf>. “The underground economy must be distinguished clearly and unmistakably from the criminal activities of the underworld . . . Both groups are knowingly violating laws and regulations and defying political authority. But they differ radically in the role they play in society. The underworld comprises criminals who are committing acts of bribery, fraud, and racketeering, and willfully inflicting wrongs on society. The underground economy involves otherwise law-abiding citizens who are seeking refuge from the wrongs inflicted on them by government.” *Id.* For the purposes of this note, the phrases black market and underground market will both refer to the underground organ market.

<sup>99</sup> See U.S. CONST. amend. XVIII, § 1 (repealed 1933). In response to the needs of the First World War, the United States Congress prohibited the sale, manufacture and importation of all intoxicating liquors. See Brannon P. Denning, *Smokey and the Bandit in Cyberspace: The Dormant Commerce Clause, the Twenty-first Amendment, and State Regulation of*

to an increase in organized crime.<sup>100</sup> As the organ donor waiting list grows longer, more people will begin turning to the black market in a last ditch effort to save their lives.<sup>101</sup> Around 300 Americans travel abroad each year in an attempt to purchase organs that will save their lives.<sup>102</sup> Though organ sales are illegal in most countries,<sup>103</sup> individuals facing death have found creative ways to purchase organs in several countries.<sup>104</sup> Transplant tourism is a very structured and lucrative business. Often, companies offer packages including airfare, accommodations, and medical care, as well as the organ.<sup>105</sup> This development is hardly surprising given the dire situations of both the persons needing an organ and the donors.<sup>106</sup> Unfortunately, the brokers prey on this desperation. Kidney donors in India earn between \$1,250 and

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*Internet Alcohol Sales*, 19 CONST. COMMENT. 297, 302-03 (2002). President Franklin D. Roosevelt initiated the repeal of this law as part of his New Deal Program. The Eighteenth Amendment was effectively repealed by the Twenty-First Amendment. *Id.* at 303. *See also* U.S. CONST. amend. XXI.

<sup>100</sup> Igor V. Dubinsky, Comment, *How Bad Boys Turn Good: The Role of Law in Transforming Criminal Organizations Into Legitimate Entities By Making Rehabilitation an Economic Necessity*, 5 DEPAUL BUS. & COM. L.J. 379, at 410 (2007). “With the advent of this tremendous new black market, legal distilleries and businessmen were rapidly substituted by organizations skilled in secrecy and bribery.” *Id.*

<sup>101</sup> *See Organs for Sale: China's Growing Trade and Ultimate Violation of Prisoners' Rights: Hearing Before the Subcomm. on Int'l Oper. and Human Rights of the H. Comm. on Int'l Relations*, 107th Cong. 24, 28 (2001) (testimony of Professor Nancy Scheper-Hughes) (testifying that “the traffic in human organs, tissues, and body parts” is extensive, occurring in China, India, Brazil, and other countries).

<sup>102</sup> *See* Eamonn O'Neill, *The Cost of Living*, THE SCOTSMAN, Mar. 10, 2001, at 14,

<sup>103</sup> J. Andrew Hughes, *You Get What You Pay For?: Rethinking U.S. Organ Procurement Policy in Light of Foreign Models*, 42 VAND. J. TRANSNAT'L L. 351, 362 (2009).

<sup>104</sup> *See* Marina Jimenez, *Europe's Poorest Sell Their Kidneys*, NATIONAL POST, Mar. 29, 2002, at A1, available at 2002 WL 17680080. These countries include Israel, India, South Africa, Turkey, China, Russia, Iraq, Argentina, and Brazil. *Id.*

<sup>105</sup> Yosuke Shimazono, *The State of the International Organ Trade: A Provisional Picture Based on Integration of Available Information*, 85 Bulletin of the World Health Organization 901 (December 2007), available at <http://www.who.int/bulletin/volumes/85/12/06-039370/en/>. These packages are referred to as medical tourism. A cursory Google search yields many results. One site seems to offer kidney transplants for \$19,750 in India but claims individuals must have a donor. <http://www.allmedicaltourism.com/usa/surgery/kidney-transplant/> (last visited Feb. 14, 2010). Another site makes no mention of a donor or price. [http://www.indiamedicaltourism.net/medical\\_tourism\\_india\\_medical\\_packages/dialysis\\_kidney\\_transplant.html](http://www.indiamedicaltourism.net/medical_tourism_india_medical_packages/dialysis_kidney_transplant.html) (last visited Feb. 14, 2010).

<sup>106</sup> Kathleen Maclay, *UC Berkeley Anthropology Professor Working on Organs Trafficking*, U.C. BERKELEY NEWS (April 30, 2004, 8:34 PM), [http://berkeley.edu/news/media/releases/2004/04/30\\_organos.shtml](http://berkeley.edu/news/media/releases/2004/04/30_organos.shtml). “Transplant tourism involving trafficked living organ donors is increasingly common in a world where, she says, cadaver organs are scarce, while desperately poor people are plentiful and “available.” Transplant patients can now buy a “fresh” kidney from a stranger if they have enough cash, health insurance and the right connections with organs brokers. They also have to be willing to break the laws against buying and selling human body parts and be willing to travel to distant lands.” *Id.*

\$2,500, while the donees typically pay around \$25,000, leaving the difference to the unscrupulous brokers and doctors.<sup>107</sup>

Participation in underground markets is incredibly risky. Underground transactions often consist of inadequate information, a lack of remedies when disagreements arise or fraud occurs, and, in organ transactions, desperate donors and donees dealing with greedy brokers.<sup>108</sup> The donors are often left in an even worse financial state after they donate because of medical bills and the inability to continue working.<sup>109</sup> Comparing the countries of the donees to the countries of the donors further illustrates the gap between the haves and have-nots. The countries receiving the most organs are several of the world's most wealthy nations, including the United States, Japan, Israel, Saudi Arabia, Canada, and Australia.<sup>110</sup> On the other end of the spectrum, Pakistan, India, China, the Philippines, Bolivia, Brazil, Peru, Iraq, Turkey, and the Republic of Moldova comprise the nations whose citizens donate the most organs.<sup>111</sup> In India alone, over 2,000 citizens "donated" a kidney.<sup>112</sup> It is also not surprising that Pakistan is on the list because they have no law against the sale of organs.<sup>113</sup>

Even more shocking, human rights violations are rampant. Reports have emerged from Thailand about patients at hospitals whose organs were harvested before they were dead.<sup>114</sup> In both Argentina and South Africa, there have been claims that homeless people were killed to harvest their organs.<sup>115</sup> In China, prisoners with the correct blood type were selected for execution so that their organs could be harvested.<sup>116</sup>

Black market activity occurs in the United States as well. Several United States

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<sup>107</sup> Anuj Chopra, *Organ-Transplant Black Market Thrives in India*, S.F. CHRON., Feb. 9, 2008, at A7 available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/02/09/MN23UPQ0K.DTL>.

<sup>108</sup> MICHELE GOODWIN, BLACK MARKETS: THE SUPPLY AND DEMAND OF BODY PARTS 170 (2006). See generally GARY W. BRUNETTE, CDC HEALTH INFORMATION FOR INTERNATIONAL TRAVEL 2010 183 (Sue Hodgson et al. eds., 2010) available at <http://wwwn.cdc.gov/travel/yellowBookCh2-HealthCareAbroad.aspx>.

<sup>109</sup> See Nullis-Kapp, *Organ Trafficking and Transplantation Pose New Challenges*, 82 BULL. WORLD HEALTH ORG. 715 (2004), available at <http://www.who.int/bulletin/volumes/82/9/infocus.pdf>. See also Madhav Goyal et al., *Economic and Health Consequences of Selling a Kidney in India*, 288 J. AMER. MED. ASSOC. 1589-91 (2002).

<sup>110</sup> Shimazono, *supra* note 105.

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

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

<sup>113</sup> Hughes, *supra* note 103.

<sup>114</sup> Erica Teagarden, *Human Trafficking: Legal Issues in Presumed Consent Laws*, 30 N.C. J. INT'L L. & COM. REG. 85, 689 (2005).

<sup>115</sup> O'Neill, *supra* note 102.

<sup>116</sup> *U.S./China Relations and Human Rights: Is Constructive Engagement Working? Hearing Before the S. Comm. on Int'l Operations and Human Rights of the H. of Rep. Comm. on Int'l Relations*, 105th Cong. 14 (1997) (statement of Harry Wu, Exec. Dir., The Laogai Research Foundation).

hospitals have a “don’t ask, don’t tell” policy when it comes to organ donation, and organ brokers know which hospitals to use.<sup>117</sup> Foreign and domestic patients arrive with the paid donors and pretend to be related to avoid detection.<sup>118</sup> Recently, dozens of Moldavians were suspected of entering the country to sell their organs in this manner.<sup>119</sup> Without a change, neither the black market nor the massive organ shortages will be eliminated.

### III. POSSIBLE SOLUTIONS

The United States system of altruistic, voluntary donation has failed to increase organ supplies and has contributed to the burgeoning black market organ trade.<sup>120</sup> Proposals to increase organ donation include organ markets,<sup>121</sup> routine request,<sup>122</sup> presumed consent<sup>123</sup> and organ drafts.<sup>124</sup> There have been many proposed reforms, but this Note argues that the best way to ensure adequate organ supply is a compensated, but mandatory, organ draft.<sup>125</sup>

#### A. Organ Market

In a traditional organ market system, organs are commodities that should be bought and sold in a free market system with minimal regulation.<sup>126</sup> The regulations should be limited to ensuring that individuals are properly matched, determining who can enter the market, and assuring that neither party is taking advantage of the other unconscionably.<sup>127</sup> It is contended that the benefits of such a system include an immediate response to the shortage of organs, a decrease in cost associated with

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<sup>117</sup> *Your Money or Your Life: The Kidney Trade*, CBSNEWS.COM, <http://www.cbsnews.com/stories/2002/02/11/48hours/main328962.shtml> (last visited July 31, 2002, 9:15 PM) (citing to Dr. Michael Friedlander).

<sup>118</sup> *Id.*

<sup>119</sup> Jimenez, *supra* note 104.

<sup>120</sup> *See supra* Parts II.C.1-2.

<sup>121</sup> *See Hughes, supra* note 103 (arguing that states should experiment with regulated open markets for cadaveric organs).

<sup>122</sup> Marlene R. Matten et al., *Nurses' Knowledge, Attitudes, and Beliefs Regarding Organ and Tissue Donation and Transplantation*, 106 PUB. HEALTH REP. 155, 157 (1991) (arguing for routine request).

<sup>123</sup> *See* Jesse Dukeminier, *Supplying Organs for Transplantation*, 68 MICH. L. REV. 811, 837 (1970) (concluding that the organ supply would increase significantly if usable organs were routinely removed from cadavers except where the potential donor or her family had registered an objection to removal).

<sup>124</sup> *See* Theodore Silver, *The Case for a Post-Mortem Organ Draft and a Proposed Model Organ Draft Act*, 68 B.U. L. REV. 681, 695 (1988) (advocating an organ draft, without compensation, for transplantable cadaveric organs).

<sup>125</sup> There would still be a limited exception for religious reasons. *See infra* Part III.D.1.

<sup>126</sup> Christopher J. Ryan, *The Anatomical Wealth of Nations: A Free Market Approach to Organ Procurement*, 13 MICH. ST. U. J. MED. & L. 427, 437 (2009).

<sup>127</sup> *Id.* at 436.



maintaining people who would no longer be sick after transplantation, and an incentive to encourage people to donate.<sup>128</sup>

A futures market in organs is a more radical financial incentive some have proposed, claiming it would increase the organ supply.<sup>129</sup> The hope is that in addition to increasing organ supply, a futures market would discourage the economic exploitation of the poor that most likely would occur in an open organ market.<sup>130</sup> In the most basic version of a futures market, as proposed by scholars Lloyd Cohen and Gregory Crespi, individuals could sell the right to harvest their organs upon death as a futures contract.<sup>131</sup> In return, if one's organs were subsequently taken, a beneficiary designated by the donor at the time he executed the contract would receive the contractual payment.<sup>132</sup> The thought is that poor organ sellers would not be exploited because living donor transactions would still be prohibited, their consent would not be motivated by economics, and they would not risk their health by entering such contracts.<sup>133</sup> Equal access to the organ supply for poor organ recipients might be maintained by using the futures market as a supply mechanism but not as an allocation mechanism.<sup>134</sup> The system, if it works as intended, could provide that potential recipients would not be responsible for making the payments.<sup>135</sup> However, this system still fails to address the issue that the poor may still be coerced into donating with the knowledge that their families will be better off after they die.

The problems associated with an organ market far outweigh any potential benefits. First, Americans have demonstrated a moral aversion to a market in human organs.<sup>136</sup> One reason for this feeling is the fear that the poor would be coerced into donating their organs in an attempt to escape poverty.<sup>137</sup> This fear is based on the

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<sup>128</sup> *Id.* at 438-42.

<sup>129</sup> Steve P. Calandrillo, *Cash for Kidneys? Utilizing Incentives to End America's Organ Shortage*, 13 *GEO. MASON L. REV.* 69, 108 (2004).

<sup>130</sup> *Id.* at 108. The recent film *Repo Men*, depicts a dystopic future where organs are regulated by a free market system. *REPO MEN* (Universal Pictures 2010). In the film, organs are so expensive that people who need them are forced to buy them with credit. *Id.* When they are unable to make payments, the repo men come and "repossess" the organs. *Id.*

<sup>131</sup> See Gregory S. Crespi, *Overcoming the Legal Obstacles to the Creation of a Futures Market in Bodily Organs*, 55 *OHIO ST. L.J.* 1, 6-7 (1994); see also Lloyd R. Cohen, *Increasing the Supply of Transplant Organs: The Virtues of a Futures Market*, 58 *GEO. WASH. L. REV.* 1, 1 (1989).

<sup>132</sup> Cohen, *supra* note 131, at 2. The futures market could be designed to apply only to specific organs, or to be valid for only a short duration, allowing the seller to revisit his decision periodically; see Hansmann, *supra* note 28, at 62.

<sup>133</sup> Cohen, *supra* note 131, at 2.

<sup>134</sup> Calandrillo, *supra* note 129, at 108.

<sup>135</sup> Cohen, *supra* note 131, at 30.

<sup>136</sup> See Christian Williams, *Combating the Problems of Human Rights Abuses and Inadequate Organ Supply Through Presumed Donative Consent*, 26 *CASE W. RES. J. INT'L L.* 315, 316 (1994).

<sup>137</sup> *Id.* at 343.

realities of the black market.<sup>138</sup> In countries where organ sales are legal, the poor have been exploited.<sup>139</sup> Furthermore, it is difficult to imagine that the commercialization of organs would satisfy the demand.<sup>140</sup> This commercialization would result in outrageous prices for organs and effectively deny organs to the poor.<sup>141</sup> Finally, the ruling in *Moore v. Regents of the University of California* would seem to prohibit the sale of any organs or tissue of a living person.<sup>142</sup> Since this ruling relied on the UAGA, all states would attempt to apply this ruling uniformly. Therefore, a free market in organs would not yield the needed organs, but would cause organ allocation to be based on wealth and would be contrary to precedent.

#### B. Routine Request

Proponents of the routine request system, also called mandated choice, argue that if people were forced to choose whether or not to donate, more people would.<sup>143</sup> The mandated choice system would require a citizen's organ donation preference to be recorded at a certain point during his or her life, for example, when a citizen "file[s] a tax return or obtain[s] or renews a driver's license."<sup>144</sup> This system is used today in most places.<sup>145</sup> Furthermore, if the number of times people were asked was increased, it may be financially and logistically prohibitive to maintain a system that records each citizen's organ donation preference.<sup>146</sup> Currently, forty-six states require individuals to opt in or opt out when obtaining driver's licenses, and many hospitals ask for donations on intake forms.<sup>147</sup>

The 1987 revision to the UAGA called for health care professionals to ask families of deceased individuals to consent to organ donation if their loved one had

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<sup>138</sup> See *supra* Part II.C.2.

<sup>139</sup> Nancy Scheper-Hughes, *The Global Traffic of Human Organs*, 41 CURRENT ANTHROPOLOGY 191, 193-94 (2000).

<sup>140</sup> Hearts, lungs, and whole livers cannot be donated inter vivos. This would require a speculative futures market with low value and unlikely returns or sales by surviving heirs. Also, it is not safe to assume that those heirs would be willing to sell their recently passed relatives organs. Even more critically, it is extremely unlikely that as many people would donate their organs for valuable consideration as would be conscripted through the proposal in this note.

<sup>141</sup> See Goyal et al, *supra* note 109, at 1589 (96% of organ sales were to escape poverty), see generally, Scheper-Hughes, *supra* note 139.

<sup>142</sup> See *Moore v. Regents of the University of California*, 793 P.2d 479 (Cal. 1990).

<sup>143</sup> See Dukeminier, *supra* note 123.

<sup>144</sup> Denise Spellman, *Encouragement Is Not Enough: The Benefits of Instituting a Mandated Choice Organ Procurement System*, 56 SYRACUSE L. REV. 353, 371 (2006).

<sup>145</sup> DAVID L. KASERMAN & A.H. BARNETT, THE U.S. ORGAN PROCUREMENT SYSTEM: A PRESCRIPTION FOR REFORM, 48-49 (Marvin H. Kusters, 2002).

<sup>146</sup> Andrew C. MacDonald, *Organ Donation: The Time Has Come to Refocus the Ethical Spotlight*, 8 STAN. L. & POL'Y REV. 177, 183 (1997).

<sup>147</sup> Kasermns & Barnett, *supra* note 145, at 54.

not already signed an organ donor card.<sup>148</sup> There is still debate, however, over who should ask for such consent (i.e., doctor, nurse, hospital staff, or OPO representative), and whether or not it would work in practice. Unfortunately, results of required request policies have not been successful.<sup>149</sup>

There have been several attempts to explain why this occurs. One commentator has suggested that this outcome is a result of psychological factors.<sup>150</sup> He suggests that individuals may have negative feelings towards organ procurement because of its relationship with death and that these feelings impact the legal systems designed to encourage donation.<sup>151</sup> Emotional issues involved may deter the decedent's family from agreeing to donation, as well as prevent health care professionals from feeling comfortable enough to sensitively request donation from the family.<sup>152</sup> Therefore, he proposes that the solution to the organ shortage lies in addressing the psychological issues involved in procurement rather than adopting more restrictive legal regimes, like presumed consent.<sup>153</sup> This solution could be accomplished by educating health providers about the need to ask families for consent and by providing training that allows them to do so in a manner that respects the family's grieving.<sup>154</sup> These measures alone, he argues, would significantly increase the number of organ donors.

Thus, legally mandating that health care providers ask for organs is not likely to have a dramatic impact if done alone. Required request statutes need to be accompanied by training, education, and public awareness campaigns if they are to have the impact on organ procurement rates that was initially anticipated. They may play an important role in demonstrating that this issue is important and needs to be addressed. However, because most states already employ routine request, and organ donation numbers are still woefully low, routine request is not an adequate solution.

### C. Presumed Consent

Commentators who argue for a presumed consent system believe that the true reason people do not donate is because it requires an affirmative action to donate.<sup>155</sup> These commentators claim either that people do not want to confront their own mortality, or that people are just too unmotivated even to check a box when

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<sup>148</sup> Unif. Anatomical Gift Act § 3 (1987). All hospitals are required by law to have a "Required Referral" system in place. Under it, the hospital must notify the local Organ Procurement Organization (OPO) of all patient deaths. If the OPO determines that organ and/or tissue donation is appropriate in a particular case, they will have a representative contact the deceased patient's family to offer them the option of donating their loved one's organs and tissues.

<sup>149</sup> Orly Hazony, *Increasing the Supply of Cadaver Organs for Transplantation: Recognizing that the Real Problem is Psychological Not Legal*, 3 HEALTH MATRIX 219, 231 (1993).

<sup>150</sup> *Id.* at 220

<sup>151</sup> *Id.* at 236

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

<sup>153</sup> *Id.* at 256-57.

<sup>154</sup> *Id.* at 257.

<sup>155</sup> Linda C. Fentiman, *Organ Donation As National Service: A Proposed Federal Organ Donation Law*, 27 SUFFOLK U. L. REV. 1593, 1598 (1993)

renewing their driver's license.<sup>156</sup> Under presumed consent, instead of having an option to opt in, individuals must actively opt out. Many countries employ this system with some success.<sup>157</sup> Unfortunately, this system is partially in effect in the United States with regard to corneas after the 1987 UAGA, and the significance of any increase in donation or transplants is arguable.<sup>158</sup> Even Austria, where the strictest form of presumed consent is applied, suffers from a shortage of transplantable organs.<sup>159</sup> Furthermore, if people are just too unmotivated to opt out, presumed consent is merely a disguised form of conscription without the benefit of society understanding the important message that the living come before the dead.<sup>160</sup> If it is true that presumed consent is a disguised form of conscription, it could be argued that it violates the Fifth Amendment.<sup>161</sup> For these reasons, outright conscription would be more straightforward and would allow compensation for donation.

#### IV. PROPOSED SOLUTION

##### A. *Organ Conscription*

In order to discuss the benefits of and problems with organ conscription, it is necessary to elaborate on how it would operate. Organ conscription would require that every person, outside of exempted persons,<sup>162</sup> who dies under the circumstances enabling organ transplantation, must automatically donate their organs. In consideration, each person's heirs would be compensated for any organs transplanted at the value determined to be just compensation.<sup>163</sup> The current regional and national organizations, including OPTN and UNOS, who match donors would continue to operate as they do now. Furthermore, the implementation would need to be done at the state level. It could be accomplished through an amendment to the UAGA, which would then need to be adopted by the states. In addition, each state would

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<sup>156</sup> See *id.* at 1597.

<sup>157</sup> Sheldon F. Kurtz & Michael J. Saks, *The Transplant Paradox: Overwhelming Public Support for Organ Donation v. Under-Supply of Organs: The Iowa Organ Procurement Study*, 21 J. CORP. L. 767, 778 (1996). See also, Curtis E. Harris & Stephen P. Alcorn, *To Solve a Deadly Shortage: Economic Incentives for Human Organ Donation*, 16 ISSUES L. & MED. 213, 225 (2001) (describing presumed consent laws in France, Belgium, and Austria); Monique C. Gorsline & Rachelle L.K. Johnson, Note, *The United States System of Organ Donation, the International Solution, and the Cadaveric Organ Donor Act: "And the Winner Is ..."*, 20 J. CORP. L. 5, 21, 24 (1995) (citing similar presumed consent models in Chile, Argentina, and Brazil).

<sup>158</sup> Goodwin, *supra* note 108, at 121-123

<sup>159</sup> Harris & Alcorn, *supra* note 157, at 225.

<sup>160</sup> Silver, *supra* note 124, at 706.

<sup>161</sup> See *infra* part IV.B.1.

<sup>162</sup> All mentally competent individuals over the age of 18, who do not get a religious exemption would have their organs conscripted upon death if they could be transplanted. Reasons they could not be transplanted include the manner of death, place of death and organ integrity/health.

<sup>163</sup> See *infra* part IV.B.1.b.

need to create a board to determine whether people wishing to be excluded met the qualifications for exemption. The governor should appoint these state boards every four years, and they should represent a diverse mixture of religious and community leaders.

The primary reason for, and benefit of, conscripting organs is the immediate impact upon organ shortages. No one would deny that conscription is the quickest way to obtain the organs needed because, through organ conscription, almost all usable organs would be harvested. If two million people die each year, and sixty percent of those people die in circumstances suitable for organ transplantation, organ demand would slow to a trickle in this country.<sup>164</sup> Moreover, at least one court has noted that removing organs is good public policy and a legitimate state interest.<sup>165</sup> Yet, conscripting organs does present several important issues.

### B. Concerns

#### 1. The Fifth Amendment

The Fifth Amendment forbids the government from taking private property for a public use without just compensation.<sup>166</sup> When analyzing whether a taking has occurred, the courts must determine whether a government action could be properly characterized as regulatory or a permanent physical invasion.<sup>167</sup> If it is a regulation that denies all economically beneficial use, it is a taking.<sup>168</sup> If not, courts use a case-specific, multifactor-balancing test that considers the government's interest, the scope of the restriction, and the diminution in the value of the property.<sup>169</sup> However, if there has been a physical appropriation, it is a taking, regardless of any public purpose.<sup>170</sup> This "per se" rule clearly applies to organ conscription.<sup>171</sup> The Supreme

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<sup>164</sup> Even with a conservative estimate of ten percent of those who die being suitable donors, over 200,000 organs would be available. Just over 105,000 people are currently on waiting lists. U.S. Department of Health and Human Services, *supra* note 11.

<sup>165</sup> *State v. Powell*, 497 So.2d 1188, 1193-94 (Fla. 1986) (holding state interest in providing sight to the blind was so great that removal without notifying next of kin was acceptable). Certainly the state interest in providing life-saving livers, kidneys and hearts is even more compelling.

<sup>166</sup> U.S. CONST. amend. V, ". . . nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." *Id.*

<sup>167</sup> See G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW 1580 (LITTLE, BROWN AND COMPANY, 1991). It is difficult to distinguish a regulation from a taking. "Almost all government action . . . diminishes the value of some people's property and increases the value of the property of other people." *Id.*

<sup>168</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). "[R]egulatory action is compensable without case-specific inquiry into the public interest advanced in support of the restraint . . . [where] regulation denies all beneficial or productive use of the land." *Id.* at 1015.

<sup>169</sup> See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

<sup>170</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982). "Permanent physical occupation" (even a minor one) "is a taking without regard to the public interests that [the government action] may serve." *Id.*

Court has adopted the “per se” rule because the invasion would destroy the individual’s bundle of property rights.<sup>172</sup> When a doctor removes an organ from a deceased person and plans to transplant it into someone else, there has most certainly been a physical invasion. Thus, if the government wanted to conscript organs, it would need to pay just compensation and show that it satisfies a public purpose.

Even if the government pays just compensation for the organ conscription, it must still satisfy the Fifth Amendment requirement of public use. The Supreme Court has held that “one person’s property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.”<sup>173</sup> There is a persuasive argument that organ conscription is a public purpose. Thousands of people are in desperate need of organs, and the state has a compelling interest in improving the public health. Furthermore, public purpose has been interpreted so broadly that almost anything is a public purpose.<sup>174</sup> Seemingly, as long as the legislature says that it is a public purpose, the courts will show almost complete deference to its determination.<sup>175</sup> The questions become whether organs are property, and what compensation is just.

*a. The Deceased’s Organs Are Property*

“In its precise legal sense, property is nothing more than a collection of rights.”<sup>176</sup> Thus, property is often described as a bundle of rights or interests that a person has in an object, including the right to use, possess, exclude, and dispose.<sup>177</sup> The more rights and characteristics an item has in its bundle, the more likely it is to be considered property.<sup>178</sup> An item with only one or two of the characteristic rights in

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<sup>171</sup> However, the government may attempt to assert a variety of traditional Takings Clause defenses to avoid liability for the removal of organs. *See* *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (where regulation results in a reciprocity of advantage, no taking has occurred); *Hadacheck v. Sebastian*, 239 U.S. 394, 411 (1915) (nuisance prevention is within the purview of state police power and not a taking). The defense to takings as merely nuisance abatement seems inapplicable because it is difficult to characterize maintaining the integrity of a corpse as a nuisance. One could argue that there is a reciprocity of advantage based on the fact that the mandatory taking of organs makes it more likely that a relative would receive an organ if they needed it. However, reciprocity of advantage should benefit the individual who is the subject of the taking and any benefit to friends and family seems too remote.

<sup>172</sup> *Loretto*, 458 U.S. at 441. Where permanent physical occupation is present, “the government does not simply take a single ‘strand’ from the ‘bundle’ of property rights: it chops through the bundle, taking a slice of every strand.” *Id.* at 435.

<sup>173</sup> *Hawaii House Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (quoting *Thompson v. Consolidated Gas Corp.*, 300 U.S. 55, 80 (1937)). “Public use” is broadly interpreted; as the Court states in *Midkiff*, it will defer to the legislature’s determination “until it is shown to involve an impossibility.” *Id.* at 240 (citations omitted).

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

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

<sup>176</sup> 63C AM. JUR. 2D *Property* § 1 (1997).

<sup>177</sup> *See id.* This list of property rights is neither exhaustive nor conclusive. *See generally id.*

<sup>178</sup> *See* *Peterson*, *supra* note 54, at 181-82 (citing *First Victoria Nat’l Bank v. United States*, 620 F.2d 1096, 1104 (5th Cir. 1980)).

the bundle may still be considered property.<sup>179</sup> It is important to determine whether something is property because someone must be named the owner, and that person “gets the relevant bundle of rights protected by law.”<sup>180</sup> Furthermore, “[p]roperty rights both create and protect the reasonable expectations of an individual in his or her dealings with others in society. Through consistent application, property rights provide predictable results in given situations.”<sup>181</sup>

The problem with defining the organs of the deceased as property is that the inevitable question of who can claim ownership of the organs arises.<sup>182</sup> The traditional view that the corpse was not property emerged largely because there was no financial value in corpses.<sup>183</sup> Inevitably, disputes arose over proper burial, organ donation, and other familial squabbling.<sup>184</sup> These disputes often cast the dead body as a thing, a sign suggesting that the decedent's immediate family or spouse should hold the right to possess, dispose of, or transfer the corpse in whole or in part.<sup>185</sup> The law fails to provide reasonable expectations or predictability with regard to human bodies and their disposition because it lacks a precise definition of the rights surrounding the dead bodies.<sup>186</sup>

Originally, the common law did not recognize the corpse as property.<sup>187</sup> Ecclesiastical courts in England had province over bodily remains, while the legal courts' jurisdictional power was limited to matters surrounding the burial site, grave

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<sup>179</sup> See *First Victoria*, 620 F.2d at 1104. “‘Property’ evolves over time. It can be described as the bundle of rights attached to things conferred by law or custom, or as everything of value which a person owns that is or may be the subject of sale or exchange. Both of these definitions contemplate the possibility that law or custom may create property rights where none were earlier thought to exist.” *Id.* at 1103 (internal citations omitted).

<sup>180</sup> See Prue Vines, *The Sacred and the Profane: The Role of Property Concepts in Disputes About Post-mortem Examination*, 20 SYDNEY L. REV. 235, 246 (2007).

<sup>181</sup> Roy Hardiman, Comment, *Toward the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue*, 34 UCLA L. REV. 207, 227 (1986).

<sup>182</sup> See Vines, *supra* note 180, at 237.

<sup>183</sup> See Vines, *supra* note 180, at 236-37.

<sup>184</sup> See *Spanich v. Reichelderfer*, 628 N.E.2d 102, 102 (Ohio Ct. App. 1993) (dispute between a decedent's husband and her relatives over “unearthing and removing the [decedent's] remains”); see *Brownlee v. Pratt*, 68 N.E.2d 798, 799 (Ohio Ct. App. 1946) (daughter protested the action of her step-mother placing the step-mother's second's husband's remains in the same burial vault as the daughter's mother and father); see *Herold v. Herold*, 1905 Ohio Misc. LEXIS 127, 1 (C.P. 1905) (dispute over custody of decedent's body between a widow and father of the deceased).

<sup>185</sup> See, e.g., *Spanich*, 628 N.E.2d at 102, 104-05.

<sup>186</sup> See Hardiman, *supra* note 181, at 216-18, 227.

<sup>187</sup> See Charles C. Dunham IV, Comment, “*Body Property: Challenging the Ethical Barriers in Organ Transplantation to Protect Individual Autonomy*,” 17 ANNALS HEALTH L. 39, 50 (2008) (citing *Brotherton v. Cleveland*, 923 F.2d 477, 481 (6th Cir. 1991)); see also Hardiman, *supra* note 181, at 225 (“In England, the common law held that there was no ‘property’ right in a dead body and, therefore, it could not be disposed of by will.”) (citing B. Katz, *Increasing the Supply of Human Organs for Transplantation: A Proposal for a System of Mandated Choice*, 18 BEV. HILLS B.A. J. 152, 155 (1984)).

markers, and monuments.<sup>188</sup> The United States, no longer under the influence of ecclesiastical courts, “devised a way around the rule” and assumed jurisdiction over dead bodies by declaring that a decedent’s relatives had an interest in the body but only for burial and interment purposes.<sup>189</sup>

Later, a Rhode Island court described this interest as “quasi-property.”<sup>190</sup> State courts gradually expanded these rights, adding the right to prevent the removal of body parts, the right to have the corpse remain in its final resting place, the right to have it buried where the closest relative wants, the right to refuse an autopsy, and the right to recover damages for any outrage, indignity, or injury to the body of the deceased.<sup>191</sup> Recently, courts across the country have held that heirs have “constitutionally protected property rights” in the corpse of the deceased.<sup>192</sup> The extent of those rights is inconsistent from state to state but generally, they extend to the prevention of removal of body parts unless the state can assert a countervailing compelling state interest.<sup>193</sup> The Utah Supreme Court even stated that property rights in cadavers arise directly under the provisions of the UAGA.<sup>194</sup> Though no court has decided a case based on the takings clause, if heirs possess a constitutionally protected right over the decedent’s body, that property right should be protected from government takings as well.

The extent of property interest in living persons’ tissues and organs is seemingly more apparent. The California Supreme Court held in *Moore v. Regents of the University of California* that an individual’s cells, used to derive a commercial line, were not the person’s property and he, therefore, did not have a cause of action for conversion.<sup>195</sup> One could argue that if a living person’s tissues are not his or her own property, a deceased person’s tissue certainly could not pass to their heirs. However, at least one commentator has noted that “it is possible that the court’s refusal to

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<sup>188</sup> See Hardiman, *supra* note 181, at 226.

<sup>189</sup> Peterson, *supra* note 54, at 185.

<sup>190</sup> *Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227, 237-238 (1872). “That there is no right of property in a dead body, using the word in its ordinary sense, may well be admitted. Yet the burial of the dead is a subject which interests the feelings of mankind to a much greater degree than many matters of actual property.” *Id.* at 238.

<sup>191</sup> Philippe Ducor, *The Legal Status of Human Materials*, 44 DRAKE L. REV. 195, 229 (1996); see also *Pettigrew v. Pettigrew*, 56 A. 878, 879 (P.A. 1903) ([I]t would be more accurate to say that the law recognizes property in a corpse, but property subject to a trust, and limited in its rights to such exercise as shall be in conformity with the duty out of which the rights arise.”).

<sup>192</sup> *Waeschle v. Dragovic*, 576 F.3d 539, 550 (6th Cir. 2009) (limited rights form the basis of constitutionally protected property rights); see *Janicki v. Hosp. of St. Raphael*, 744 A.2d 963, 968 (Conn. Super Ct. 1999); see *Mansaw v. Midwest Organ Bank*, No. 97-0271-CV-W-6, 1998 WL 386327, at \*3 (W.D. Mo. July 8, 1998). *But see* *Ga. Lions Eye Bank v. Lavant*, 335 S.E.2d 127, 128 (Ga. 1985) (emphasis omitted) (holding that there was no “constitutionally protected right in a decedent’s body”); *Albrecht v. Treon*, 889 N.E.2d 120, 129 (Ohio 2008) (holding that there was no property right in the decedent’s body).

<sup>193</sup> See generally *Whaley v. County of Tuscola*, 58 F.3d 1111 (6th Cir. 1995).

<sup>194</sup> *In re Estate of Moyer*, 577 P.2d 108, 110 n. 4 (Utah 1978).

<sup>195</sup> See *Moore v. Regents*, 51 Cal. 3d 120, 137 (1990).



recognize Moore's conversion claim stems from the intuition that body parts cannot be property so long as they are contained within a living human being.<sup>196</sup> Since much of the opinion rests on public policy and the lack of judicial decisions or legislative actions granting a cause of action, this interpretation is persuasive.<sup>197</sup> Furthermore, the court only attempted to distinguish *Venner v. State*, which noted personal property rights in organs and tissue, instead of refusing to follow it.<sup>198</sup> Thus, it can be distinguished as not relevant to whether organs of the deceased are property.

*b. Just Compensation*

If a protectable quasi-property right exists which courts will protect, then any taking must be compensated to avoid violating the Fifth Amendment. Another commentator has argued that even if one's organs are one's own during life, no one obtains constitutional rights to them after death and even if they did, because there can be no sale, organs have no value to be compensated.<sup>199</sup> This assertion flies in the face of both case law and logic. Courts have determined that next of kin inherit "constitutionally protected property rights" in the deceased's organs.<sup>200</sup> Furthermore, just because Congress has banned the sale of organs does not mean that they have no value. In fact, a kidney recently sold in America for \$20,000.<sup>201</sup> Typically, just compensation "is the property's fair market value, so that the owner is theoretically no worse off after the taking."<sup>202</sup> Fair market value is difficult to determine in the case of organs because their sale is banned by NOTA.<sup>203</sup>

It is not fair to say that the fair market value is zero dollars merely because that is the government's price ceiling. Determining fair value based on underground markets would also not be just compensation because underground market prices are higher because of the risk of being caught and the difficulty in obtaining organs.<sup>204</sup>

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<sup>196</sup> Radhika Rao, *Property, Privacy and the Human Body*, 80 B.U. L. REV. 359, 374 (2000).

<sup>197</sup> See generally *Moore*, 51 Cal. 3d at 120-85. The dissent stated "there [is not] any reported decision rejecting such a claim [that Moore had retained an ownership interest in his cells]". *Id.* at 161 (Mosk, J., dissenting).

<sup>198</sup> See *Venner v. State*, 354 A.2d 483, 498 (Md. Ct. Spec. App. 1976) (finding that "it is not unknown for a person to assert a continuing right of ownership, dominion, or control, for good reason or for no good reason, over such things such as excrement, fluid, waste, secretions, hair, fingernails, toenails, blood and organs or other [separated] parts of the body") *aff'd*, 367 A.2d 949 (1977); see also *Moore*, 51 Cal. App. 3d at 138.

<sup>199</sup> See *Silver*, *supra* note 124, at 714-15.

<sup>200</sup> See *Brotherton v. Cleveland*, 923 F.2d 477, 479-82 (6th Cir. 1991).

<sup>201</sup> Drew Griffin & David Fitzpatrick, *Donor Says He Got Thousands for His Kidney*, CNN.COM, <http://www.cnn.com/2009/WORLD/meast/09/01/blackmarket.organs/index.html?iref=allsearch> (last visited Dec. 1, 2009).

<sup>202</sup> BLACK'S LAW DICTIONARY 122 (3d Pocket ed. 2004).

<sup>203</sup> See 42 U.S.C.S. § 274e (2011).

<sup>204</sup> David Kaserman, *Markets for Organs: Myths and Misconceptions*, 18 J. CONTEMP. HEALTH L. & POL'Y 567, 573 (2002).

Two possible alternatives are to allow the government to determine the intrinsic value through statute or to value just compensation as the recovery of the next of kin in a suit for wrongful interference with a corpse. The former solution, though more definite, is highly subjective. Since there is no true measure of intrinsic value for organs, legislatures would eventually need to base their determination on a market value or some other test with more transparency. The latter solution, as noted by one commentator, would reflect the emotional distress suffered by the next of kin, rather than the value of the cadaver itself. Though the value of recoveries in such cases “would be difficult to ascertain,” it would provide a legitimate starting point.<sup>205</sup> Furthermore, it could combine the certainty of the first solution by allowing the statute to provide the guidelines, varying in amount depending upon the organs taken and “the nearness of the relationship between the survivor and the deceased.”<sup>206</sup> This plan would incorporate the best of both solutions and provide just compensation for conscripted organs. Therefore, in order to avoid violating the Fifth Amendment by conscripting organs, the states should provide just compensation in the form of a statutorily determined amount derived from wrongful interference with a corpse recoveries.

## 2. Religion

Another objection to organ conscription is that it would violate individuals’ First Amendment right to freely exercise their religion.<sup>207</sup> Based on a letter written by Thomas Jefferson,<sup>208</sup> the Supreme Court held that “Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.”<sup>209</sup> Therefore, courts have held that the free exercise of religion does not permit individuals to “hurt or harm the overwhelming majority of the community.”<sup>210</sup> Though the lack of organs is harmful to people in need of organs, they certainly are not a majority, let alone an

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<sup>205</sup> Note, *Compulsory Removal of Cadaver Organs*, 69 COLUM. L. REV. 693, 700 (1969).

<sup>206</sup> *See id.*

<sup>207</sup> Abena Richards, Comment, *Don't Take Your Organs to Heaven...Heaven Knows We Need Them Here: Another Look at the Required Response System*, 26 N. Ill. U. L. Rev. 365, 393 (2006). *See* CONST. amend. I. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” U.S. CONST. amend. I.

<sup>208</sup> Letter from Thomas Jefferson to Messr. Nehemiah Dodge et al. (Jan. 1, 1802), in PAPERS OF THOMAS JEFFERSON, 1743-1826, at 295 (Julian P. Boyd et al. eds., 1950). “Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion, or prohibiting the free exercise thereof,’ thus building a wall of separation between church and State.” *Id.*

<sup>209</sup> *Reynolds v. United States*, 98 U.S. 145, 164 (1898) (holding that a law against polygamy did not violate the free exercise clause).

<sup>210</sup> *In re Whitmore*, 47 N.Y.S.2d 143, 144 (N.Y. Dom. Rel. Ct. 1944).

overwhelming majority. Thus, it is doubtful that conscription would not violate the free exercise clause.<sup>211</sup>

To ensure that it does not violate the clause, a two-tiered exception to conscription would be allowed for all persons who believe that donation conflicts with the practice of their religion or their child's religion. The first tier would be an automatic exemption for anyone whose religion does not allow organ donation.<sup>212</sup> The second exception would be an opportunity for anyone who feels that their personal religious beliefs prohibit themselves or their children from donating to submit a claim to the state board to review and grant an exception. They would be entitled to this exception even though almost all major western and eastern religions do not oppose donation.<sup>213</sup>

Most Christian religions currently take the stance that donation is a great act of love and support organ donation.<sup>214</sup> Catholicism especially supports donation and Pope John Paul II has stated, "[t]he Catholic Church would promote the fact that there is a need for organ donors and that Christians should accept this as a 'challenge to their generosity and fraternal love' so long as ethical principles are followed."<sup>215</sup> However, Pope Benedict XVI made clear that organ donation "is morally licit" when "spontaneous and free."<sup>216</sup> Since mandatory donation is neither spontaneous nor free, Catholics may express some reservations. Similarly, most other Christian groups make clear that it is important to leave the choice to the individual.<sup>217</sup> Several Christian groups are less enthusiastic about donation. In particular, Jehovah's Witnesses, though not against donation, require all the blood to be drained from the organ before allowing transplantation.<sup>218</sup> Greek Orthodox Christians believe that

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<sup>211</sup> Another commentator argued that "[i]t is not clear that an organ draft act would violate the first amendment without such an exemption." Silver, *supra* note 124 at 709. He claims that "[i]t would be 'plainly incumbent' upon the state to 'demonstrate that no alternative forms of regulation' would serve its purpose 'without infringing on First Amendment rights.' *Id.* at 711 (citing *Sherbert v. Verner*, 374 U.S. 398, 407 (1964)). However, in his final analysis he decides that an exception for religion is warranted. *Id.* at 713.

<sup>212</sup> See *DonateLife, Organ Donation and Your Religion* (Mar. 5, 2011), <http://www.donate-life.gov.au/Discover/Religion--donation.html>. Individuals practicing Gypsy or Shinto beliefs do not allow donation. The former because they believe the soul retains the shape of the body and the body should not be harmed. The latter group believes that organ donation injures the dead body, and is a severe crime. *Id.*

<sup>213</sup> See *id.* Though most do not oppose donation, they mainly leave the decision up to the individual. Mandatory donation may come into conflict with this belief. Furthermore, many religions believe that donation should be an altruistic gift and may oppose compensation. See *id.*

<sup>214</sup> *Id.*

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

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

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

<sup>218</sup> *Id.* Further, Jehovah's Witnesses believe that blood must not be eaten or transfused. *Godly Respect for Life and Blood*, THE WATCHTOWER, June 1, 1969, at 326. Therefore, not only must the blood be drained from the organ, but also neither the donee nor donor can receive any blood after the transplantation, which can make the surgery more dangerous. *Id.*

donations used to better human life, including transplantation and research, are acceptable.<sup>219</sup>

All four major branches of Judaism believe that organ donation is not in conflict with their religious beliefs.<sup>220</sup> Rabbi Dr. Moshe D. Tendler has stated, “[n]o ritual obligation impedes the effort to save a life unless it would require one to commit the sin of idolatry, adultery, or murder.”<sup>221</sup> He even has gone further stating that considering the vast deficit of available organs, remuneration to family members is acceptable considering the great value of saving lives.<sup>222</sup> On the other hand, as evidenced by the extreme organ shortage in Israel, many Jewish people believe that their religion forbids organ donation.<sup>223</sup> In this instance, a mandatory draft would enable Jewish people to better exercise their religious beliefs.

Muslims are deeply devoted to the concept of saving life.<sup>224</sup> Sheikh Omar S. Abu-Namous, Imam of the Islamic Cultural Center of New York in Manhattan made clear that it is lawful to donate organs to those whose life or cure is dependant upon receiving them.<sup>225</sup> Islamic law would even allow the taking of organs from the recently deceased with the permission of the attorney general.<sup>226</sup> Similar to the Jewish opinion on remuneration, a minority of Islamic law jurists are inclined to allow some compensation to families of donors in light of the organ shortages.<sup>227</sup> Islam is as supportive, if not more so, as the other two major western religions when it comes to organ donation.

In a recent survey of the country, seventy-six percent of Americans identified themselves as Christians and 2% more identified themselves as Jewish or Muslim.<sup>228</sup>

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<sup>219</sup> New Mexico Donor Services, *Religious Views on Organ, Tissue, and Blood Donation available at* <http://www.donatelifenm.org/religiousviews.htm#greekorth> (last visited Mar. 5, 2011).

<sup>220</sup> *Id.*

<sup>221</sup> Rabbi Dr. Moshe D. Tendler, *The Judeo-Biblical Perspective on Organ Donation: You Shall Choose Life*, [www.donatelifeny.org/uploaded\\_files/tinymce/files/rabbi\\_tendler.pdf](http://www.donatelifeny.org/uploaded_files/tinymce/files/rabbi_tendler.pdf) (last visited Feb. 8, 2011).

<sup>222</sup> *See id.*

<sup>223</sup> *See* Rabbi Lisa Grushcow, *A Sermon* (2006), [http://www.donatelifeny.org/uploaded\\_files/tinymce/files/lisa\\_grushcow.pdf](http://www.donatelifeny.org/uploaded_files/tinymce/files/lisa_grushcow.pdf) (last visited Feb. 8, 2011). In her sermon, she shares a story of a young Israeli girl flying to America for a liver transplant who passes away on the flight. Though her parents wanted to donate her organs, they didn’t because their rabbi had told them it was against Jewish law. *Id.*

<sup>224</sup> DonateLife, *supra* note 212.

<sup>225</sup> *See* Sheikh Omar S. Abu-Namous, *A Organ Donated Is Ongoing Charity* (2003), [www.donatelifeny.org/uploaded\\_files/tinymce/files/abu\\_namous.pdf](http://www.donatelifeny.org/uploaded_files/tinymce/files/abu_namous.pdf) (last visited Feb. 8, 2011).

<sup>226</sup> *See id.*

<sup>227</sup> *See id.*

<sup>228</sup> Barry A. Kosmin and Ariela Keysar, *American Religious Identification Survey: Summary Report* (2009), [http://www.americanreligionsurvey-aris.org/reports/ARIS\\_Report\\_2008.pdf](http://www.americanreligionsurvey-aris.org/reports/ARIS_Report_2008.pdf) (last visited Feb. 14, 2010). Only 2.1% of individuals identified with Eastern Religions or Other, which are the groups that Shinto and Gypsy would be only a small part. *Id.*

Therefore, because almost all Christian, Jewish, and Muslim sects support donation, it is likely that even with a religious exception, conscription would increase the organ supply because many members of religious faiths would not have religious reasons to opt out.

### 3. Commodification

One of the ethical and moral reasons for the ban on receiving valuable consideration for organs is the fear that human dignity and value would be debased if body parts could be sold.<sup>229</sup> However, recently, at least one state attempted to provide some sort of funeral payment to organ donors.<sup>230</sup> Even though this attempt failed because of the ban on receiving valuable consideration, it indicates the understanding that organ shortage is a serious problem and that, in order to solve it, creative strategies are necessary.<sup>231</sup> More importantly, it shows that a funeral benefit for organ donors is not considered to be as debasing to human dignity. Furthermore, society may be moving away from the idea that commodifying the dead body is bad.<sup>232</sup>

The concept of commodification comes from the fact that a dead body is no longer a valueless object in the law and should be entitled to property interests and rights.<sup>233</sup> This movement towards commodification is obvious in every lawsuit where a relative claims ownership over a deceased body.<sup>234</sup> By characterizing organs from the deceased as property, it allows for a person's heirs to obtain the Constitutional protection from unlawful takings they deserve, without having to rely upon "quasi-property" rights.<sup>235</sup>

Further, the notion that it is immoral to pay money to preserve one's health conflicts with the reality of medicine in our country. If we believed as a moral matter that money should never be exchanged for the preservation of life, why is it acceptable to charge fees for the provision of medical services at all? Politicians often speak of health care as a "fundamental right" to be provided to all, regardless

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<sup>229</sup> See Erica D. Roberts, Note, *When the Storehouse is Empty: Why Transplant Tourism Should Not Be Ignored*, 52 HOW. L. J. 747, 763 (2009).

<sup>230</sup> See Jeffrey P. Kahn, *Organ Donation-We'll Make It Worth Your While*, CNN.com, (May 3, 1999), [www.cnn.com/HEALTH/bioethics/archive.index.html](http://www.cnn.com/HEALTH/bioethics/archive.index.html).

<sup>231</sup> Tendler, *supra* note 221. It is especially telling that religious leaders have recognized that some remuneration may be necessary since they are the staunchest opponents of commodifying the human body. See John Habgood, *The Church of England*, in *Organ and Tissue Donation for Transplantation* 29, 25 (Jeremy R. Chapman et al. eds., 1997); Richard V. Grazi & Joel B. Wolowelsky, *Nonaltruistic Kidney Donations in Contemporary Jewish Law and Ethics*, 75 *Transplantation* 250, 250 (2003).

<sup>232</sup> See REMIGIUS N. NWABUEZE, *BIOTECHNOLOGY AND THE CHALLENGE OF PROPERTY: PROPERTY RIGHTS IN DEAD BODIES, BODY PARTS, AND GENETIC INFORMATION* 35-38 (2007).

<sup>233</sup> See Dorothy Nelkin & Lori Andrews, *Do the Dead Have Interests? Policy Issues for Research After Life*, 24 *AM. J.L. & MED.* 261, 262 (1998); Erik S. Jaffe, Note, "*She's Got Bette Davis's Eyes*": *Assessing the Nonconsensual Removal of Cadaver Organs Under the Takings and Due Process Clauses*, 90 *COLUM. L. REV.* 528, 529-30 (1990).

<sup>234</sup> See, e.g., Brotherton, 923 F.2d at 477.

<sup>235</sup> See *supra* Part IV.B.1.a.

of their means,<sup>236</sup> but the reality indicates otherwise. When a patient visits her physician in need of an antibiotic to cure her life-threatening pneumonia, she is no less relieved of her obligation to pay than if she were visiting a grocery store and trying to purchase milk.<sup>237</sup> The truth is that individuals are forced to pay for health care if they want to receive it, and access to the system is far from guaranteed.

Accordingly, either commodifying the human body is morally inappropriate, in which case the natural extension is that we have a social obligation to provide health care for all Americans regardless of their ability to pay, or we should consider various forms of compensation for human organs much like we do for any other health care treatment. Even if the first option is more appealing, there is no reason why the provision of life-saving organs should not be funded by a universal state health care system to ensure access for all. If health care is indeed a fundamental right, requiring that people pay for life-saving medicines or operations is not morally any different than making them pay for life-saving human organs.<sup>238</sup>

Thus, the concept of remuneration for health care services and products is accepted practice in the United States, as Americans believe in exchange systems to varying degrees in all aspects of life. With respect to compensating for organs, an argument can be made that government regulation is necessary to prevent abuse and exploitation, but it is much more difficult to make the case that a compensation involving the human body is altogether immoral. Since this Note does not advocate the sale of organs by the living, many other commodification arguments are irrelevant.<sup>239</sup>

#### 4. Loss of Autonomy

Americans have a strong belief in individual freedom and autonomy, to which conscription may run counter.<sup>240</sup> Many people believe that they should be free from government interference with their bodies. Commentators have argued that conscription eliminates an individual's autonomous decision to leave his corpse untouched. However, the real impact of conscription is upon the corpse itself. The question becomes whether the corpse has some fuzzy right of autonomy. And even if it does, is it so important that it surpasses the importance of saving the life of a living American? It seems clear that since the government already has significant

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<sup>236</sup> Even the President has deemed health care one of his most important issues. Organizing for America, *Issues*, <http://www.barackobama.com/issues/> (last visited Feb. 14, 2010).

<sup>237</sup> It is important to note that emergency health care is the exception to this general reality, as The Emergency Medical Treatment and Active Labor Act (EMTALA) guarantees access to all Americans regardless of their ability to pay. *See* 42 U.S.C. § 1395dd (2000).

<sup>238</sup> *See* Susan Hankin Denise, Note, *Regulating the Sale of Human Organs*, 71 Va. L. Rev. 1015, 1033 (1985) (stating that “the wealth discrimination argument logically applies to all medical care allocated by market forces and would thus prohibit any life-saving health care from being bought or sold”).

<sup>239</sup> *See* Roberts, *supra* note 229. She argued that organ sales from living donors would “exploit the underprivileged, reduce the quality of donated kidneys, and diminish the inestimable value of the human body by treating organs like commodities to be bought and sold to the highest bidder.” *Id.*

<sup>240</sup> *See* Kurtz & Saks, *supra* note 157.

control over how we dispose our deceased bodies,<sup>241</sup> it is unrealistic to argue that the deceased have a right of autonomy superseding the value of the lives their organs could save. One commentator has argued that conscription would be politically impossible to implement, but provides no evidence that it would be.<sup>242</sup> Even if it may be politically difficult to gain support, in light of the lives that would be saved, it would be foolish to eliminate conscription as an option. Important legislation should not be ignored because it lacks political expediency, especially when American lives are at stake.

## V. CONCLUSION

The current system of organ donation is simply not working. The demand for organs far exceeds the supply, and the gap is only growing. Though the intentions of the drafters of the NOTA and the UAGA were noble, the combination of altruism and voluntary donation embedded in those Acts are not workable solutions to this crisis.

Realizing this pressing need, several proposed solutions have come forward. The least controversial, routine request, has also proven to be ineffective. Presumed consent, though better at obtaining organs, is really conscription in disguise and would amount to a taking without just compensation. Finally, an organ market of any kind would marginalize the poor and create a society where only the rich could afford organs, and the poor would be forced to sell their organs out of desperation.

Organ conscription, with just compensation, is the best way to increase the organ supply and save the lives of those who desperately need an organ. By forcing donation, something that the vast majority of Americans agree upon, it would eliminate the need for transplant tourism and the black market. Since the taking would be compensated, it would fall in line with the Fifth Amendment. With a simple exception for religious beliefs, it would not violate the free exercise clause. Furthermore, it would not exploit the poor or underprivileged and would enable them to obtain life-saving organs as well. No other solution could likely provide as many organs. Organ conscription is therefore the best solution to the current organ shortage. Without this overhaul of our current organ donation system, many Americans will continue to lose their lives needlessly.

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<sup>241</sup> See OHIO R.C. § 1713.39; MISS. CODE ANN. § 41-39-7; VIR. STAT. ANN. § 54.1-2807.

<sup>242</sup> Calandrillo, *supra* note 129 at 126.