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Organ Transplantation: A Legal and Moral Analysis

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Table of Contents

Introduction 2

I. United States Organ Donation 2

A. History of Transplantation 2

B. Current Law and Policies 3

1. Uniform Anatomical Gift Act 3

2. The National Organ Transplant Act 7

C. Organ Procurement- Our Current System 10

D. Supply & Demand of Organs-The Organ Shortage 12

II. Alternative Measures to Procure Organs 13

A. Presumed Consent- "Opt-Out" System 13

B. Conscription- Mandatory Donation- Routine Organ Recovery 17

C. Mandated Choice/Required Response 19

D. Positive Incentives 20

III. Moral Analysis 21

A. Seven Basic Goods 21

1. Life 22

2. Knowledge 23

3. Play 24

4. Aesthetic Experience 24

5. Sociability (friendship) 25

6. Practical Reasonableness 25

7. Religion 26

B. Nine Principles of Practical Reasonableness 29

1. A Coherent Plan of Life-Have a Rational Plan 30

2. No Arbitrary Preferences Amongst Values 31
3. No Arbitrary Preferences Amongst Persons 32
4. Detachment & 5. Commitment 34
6. The (Limited) Relevance of Consequences: Efficiency, Within Reason 35
7. Respect for Every Basic Value in Every Act 36
8. The Requirements of the Common Good 37
9. Following One's Conscience 41
Conclusion 41

Introduction

For over sixty years the shortage of organs available for transplant has been a serious and unchanging worldwide problem since organ transplant surgeries were first made possible and safe several decades ago. That is since the beginning of organ transplantation there has always been a deficit in the amount of organs available for donation and transplantation. A majority of nations around the world have relied on different approaches to try to alleviate this problem with varying levels of success. In the United States Despite significant technological improvements and numerous publicity campaigns over the past several decades, the substantial shortage for organs, tissues and eyes for life-saving or life-improving transplants continues. Every hour another person dies waiting for an organ transplant. The first part of this paper will explain the current state of affairs surrounding organ donation including laws and regulations, statistics and facts, and alternative solutions to our system. The second part of this paper will draw upon the theory of natural law through the analysis noted in *Natural Law and Natural Rights (1980)* by John Rawls.

I. United States Organ Donation

A. History of Transplantation

On December 23, 1954, the first successful (defined as lasting more than six months)

human organ transplant in the United States was performed. At Brigham Hospital in Boston, Dr. Murray and Hume performed the first successful living-related kidney transplant from Ronald Herrick into his identical twin, Richard who was dying from advanced glomerulonephritis.[1] In 1962, Dr. Murray and Dr. Hume performed the first successful cadaveric kidney transplant at the same Boston hospital, where the patient received the new immunosuppressive drug azathioprine and lived for twenty-one months.[2] In 1968, the first organ donor programs were created, the Organ Donor Card was established as a legal document, and a 20-year-old Texas woman, who has just been shot in the head and was brain dead - her heart was beating, but she had no brain activity--becomes the world's first multiple organ donor.[3] Regrettably, the demand for organs for transplantation exceeds the supply, and this gap is rapidly growing at an alarming rate every day. Disappointingly, rather than creating a situation in which the need for organs is being met, our current system is actually creating critical levels of organ shortage.

B. Current Law and Policies

1. Uniform Anatomical Gift Act

In 1968 the National Conference of Commission on Uniform State Laws (NCCUSL) formulated the Uniform Anatomical Gift Act of 1968 ("UAGA") which all fifty states adopted with minor modifications.[4] UAGA was the first law governing organ and tissue donation and prior to its passage organ donation was controlled by each state but the systems significantly varied across the United States.[5] UAGA was enacted in an attempt to increase the number of organ donations by allowing individuals to register as organ donors and reduce the organ

[1] New York Organ Donor Network, Organ Transplant History, at http://www.donatelifeny.org/all-about-transplantation/organ-transplant-history/
[2] http://www.organtransplants.org/understanding/history/index.html
[3] *Id.*
[4] Association of Organ Procurement Organizations, Legislative, http://www.aopo.org/legislative-a33, (last visited October 12, 2014).
[5] *Id.*

shortage by making it easier for people to make anatomical gifts.[6] Under the 1968 UAGA, any person may indicate his or her wish to donate thier organs once deceased not only by a will,[7] but may also be made by another document such as a driver's license or a signed donor card.[8]

In 1987, Congress revised the UAGA to address the "inadequacies in the existing system of encouraging voluntary donation of organs,"[9] and to strengthen the legal weight of an individual's decision to make a posthumous donation.[10] While the 1968 UAGA was silent on the issue of organ sales, the 1987 UAGA was amended to explicitly prohibit the purchase and sale of organs if removal of the organ is intended to occur after death.[11] Identically, to the National Organ Transplant Act does, the 1987 UAGA also authorizes fines of up to $50,000 or imprisonment for up to five years for any violation.[12] Further, it created a system of "routine inquiry and required request" that compels hospitals to ask patients or their families about organ donation if they wish to continue receiving Medicare and Medicaid funding.[13] Moreover, it mandated that law enforcement officers and emergency/medical personnel make reasonable searches for documentation of gift or other information identifying the bearer as a donor or that one has refused to make an anatomical gift when that person is "dead or near death."[14] In

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[6] *Id.*
[7] Uniform Anatomical Gift Act (1968) § 4(a)
[8] *Id.* at § 4(b)
[9] Prefatory Note, Uniform Anatomical Gift Act (1987)
[10] *Id.*
[11] Uniform Anatomical Gift Act (1987) §10. This section provides:
Sale or Purchase of Parts Prohibited.
(a) A person may not knowingly, for valuable consideration, purchase or sell a part for transplantation or therapy, if removal of the part is intended to occur after the death of the decedent. (b) Valuable consideration does not include reasonable payment for the removal, processing, disposal, preservation, quality control, storage, transportation, or implantation of a part. (c) A person who violates this section is guilty of a [felony] and upon conviction is subject to a fine not exceeding [$50,000] or imprisonment not exceeding [five] years, or both. Id. The 1987 UAGA defines "part" as "an organ, tissue, eye, bone, artery, blood, fluid, or other portion of a human body." Id. § 1(7).
[12] 42 U.S.C. § 274(e)(b)(2011). This Section provides:
§ 274e. Prohibition of organ purchases (b) Penalties- Any person who violates subsection (a) of this section shall be fined not more than $50,000 or imprisoned not more than five years, or both.
[13] *Id.* at § 5(a), (b).
[14] *Id.* at § 5(c)

addition it gave priority to the decedents wishes over that of one's family by providing that "[a]n anatomical gift that is not revoked by the donor before death is irrevocable and does not require the consent or concurrence of any person after the donor's death."[15] Unfortunately, the 1987 UAGA was met with much resistance and only 26 states adopted it, "resulting in non-uniformity between those states and the states that retained the 1968 version".[16] In addition, subsequent changes in each state over the years has resulted in even less uniformity and more inconsistencies.[17] Moreover, neither of the prior versions of UAGA recognized "the system of organ procurement that has developed partly under federal law".[18]

In 2006, the UAGA was revised again in an effort to achieve uniformity amongst the states thereby adding to the efficiency of the current system as well as encouraging more organ donation.[19] This newest version made several revisions in order to facilitate the donation of more organs. One of the most drastic revisions was the elimination of presumed consent[20] which was added to the 1987 UAGA. It was made clear by the "NCCUSL" that "organ donation is a purely voluntary decision that must be clearly conveyed before an individual's organs are available for transplant."[21] While the 2006 version retained the basic policy of the 1968 and 1987 acts some other important changes include:

> (1) Section 4 authorizes individuals to make anatomical gifts of their bodies or parts...The section also recognizes that it is appropriate that minors who can apply for a license be empowered to make anatomical gifts, subject, in limited circumstances, to the right of their parents to revoke that gift.[22]

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[15] *Id.* at § 2(h)
[16] Uniform Law Commission, The National Conference of Commissioners on Uniform State Laws, *Anatomical Gift Act (2006) Summary*, at http://uniformlaws.org/ActSummary.aspx?title=Anatomical Gift Act (2006).
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] UAGA Prefatory Note, *supra* note 9 § 8
[21] NCCUSL, *supra* note 16
[22] Prefatory Note, Uniform Anatomical Gift Act (2006) § 4

(2) Section 5 recognizes in addition to evidencing a gift on a donor card or license, this [act] allows for the making of anatomical gifts on donor registries. It also permits oral gifts under limited circumstances.[23]
(3) Section 7 permits an individual to sign a refusal that bars all other persons from making an anatomical gift of the individual's body or parts...By permitting refusals, this [act] recognizes the autonomy interest of an individual either to be or not to be a donor. Section 8 is intended to substantially strengthen the respect due a decision to make or refuse to make an anatomical gift.[24]
(4) Section 20 creates a default rule to adjust the tension that otherwise would exist between preserving a donor's parts to assure their suitability for transplantation, therapy, research, or education and the expression of an intent by the donor in either a declaration or health-care power not to have the donor's life prolonged by use of life support systems. The rule under this act is that life support should be administered if necessary to preserve the parts and the opportunity to make an anatomical gift. Of course, an individual could expressly otherwise provide in the declaration or health care power.[25]
(5) Section 22 represents a complete revision of the relationship of the [coroner][medical examiner] to the anatomical gift process. Prior law permitted the [coroner][medical examiner] under limited circumstances to make anatomical gifts of the eyes of a decedent in the [coroner's][medical examiner's] possession. In light of a series of Section 1983 actions in which the [coroner][medical examiner]'s actions were deemed to violate the property rights of surviving family members, *see, e.g., Brotherton v. Cleveland,* 923 F.2d 477 (6th Cir. 1991), the Commissioners decided to delete the provision. In lieu thereof, a series of new provisions have been included relating to the relationship between the [coroner][medical examiner] and the procurement organizations. The intent of these provisions is to encourage meaningful cooperation between these groups in hopes of increasing the number of anatomical gifts. Importantly, the section does not permit a [coroner][medical examiner] to make an anatomical gift. Rather, parts from a decedent can be the subject of an anatomical gift only if an anatomical gift was made under Section 4 or Section 9 of this [act].[26]

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[23] *Id.* at § 5
[24] *Id.* at § 7. While prior laws provided that a donor's anatomical gift was irrevocable (except by the donor), it had been until quite recently a common practice for procurement organizations to seek affirmation of that gift from a donor's family. This could result in unnecessary delays in the harvesting of organs as well as a reversal of a donor's donation decision. This [act] intentionally dis-empowers families from making or refusing to make anatomical gifts in contravention of a donor's wishes. Thus, under the strengthened language of this [act] if a donor had made an anatomical gift, there is no reason to seek consent from a donor's family as they have no ability to give it legally. Of course, that would not bar, nor should it bar, a procurement organization from advising the donor's family of the donor's express wishes but that conversation should be focused more on what procedures will be followed to carry out the donor's wishes rather than on seeking approval of the donation.
[25] *Id.* at § 20
[26] *Id.* at § 22

As of today, forty-four states have adopted the 2006 UAGA version, Delaware, Illinois, and Maryland plus D.C. are still regulated under the 1968 UAGA and Massachusetts, New York, and Pennsylvania have retained the 1987 version.[27]

2. The National Organ Transplant Act

A little more than thirty years ago on October 19, 1984 Congress passed the National Organ Transplant Act ("NOTA") in response to a series of public appeals by desperate families seeking organs and financial assistance for transplants[28] and also the appearance of a commercial market for transplant organs.[29] To help achieve this goal, Title III of NOTA promoted altruistic donation by firmly rejecting the idea of an organ market by outlawing the sale of human organs in interstate commerce.[30] Title I of the Act, provided for the establishment of the Task Force on Organ Transplantation, which was charged with "conducting comprehensive examinations of the medical, legal, ethical, economic, and social issues presented by human organ procurement and transplantation.[31] The Task Force is also accountable for assessing immunosuppressive medication used to prevent organ rejection in transplant patients, including safety, effectiveness, costs, insurance reimbursements, and making sure those who need these drugs can receive

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[27] U.S. Department of Health and Human Services, *State Organ Donation Legislation.* http://organdonor.gov/legislation_micro/. The database allows for a comparison of the different UAGA's adopted by each state as well as detailed reports of revenue sources and funding, legal consent for donation, living donor support, and donation education.

[28] Ann McIntosh, *Regulating the "Gift of Life --The 1987 Uniform Anatomical Gift Act*, 65 Wash. L. Rev. 171, 174 (1990); Citing National Organ Transplant Act, Pub. L. No. 98-507, 1984 U.S. Code Cong. & Admin. News (98 Stat.) 3975, 3977. President Reagan publicized the plight of a young child needing a liver transplant in one of his radio broadcasts.

[29] *Id.* Citing Wash. Post, Sept. 19, 1983, at A9, col. 1. In 1983, Dr. H. B. Jacobs established International Kidney Exchange Ltd., a Virginia corporation, to broker inter vivos sales of kidneys. A person who needed a transplant could purchase the organ for "cost"' plus the corporation's "'finder's fee."' Dr. Jacobs anticipated receiving some of his corporation's kidneys from willing residents of Third World countries.

[30] See 42 U.S.C. § 274e (1994). 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), (b). NOTA makes exceptions for compensation that relates to "removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ or the expenses of travel, housing and lost wages incurred by the donor of a human organ in connection with the donation of the organ." Id. § 274e(c) (2).

[31] Nat'l Organ Transplant Act § 101(b) (1) (A), Pub. L. No. 98-507, 98 Stat. 2339 (1984)

them.[32] Further, the Task Force is accountable for preparing a reports including an assessment of public and private efforts to procure organs for transplantation, the problems with coordinating the procurement of viable organs, recommendations for education and training of health professionals, and for education of the general public.[33]

NOTA's Title II authorized the Department of Health and Human Services to make grants for the planning, establishment, and initial operation of qualified regional Organ Procurement Organizations (OPO's)[34] which is responsible for arranging the procurement and preservation of all donated organs, providing or arranging for the transportation of donated organs to transplant centers within that OPO's region, identifying potential donors, and determining the quality standards for the acquisition of organs.[35] Among other criteria, an OPO must (1) have a have substantial support in their service area and a system that identifies potential organ donors (2) conduct and participate in systematic efforts, including professional education, to acquire all useable organs, and (3) provide quality standards for the acquisition of organs consistent with the standards adopted by the Organ Procurement and Transplantation Network ("OPTN").[36] OPTN was established to oversee and coordinate the allocation of organs throughout the country. To help with this task, OPTN established a national list of individuals who need organs and a national system to match recipients and donors.[37] Further, OPTN adopts standards of quality for the acquisition and transportation of organs and coordinates the transportation of organs from organ procurement locations to transplant centers.[38] Additionally

Congress elected United Network for Organ Sharing ("UNOS"), an existing private, non-

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[32] Nat'l Organ Transplant Act § 101(b) (2), Pub. L. No. 98-507, 98 Stat. 2339 (1984). See also 42 U.S.C. §273
[33] Nat'l Organ Transplant Act § 101(b)(3)(A)-(B)
[34] *Id.* at § 371(a). See also 42 U.S.C. §273
[35] Nat'l Organ Transplant Act 273 (b) (3) (1994).
[36] *Id.* at 371(b)
[37] *Id.* at § 372(b) (2)(A).
[38] *Id.* at § 372(b)(2)(D), (F)

profit central registry of potential kidney recipients, to administer OPTN and Scientific Registry of Transplant Recipients.[39] Every patient on the transplant waiting list is registered with UNOS on their centralized computer network at the UNOS Organ Center which links Organ Procurement Centers (OPOs) and transplant centers.[40] A centralized organ sharing system allowed OPTN to accomplish two of its principal goals: ensuring that patients in the most need are assigned the highest priority and guaranteeing proper matching between donors and recipients.[41] The purpose of the Scientific Registry's was to analyze the efficacy of existing OPTN allocation policies and to evaluate the need for new or revised policies.[42] The computerized registry reports and analyzes the effectiveness of organ donation and transplantation efforts. The list includes the following information: data collected on organ donor referrals, requests, consents, and discards; donor and patient demographics; factors important to transplant success; transplantation complications; and important medical advances such as improvements in surgical techniques and tissue typing.[43] Since 1987, the OPTN and Scientific Registry have been privately operated by the UNOS.[44]

In order to receive Medicare funds, the federal government requires that all transplant centers and OPOs must be registered with the OPTN to be eligible for Medicare reimbursement for transplants.[45] As of today, NOTA is the only federal law that regulates the procurement,

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[39] *Id.*

[40] United Network for Organ Sharing, *at* http://www.unos.org/whoweare (last visited Oct. 17, 2014)

[41] 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, 20 (1995).

[42] Robert G. Harmon, *The National Organ Transplantation Scientific Registry*, 264 JAMA 436, 436 (1990). The database includes information concerning where organs were procured and where they were transplanted. John C. McDonald, *The National Organ Procurement and Transplantation Network*, 259 JAMA 725, 726 (1988).

[43] Harmon, at 436 (describing data and info available through the Scientific Registry for Organ Transplantation).

[44] *Id.* at 436 (describing the creation of UNOS and its responsibilities under the National Organ Transplant Act). UNOS operates under contract with the Health Resources and Services Administration of the U.S. Public Health Service, a division of the U.S. Department of Health and Human Services (HHS).

[45] Gorsline & Johnson, *supra* note 41, at 36

distribution, and transplantation of organs.[46] Additionally, hospitals that receive Medicare must have protocols in place for notifying their federally designated OPO.

C. Organ Procurement- Our Current System

America's current organ procurement system of Express Consent otherwise known as Informed Consent or "Opt-in" system is based on notions of altruism and communitarianism.[47] Accordingly, the system, is premised on the willingness of individuals to donate their organs or that of their loved ones without any type of compensation or recognition. To demonstrate this the comments to § 10 of the UAGA cite the Hastings Center Report:[48]

> Altruism and a desire to benefit other members of the community are important moral reasons which motivate many to donate. Any perception on the part of the public that transplantation unfairly benefits those outside the community, those who are wealthy enough to afford transplantation, or that it is undertaken primarily with an eye toward profit rather than therapy will severely imperil the moral foundations, and thus the efficacy of the system.[49]

Our system requires an individual who would like to donate to "opt-in" to the system by registering with a State agency, such as Motor Vehicle or a state donor registry, his or her inclination to donate. Our current system has been unable to meet the ever-increasing demand for organs because this system relies on the active participation of the community.[50] Although, many individuals express approval of organ donation and indicate a willingness to donate, few people actually sign donor cards.[51] In 2012, a whopping 94.9 percent of U.S. adults supported or strongly supported donation but only 62.3 percent "opted-in" via their driver's license, a signed

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[46] S. Gregory Boyd, Comment, *Considering a Market in Human Organs*, 4 N.C. J. L. & TECH. 417, 457 (2003). Citing National Organ Transplant Act 42 U.S.C. § 273-274 (1994).
[47] A. H. Barnett & David L. Kaserman, *The Shortage of Organs for Transplantation: Exploring the Alternatives*, 9 ISSUES L. & MED. 117, 121 (1993).
[48] The Hastings Center Report, http://www.thehastingscenter.org/publications/hcr/hcr.asp (last visited Oct. 21, 2014). The Hastings Center Report is a periodical that discusses the ethical and social issues of medicine and medical science.
[49] Uniform Anatomical Gift Act (1987) § 10. Cmt;
[50] Barnett & Kaserman, *supra* note 47 at 121
[51] 2012 National Survey of Organ Donation Attitudes and Behaviors at http://organdonor.gov/dtcp/nationalsurveyorgandonation.pdf

donor card, or by joining their state donor registry.[52] As is obvious by these numbers, the problem is not a lack of willingness to donate, but the lack of an adequate incentive to take such a step. In other words, most people are not sufficiently motivated to commit to donate. "Complete reliance on altruism is insufficient to overcome the aggregate effects of psychological barriers of confronting one's mortality, religious and moral beliefs, and mistrust that physicians will not care for a registered donor to the fullest extent medically possible."[53] "It has long been argued that organ donation should be motivated solely by altruism, but relying only on such generosity leaves half of the suitable organs in cadavers unused."[54] It has been proven historically, that relying on altruism to provide other needed goods and services has failed. Therefore, it should be of no surprise that altruism alone has failed to increase organ donation rates and produce an adequate supply of organs.

While both the UAGA and NOTA have helped shape and guide our altruistic system of organ procurement they have barely began to scratch the surface in curing the nation's organ shortage issues. In addition to our laws falling short in curing the organ shortage, the disconnect between organ supply and demand can be attributed to several reasons. First and foremost, for the past thirty plus years the number of registered donors has been grossly inadequate compared to the increasing number of individuals awaiting organ transplant.[55] Secondly, donations fail to occur in certain instances because either potential donors or their family members refuse to

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[52] *Id.*

[53] Andrew J. Love, *Replacing Our Current System of Organ Procurement with A Futures Market: Will Organ Supply Be Maximized?*, 37 Jurimetrics J. 167, 171 (1997) (citing) Gregory S. Gespi, Overcoming the Legal Obstacles to the Creation of a Futures Market in Bodily Organs, 55 Ohio St.L.J. 1, 2 (1994

[54] Mark S. Nadel & Carolina A. Nadel, *Using Reciprocity To Motivate Organ Donations at pg. 295*

[55] Barnett & Kaserman, *supra* note 47, ("The number of organs donated annually under this policy has fallen short of the number of organs needed by potential transplant recipients for at least the past twenty years. In recent years, this chronic condition of undersupply has grown rapidly worse, and waiting lists of potential organ recipients have lengthened commensurately. Expected waiting times are now measured in years rather than months, and many patients will die because a suitable donor organ cannot be found in time. Thus, the organ shortage, which has persisted for so long, is rapidly growing worse and is now approaching crisis proportions").

donate the organs.[56] Further, even in circumstances where the potential donor or their family member are willing to donate the organs, medical professionals do not request donation as the law requires causing the potential donation to fail. In either situation, the result is the same: potentially transplantable organs are wasted. In 2012, the likelihood of donating family members' organs upon their death was very high (96.7 percent) when family members' wishes to donate were known.[57] Further, when unsure of their family members' wishes, a majority of U.S. adults were still likely to donate (75.6 percent), but to a lesser extent.[58]

Half of the U.S. adult population (51.1 percent) would *support* or *strongly support* a system of presumed consent in the United States. Regardless of support for a presumed consent system, there was little question of the utility of presumed consent. Most U.S. adults believed that this policy would increase the number of available organs for transplants. About one-quarter of the population (23.4 percent) said that under a system of presumed consent they would sign up as a non-donor, significantly less than the 29.7 percent reported in 2005.

D. Supply & Demand of Organs-The Organ Shortage

In the United States, a new patient is added to the organ transplant waiting list every ten minutes[59] which is an average of 144 people added each day. In 2013, almost 7,000 people died while on the waiting list and of that, 4696 were in need of a kidney.[60] Further, in 2013, there were 14,256 Donors (8268 deceased, 5988 living), and 28,954 (22967 Deceased, 5987 Living) Transplants.[61] It has been thirty years since the passage of NOTA and there are currently 123,

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[56] *Id.* at 120.
[57] Love, *supra* note 53
[58] *Id.*
[59] http://www.medicalnewstoday.com/articles/282905.php
[60] Organ Procurement & Transplantation Network, National Data Reports, U.S. Dept. of Health & Human Servs., http://optn.transplant.hrsa.gov/ (select "Data"; "View Data Reports"; "National Data"; "Waiting List Removals"; and "Removal Reasons by Year") (last visited Nov. 28, 2014)
[61] *Id.* at (select "Data"; "View Data Reports"; "National Data"; "Donors"; and "All Donors by Donor Type") (last visited Nov. 28, 2014)

884 people on the waiting list. As of today, 4367 people have already died on the waiting list this year alone.[62] The organ shortage faced worldwide likely would be improved dramatically if the organ procurement system was altered. Today, many organs are wasted due to burial or cremation, when it is possible that they could have been used to save a life. Sadly, the current organ procurement system is causing unsettling and unacceptable results.

An average of 18 patients die every day while waiting for a transplant, simply because the organ they needed did not become available in time. From 1995 through current day, approximately 131,000 individual have died while waiting on an organ to become available.[63] As the organ shortage continues to rise and waiting times become longer, an increasing number of patients are dying. Longer waiting times also lead to a deterioration in patients' health which in turn could cause removal from the waiting list because one would be too deteriorated for transplantation.[64] Unfortunately, the end result is that an increasing number of patients are not able to survive the extended times required to locate an acceptable organ for transplantation.

II. Alternative Measures to Procure Organs

There are several alternatives that may be utilized to increase organ donation. I have chosen presumed consent, conscription, mandated choice, and incentives to explore as alternatives.

A. Presumed Consent- "Opt-Out" System

Presumed consent alternatively known as an 'opt-out' system, presumes that unless the deceased has expressed a wish in life not to be an organ donor then consent will be assumed. The system usually falls under one of two different approaches known as a Strong/ 'hard opt-out'

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[62] OPTN *supra* note 60
[63] OPTN *supra* note 60
[64] *Id.*

where families are not consulted or a Weak/ 'soft opt-out' when the family's wishes are considered in the same manner as with our current system.[65] Instead of having to go out of one's way to memorialize one's choice to donate, as in an expressed consent system, a person would be presumed a donor unless one has specifically objected.[66] Under presumed consent those who object to organ donation would still have their views respected, while at the same time pushing for the maximum possible donation rate from the citizenry. "Proponents of this system argue that it treats the bereaved family more humanely, since it does not require that the family members be disturbed at their deepest period of mourning with requests for the removal of a loved one's organs."[67] It would relieve or take some of the pressure off the grieving families because it takes this responsibility off of the grieving family and relies on the decision made by the donor himself.[68] Due to how stressful and traumatic the death of a relative is, family members are not always in the best mindset or well placed to make the best decision on behalf of the deceased.[69]

Several European countries including Austria, Spain, France Belgium, Finland, Denmark, Italy, Norway and Sweden have shed the restrictions of the 'opt-in' or purely altruistic system in favor of an 'opt-out' system.[70] As of 2010, twenty-four European countries have some form of presumed consent system, with the most prominent and limited opt-out systems in Spain, Austria, and Belgium yielding high donor rates.[71] Presumed Consent has been praised tremendously because of the huge positive impact that it has had on the total number of potential

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[65] *Presumed consent for organ donation: a case against,* Annals of The Royal College of Surgeons of England. May 2011; 93(4)270. http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3363073/
[66] Organ Transplantation- Organ Transplantation and Donation in the World. Opt-Out versus Opt-In Donation Systems at https://pub.mtholyoke.edu/journal/Organ/entry/opt_out_versus_opt_in
[67] Abena Richards, *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, 385 (2006)
[68] *Id.*
[69] *Id.*
[70] Opt-out vs. Opt-in, *supra* note 66
[71] Gormley, Michael (April 27, 2010*). "New York To Be First Organ Donor Opt-Out State?".* New York. *The Huffington Post* (New York City). Archived from the original on April 30, 2010. Retrieved October 7, 2014.

donors. In Belgium, for example, only 3-4% of people opt out, leaving 96-97% of the population as potential donors, as compared with the roughly 30% of Americans who are organ donors in the opt-in system we have here.[72] The main benefit for a "default" donor rule is to expand the number of organ donors and help change social norms about the appropriateness of organ donation.

For example, Spain, unlike most countries, has had tremendous success in raising organ donor rates. With 35.1 deceased cadaveric donors per million people[73] coupled with a conversation rate of 80-85%,[74] Spain has the world's leading (highest) rate of actual donation. Despite the fact that Spain has not completely eliminated its organ transplant waiting list, it has reduced the number of people on the list to a few hundreds.[75] In 1979, Spain passed its "soft" presumed-consent law, requiring the prospective donor to be declared dead on neurological criteria ("brain dead") by three physicians.[76] Consequently, at the time of one's death if one has not formally registered his or her opposition he will be considered a potential organ donor. The presumed-consent system combined with a societal respect for organ donors has contributed to Spain's tremendously successful organ procurement program.[77] Further, several experts credit their success to measures such as a transplant co-ordination network that works both locally and nationally, and improving the quality of public information available about organ donation.[78]

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[72] Opt-out vs. Opt-in, *supra* note 66
[73] Evangeline O'Regan, *Spain's model organ donor system in jeopardy?*, Aljazeera at http://www.aljazeera.com/indepth/features/2014/08/spain-model-organ-donor-system-jeopardy-201481111437957240.html
[74] Kershaw J, Nunmaker L, Hinds M, DeCosta J: *Reforming the U.S. Organ Donation System: Policy Insights From the Experience in Other Countries*. Global Health - an Online Journal for the Digital Age (2011)
[75] *Id.*
[76] K. Gundle. Presumed consent: an international comparison and possibilities for change in the United States. Camb Q Healthc Ethics. 2005;14:113-118.
[77] S.Zink, R. Zeehandelaar, S. Wertlieb, *Presumed vs. Expressed Consent in the US and Internationally*. Virtual Mentor. September 2005, Volume 7, Number 9 at http://virtualmentor.ama-assn.org/2005/09/pfor2-0509.html (last visited Oct. 17, 2014)
[78] James McIntosh, *Organ donation: is an opt-in or opt-out system better?*, Medical News Today (Sept. 24, 2014) at http://www.medicalnewstoday.com/articles/282905.php (last visited Oct. 14, 2014).

Additionally, the presumed-consent policy in Spain has proved to be cost-effective, saving the National Health Service more than €200,000 in medical costs for each kidney transplant preformed on a patient on dialysis.[79]

In contrast, Austria applies the principle of "strong" or "pure presumed consent with few concessions. The Hospital Law states "it shall be permissible to remove organs . . . from deceased persons" for the purpose of transplantation and that "such removal shall be prohibited if the physicians are in possession of declaration in which the deceased person, or prior to his death, his legal representative, has expressly refused his consent to organ donation."[80] Austria is the only country with a pure presumed consent system, as it does not offer the next of kin an opportunity to object to the donation.[81] The doctors in Austria are under no obligation to consult with or even inform the family of the potential donation.[82] To avoid the procurement of one's organs, a person must have not only indicated their refusal, but the objection must be known to or in the physician's possession at the relevant hour.[83] However, the physician has no affirmative obligation to seek out documents indicating the deceased wishes even when there is doubt.[84] "Therefore, in most emergency situations, it is likely that conscription would occur, even if the individual has previously registered a dissent, since in most instances a physician will not have the written documentation in hand when the person arrives at the hospital in an emergency situation."[85] Consequently, any Austrian citizen who needs a transplant but has previously

[79] Lopez-Navidad A, Caballero F. For a rational approach to the critical points of the cadaveric donation process. Transplant Proc. 2001;33:795-805.
[80] Federal Law of 1 June 1982 (Serial No. 273), ch. 7, § 62a(1), amended to the Hospital Law, No. 113, reprinted in Legislative Responses to Organ Transplantation 132 (1994)
[81] Gabriele Wolfslast, *Legal Aspects of Organ Transplantation: An Overview of European Law*, 11 J. Heart & Lung Transplantation S160, S160 (1992). (Discussing the absence of a family consent requirement under Austrian law).
[82] *Id.*
[83] *Id.* (discussing the legal right of physicians to ignore the wishes of the next of kin).
[84] Marie-Andree Jacob, *On Silencing and Slicing: Presumed Consent to Post- Mortem Organ "Donation" in Diversified Societies*, 11 TULSA J. COMP. & INT'L L. 239, 248 (2003).
[85] *Id.*

registered his objection, is placed at the bottom of the waiting list.[86] Today, the procurement rate in Austria is twice as high as those in the United States and most of Europe, with the number of kidney transplants performed nearly equal to the number of people awaiting donor kidneys.

B. Conscription- Mandatory Donation- Routine Organ Recovery

Conscription, alternatively referred to as mandatory donation or routine recovery, is the routine posthumous removal of organs for transplantation.[87] "As such, it presupposes society's right of access to the organs of any deceased person. Such a right would rest either on the claim that society "owns" the body of the deceased or on the premise of an enforceable moral duty all of us as humans have to allow postmortem organ retrieval."[88] Under our current system, the government does not assert a right to claim authority over the disposal of a cadaver.[89] There are several proponents for conscription that posit the appropriateness of conscription on practical and ethical grounds. Two practical arguments are that people with organ failure are dying daily because of the shortage of available organs and many usable organs are never made available, most commonly because of family refusal and the routine request requirement not being followed by medical/emergency personnel.[90] Additionally, many scholars have argued that honoring a decedent's wishes cannot be made a priority over preventable deaths.[91]

Fortunately, Conscription would override family refusal for donation and produce an

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[86] Kathleen Robson, *Systems of Presumed Consent for Organ Donation –Experiences Internationally* 9 (Scottish Parliament Info Center (SPICe), Briefing No. 05/82, Dec. 16, 2005), available at http://www.scottish.parliament.uk/business/research/briefings-05/SB05-82.pdf.
[87] Verheijde JL, Rady MY, McGregor J: Recovery of transplantable organs after cardiac or circulatory death: transforming the paradigm for the ethics of organ donation. *Philos Ethics Humanit Med* **2**:8. May 22, 2007 http://www.peh-med.com/content/2/1/8
[88] *Id.*
[89] Committee on Increasing Rates of Organ Donation-Board on Health Sciences Policy-Institute of Medicine: *Organ Donation: Opportunities for Action.* Edited by Childress JF, Liverman CT. Washington, D.C., The National Academies Press; 2006.
[90] Aaron Spital & James Stacey Taylor, *Routine Recovery of Cadaveric Organs for Transplantation: Consistent, Fair, and Life-Saving*, 2 Clin. J. Am. Soc. Nephrol. 300-303 (2007)
[91] *Id.*

efficient rate of deceased organ recovery almost close to 100%.[92] Conscription would eliminate the need for maintenance of donor registries, training of medical requesters, and costly public education programs.[93] Further it is possible that it might also alleviate concern about abuse or possible commodification of the human body. Conscription would maximize organ recovery because it would allow for the procurement of all useable cadaveric organs. Similar to a military draft, this would be a draft of organs from recently deceased people.[94]

There are several advantages of conscription as noted above. The most important "benefit of conscription is that under this plan the efficiency of cadaveric organ procurement would approach 100%, which would increase dramatically the number of organs available for transplantation. It is unlikely that any other cadaveric procurement system could even come close. Conscription would greatly increase the number of organ transplants, while reducing the need for living donors."[95] It would be very simple in order to implement this plan through our current organ procurement network. Another great advantage would be that distraught families and reluctant staff would no longer have to confront the emotionally difficult question of cadaveric organ donation.[96] Additionally, the many jeopardizing delays that happen in between a person dying and the procurement of their organs would be eliminated. Finally, conscription would satisfy the principle of distributive justice since all people who die with usable organs would contribute eliminating 'free riders' (people who are unwilling to give an organ but happy to accept one) and everyone would stand to benefit with no possibility of exploitation here.[97]

One of the major concerns about conscription is that it violates autonomy; however as

[92] Aaron Spital: Conscription of Cadaveric Organs: We Need to Start Talking About It. American Journal of Transplantation 2005, 5(5):1170-1171.
[93] Spital and Taylor, *supra* Note 90
[94] Spital, *supra* Note 92
[95] *Id.*
[96] Spital and Taylor, *supra* Note 90
[97] Spital, *supra* Note 92

Jonsen the author of *Transplantation of Fetal Tissue: An Ethicist's Viewpoint Notes*: "the cadaver... has no autonomy and cannot be harmed".[98] The possibility of harming the sensibilities of surviving family members is concerning but any such harm cannot justify allowing people to die for lack of a transplant. "If we can mandate autopsy when public safety is threatened and if we can conscript a person into the military at the risk of death, then surely we can conscript a kidney from a dead person where the risk to that person would be zero while the benefit could be lifesaving."[99]

C. Mandated Choice/Required Response

Another option to help the organ shortage is Mandated Choice, under which individuals must indicate their choice on whether they would like to donate their organs. Under Mandated Choice, individuals would be required to opt in or out of the system: that is, make an affirmative choice either for or against cadaver organ donation. "The key, however, is to make signup easy, and requiring people to make a choice is just one way to accomplish it."[100] One option to facilitate this plan would be when obtaining or renewing a driver's license one would be required to answer the question: "Do you wish to be an organ donor?"[101] For example each individual/person would be required to answer the question: "Do you wish to be an organ donor?" when obtaining or renewing a driver's license or filing one's taxes. Other options would be requiring all persons applying for a social security number, identification card or alien registration number to state whether they wish to be an organ donor.[102] A First-Person Consent Law, could make one's wishes to be a donor legally binding. Thus, mandated choice may

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[98] Jonsen AR. Transplantation of fetal tissue: an ethicist's viewpoint. Clin Res 1998;36:215–9.
[99] See Conscription, supra note 81
[100] Richard H. Thaler, Opting In vs. Opting Out, The New York Times, Sept. 26, 2009, http://www.nytimes.com/2009/09/27/business/economy/27view.html?_r=0
[101] *Id.*
[102] Cadaveric Organ Donor Act, 18 J. Corp. L. 523 (1993) [hereinafter CODA]

achieve a higher rate of donations than presumed consent, and avoid upsetting those who object to presumed consent for whatever reasons.

D. Positive Incentives

For those able to donate an organ while living there are several options of positive incentives that would likely help increase organ donation. Positive monetary incentives such as payment of health insurance, education benefits, or medical leave benefits are all sources or likely increased live organ donation rates. Other options for living donor incentives are a donor Medal of Honor tax breaks and ensuring access to organs as a previous donor. There are several forms of compensation incentives or death benefits for deceased donors (or family thereof) that would likely help increase organ donation rates. Some of the incentives are funeral expense allowances, college education benefits for one's children or a family member or estate tax deductions, funeral expense allowances, or college education benefits.[103] Another option is a charitable contribution to one's charity organization. Death benefits seem less offensive and is absolutely not equivocal to the buying and selling of organs.

A financial incentive would be a voluntary death or living donor benefit as a means of increasing actual organ donations and providing a more equitable allocation of organs.[104] These incentive plans would be able to be "compassionately administered, centrally controlled benefit payment plan to families of cadaveric organ donors and live donors operating throughout the United States.[105] Additionally, acceptance of any type of benefit would only be an option, not a requirement of donating one's organs. No individual or family member would be forced to

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[103] Andrew C. MacDonald, Organ Donation: The Time Has Come to Refocus the Ethical Spotlight, 8 Stan. L. & Pol'y Rev. 177, 182 (1997). *See* John A. Sten, Comment, *Rethinking the National Organ Transplant Program: When Push Comes to Shove*, 11 J.CONTEMP. HEALTH L. & POL'Y 197, 197 n.5 (1994) 213-219.
[104] John A. Sten, *Rethinking the National Organ Transplant Program: When Push Comes to Shove*, 11 J. Contemp. Health L. & Pol'y 197, 214 (1994) citing Dr. Thomas G. Peters, Life or Death: The Issue of Payment in Cadaveric Organ Donation, 265 JAMA 1302, 1302 (1991).
[105] *Id.* at 1302-03.

accept any benefit for recovered organs. While all of these incentives would likely increase the number of organs available, it will not create a surplus of organs or remedy the organ shortage.

III. Moral Analysis

Legal scholar and philosopher, John Finnis, presents his view of the theory of natural law in Natural Law and Natural Rights (1980). Finnis' natural law theory is divided into three different parts, that are all interrelated but each with its own purpose.[106] First, Finnis describes a set of basic principles "which indicate the basic forms of human flourishing as goods to be pursued and realized, and which are in one way or another used by everyone who considers what to do however unsound his conclusions.[107] These values are promoted by a set of basic methodological requirements of practical reasonableness... which distinguish sound from unsound practical thinking and which, when all brought to bear, provide the criteria for distinguishing between acts that...are reasonable all things considered...and acts that are unreasonable all things considered."[108] For example, following these principles allows one to distinguish between ways of acting morally right or morally wrong, "enabling one to formulate a set of general moral standards."[109]

A. Seven Basic Goods

Finnis identifies exactly seven basic, fundamental, universal and absolute values or goods including life, knowledge, friendship, play, aesthetic experience, religion and practical reason. Finnis' argues that the seven basic goods are irreducible categories and an exhaustive theory in that "other objectives and forms of good will be found, on analysis, to be ways or combinations of ways of pursuing . . . and realizing . . . one of the seven basic forms of good, or some

[106] John Finnis, *Natural Law & Natural Rights*, 2d Ed., 23 (2011)
[107] *Id.*
[108] *Id.*
[109] *Id.*

combination of them.[110] Each of Finnis' basic values "can be participated in, and promoted, in an inexhaustible variety of ways and with and inexhaustible variety of combinations of emphasis, concentration, and specialization."[111]

1. Life

Life, the first basic value, corresponds to the drive for self-preservation and "signifies every aspect of the vitality which put a human being in good shape for self-determination". [112] This good includes a wide range of components such as procreation, preservation of one's own life (self-preservation) as well as others, "bodily (including cerebral) health, and freedom from the pain that betokens organic malfunctioning or injury".[113] In other words, the value of life includes every aspect of human existence that empowers one to pursue or create their own objective or destiny.[114]

Finnis would agree with William Jennings Bryan that, "Destiny is not a matter of chance; it is a matter of choice. It is not a thing to be waited for, it is a thing to be achieved." In this instance, any of the suggested alternatives for organ procurement would all promote the value of life by saving more lives that we are under current laws. Most Americans support organ donation which is further evidence that the good of life would be promoted if we were to change our current system to one that increases both cadaveric and live organ donation. Finnis notes several networks, institutions, and systems that exist only to enrich and preserve the basic good of life which can be compared to the current organ procurement systems goals and that of the alternative systems as well. In general saving lives through any means goes directly to the promotion of the good of life. Choosing not to donate one's organs would be in direct violation

[110] *Id.* at 90
[111] *Id.* at 100
[112] *Id.* at 86
[113] *Id.*
[114] *Id.* at 154

of the basic value of human life because it denies access to life saving opportunities for others for no legitimate purpose.

2. Knowledge

The second basic value is knowledge, "considered as desirable for its own sake, not merely instrumentally" (an instrument to obtain other goods).[115] Knowledge is of truth, therefore, can also be articulated as such.[116] Accordingly, one could speak of truth sought for its own sake in the same manner as knowledge.[117] In this situation, Finnis is not describing an instrumental use of knowledge, but rather knowledge sought merely out of curiosity "the pure desire to know, to find out the truth about it simply out of interest in concern for truth and a desire to avoid ignorance or error."[118] An interest in knowledge, and engaging in the process of obtaining knowledge, results in quickly discovering that "knowledge is something good to have. Being well informed and clear-headed is a good way to be."[119] Consequently, our understanding of knowledge can become muddled and muddle and ignorance must be avoided.[120] Knowledge is worth pursuing and has inherent, self-evident, value. This inherent value "cannot be demonstrated, but equally it needs no demonstration."[121] This is not because its value is inherently understood (it is not "innate" or "inscribed in the mind at birth"), instead for people who have pursued knowledge for any reason, the truth becomes obvious that knowledge is worth having.[122]

Knowledge is not significantly impacted or damaged by the alternative organ donation systems. More than likely one of the alternatives or a combination thereof would increase organ

[115] *Id.* at 87
[116] *Id.* at 59
[117] *Id.*
[118] *Id.* at 60
[119] *Id.* at 63
[120] *Id.*
[121] *Id.* at 65
[122] *Id.*

donation and reduce organ shortages which in turn enhance one's well-being and promotes all the values through saving lives. By enhancing one's well-being and saving lives organ donation allows organ recipients to go on and pursue the good knowledge. It could be argued that our current organ procurement system which is based strictly on altruism is in essence a direct violation of this principle because knowledge can't be sought or further increased without for example, the opportunity to study cadaveric organs which requires organ donation.

3. Play

The third basic aspect of human well-being is play which "has and is its own value". According to Finnis, play includes "engaging in performances which have no point beyond the performance itself, enjoyed for its own sake."[123] This activity can be in several forms: relatively informal or highly structured, intellectual or physical, solitary or social, relaxed or strenuous, conventional or ad hoc in its pattern.[124] Moreover, "an element of play can enter into any human activity"[125] including in this instance, becoming an organ donor through altruistic means (our system now), conscription, incentives, mandated choice, and presumed consent. While play is not as greatly affected as other values, it is honored through organ donation because the organ recipient whose life is saved and organ donor (if live donation) can go on to further pursue this good as well as the others, where otherwise that would not be possible.

4. Aesthetic Experience

Next Finnis discusses aesthetic experience, the fourth basic component for our wellbeing. Finnis posits that unlike play, aesthetic experience does not need to involve "need not involve an action of one's own; what is sought after and valued for its own sake may simply be the beautiful

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[123] *Id.* at 87
[124] *Id.*
[125] *Id.*

form 'outside' one, and the 'inner' experience of appreciation of its beauty". Oftentimes, this value can be found in "the creation and/or active appreciation of some *work* of significant and satisfying form".

Aesthetic experience, like play is not as greatly affected as other goods may be, but is honored through all organ donation because both the organ donor (if live donation) or cadaveric donor's loved ones and the recipient can go on to further pursue this value. They are able to pursue this value because these individuals may seek the beautiful form outside one and the inner experience of appreciation of the beauty in organ donation.

5. Sociability (friendship)

The fifth value is that of sociability or friendship "which can be realized in its weakest form by peace and harmony amongst persons, and which ranges through the forms of human community to its strongest form in the flowering of full friendship". The relationship of friendship involves acting out of the interest of the other person and the (that persons) other's well-being.

Friendship is advanced through all types of organ donation because one person is giving the ultimate gift of life to another. Additionally, bonds may be created when the donation is fostered through people who are complete strangers to one another. The value of sociability is furthered or affected or impacted because friendship (true full friendship not utility, business) involves the concern for another's wellbeing therefore saving a life via organ donation falls in this realm. Additionally friendship is affected because without organ donation people die and the deceased as well as loved ones will no longer enjoy the love, affection, company, and community between each other.

6. Practical Reasonableness

Finnis' sixth basic good is that of practical reasonableness to which he describes as "being able to bring one's own intelligence to bear effectively (in practical reasoning that issues in action) on the problems of choosing one's actions and lifestyle and shaping one's own character."[126] Practical reasonableness is "participated in precisely by shaping one's participation in the other goods, by guiding one's commitments, one's selection of projects, and what one does in carrying them out."[127] Practical reasonableness is complex, involving effective use of one's own intelligence, intellectual "freedom and reason, and integrity and authenticity. However, it has the sufficient unity to be treated as one."[128] As such this value will be discussed in conjunction with its nine requirements of practical reasonableness in the corresponding section.

7. Religion

The seventh and final value Finnis presented was religion as a basic form of human good.[129] According to Finnis, religion ultimately represents thoughtful and thorough contemplation "of the origins of cosmic order and of human freedom and reason".[130] More importantly, Finnis asks "does not one's own sense of responsibility, in choosing what one is to be and do, amount to concern that is not reducible to the concern to live, play, procreate, relate to others, and be intelligent".[131] This good encompasses the recognition of a concern for "an irreducibly distinct form of order."[132] Finnis' explains that even an atheist has an individual sense of responsibility in choosing what he is to be because "prior to any choice of his, 'man' is and is-to-be free."[133]

Choosing to donate one's organ or those of a loved one is a very intimate and personal

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[126] *Id.* at 88
[127] *Id.* at 100
[128] *Id.* at 88
[129] *Id.* at 89
[130] *Id.* at 89
[131] *Id.* at 90
[132] *Id.* at 90
[133] *Id,*

decision. When we contemplate our own death or someone we know dies, it can call attention to the importance of the spiritual dimension of life. More specifically, when faced with the decision of organ and tissue donation during the shock of losing a loved one or when making the choice in preparation for one's own death, a person's religion suddenly becomes very important. Nearly all religious groups support organ and tissue donation or support the right of individual to make their own decision, as long as it does not impede the life or hasten the death of the donor.[134] Most religions like the Roman Catholic Church and Islam are in favor of and in fact encourage organ donation as acts of charity and as a means of saving a lives.

In Catholicism, "organ, tissue, and eye donation is considered an act of charity and love, and transplants are morally and ethically acceptable to the Vatican."[135] Pope John Paul II wrote, "in thinking about the glorious gift of life God has given each of us, it would seem that one of the greatest ways an individual can honor that gift is by making a conscious decision to be an organ donor—a decision that enables another's life to continue—and in a very real and tangible way promotes 'a culture of life." According to the Fourth Conference of the Islamic Fiqh Council organ donation and transplantation offers "clear positive results" if practiced "...to achieve the aims of Shariah which tries to achieve all that is good and in the best interests of individuals and societies and promotes cooperation, compassion and selflessness."[136] The Islamic faith encourages these virtuous qualities like duty, co-operation, generosity, and charity which are supportive of organ donation.[137] "One of the basic aims of the Muslim faith is the saving of life: This is a fundamental aim of the Shariah and Muslims believe that Allah greatly rewards those

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[134] United Network For Organ Sharing, *Theological Perspective on Organ and Tissue Donation* at http://www.unos.org/donation/index.php?topic=fact_sheet_9 (last visited November 13, 2014).
[135] U.S. Department of Health and Human Services, *Religious Views on Donation*, at http://www.organdonor.gov/about/religiousviews.html (last visited November 13, 2014).
[136] *Id.* Organ Donor
[137] UNOS *supra* note 134

who save others from death."[138]

In contrast to Catholicism and Islam, the Shinto outright prohibit organ transplantation or donation. In Japan, organ transplantation is comparatively rare because the deceased body is considered impure according to Shinto tradition.[139] Under Shinto tradition, the deceased's body is considered to be quite powerful therefore, interfering with or injuring a corpse brings bad luck and is a serious crime.[140] It is difficult to obtain consent from bereaved families because they are "concerned that they might injure the relationship between the dead person and the bereaved (known as the *itai*) by interfering with the corpse. This means that many followers of Shinto oppose the taking of organs from those who have just died, and also would refuse an organ transplanted from someone who has died."[141]

Since all of the alternatives to our current organ system would likely increase donation significantly, the good of religion is promoted because as established all most all religions support and encourage some form of organ donation. Therefore, individuals who believe in a set religion or custom are also honoring it at the same time promoting the good of religion. Additionally, religion is advanced when one donates or is a recipient because they are able to incorporate this good into their own life with feelings of charity, love, and overall fostering and furthering their beliefs. Under any of the proposed legislation, if one's particular religion completely forbids organ donation, there would be an exception made for those individuals. Routine recovery is the only alternative that would directly interfere with the good of religion because everyone would be required to donate their organs upon death; however an individual would simply provide documentation of their religious or cultural belief. Therefore, the proposed

[138] *Id.*
[139] BBC, Organ Donation in Shinto, at http://www.bbc.co.uk/religion/religions/shinto/shintoethics/organs.shtml
[140] Id; See also UNOS, supra note 134 at Shinto UNOS
[141] BBC, *supra* note 139

alternatives would not discount or damage the good of religion.

B. Nine Principles of Practical Reasonableness

The nine principles of practical reasonableness can be said to express the "'natural law method' of working out the (moral) 'natural law' from the first (pre-moral) 'principles of natural law'."[142] Finnis's nine principals of practical reasonableness are: a coherent life plan, no arbitrary preference amongst values, no arbitrary preferences amongst persons, detachment, and commitment, the relevance of consequences, respect for every basic value in every act, the requirements of the common good, and following one's conscience. To successfully achieve the basic good of practical reasonableness, one must meet these nine requirements. Further, in order to pursue one's own basic good effectively, one must satisfy these same requirements. "All the requirements are interrelated and capable of being regarded as aspects one of another."[143]

Finnis explains that the product of the nine requirements of practical reasonableness is a 'moral' force or morality.[144] Not every one of the nine requirements has a direct role in every moral judgment, but some moral judgments do sum up the bearing of each of the nine principles of practical reasonableness. However, every moral judgment sums up the bearing of one or more of the requirements and each of them can be regarded as a mode of moral obligation.[145] "Finnis' restatement of classical natural law theory looks solely to human reason as the ground for morality. Finnis says morally responsible choices can be made enthusiastically or dryly with little or no feeling."[146] In order to properly evaluate whether practical reasonableness dictates that we should try other solutions for organ shortages, we must first assess its nine requirements.

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[142] Finnis, *supra* note 106
[143] *Id,* at 105
[144] *Id.* at 126
[145] *Id.*
[146] Center for Catholic Studies, Seton Hall University, "Understanding Values" (2013). *Center of Catholic Studies Faculty Seminars and Core Curriculum Seminars.* Paper 2. http://scholarship.shu.edu/catholic-studies/2

1. A Coherent Plan of Life-Have a Rational Plan

Finnis' first requirement of practical reasonableness is a coherent or rational plan of life.[147] "Basic aspects of human well-being are discernable only to those who think about their opportunities, and thus are realizable only if one intelligently directs, focuses and controls one's urges, inclinations, and impulses."[148] A coherent plan of life "must have a harmonious set of purposes and orientations, not as the 'plans' or 'blueprints' of a pipe-dream, but as effective commitments. Accordingly, it is therefore unreasonable "to live merely from moment to moment, following immediate cravings or just drifting"[149] from one commitment to another. Further, Finnis states that it is "irrational to solely devote one's attention to specific projects which can be carried out completely by simply deploying defined means to defined objectives."[150]

In order to achieve effective commitments, one must have direction and control of their impulses, undertake specific projects in furtherance of this goal, reform old habits, abandon old projects in favor of adopting new ones, and "overall, the harmonization of all one's deep commitments – for which there is no recipe or blueprint, since basic aspects of human good are not life the definite objectives of particular projects, but are *participated in*." Finnis shares John Rawls' belief that we should "see our lives as a one whole, the activities of one rational subject spread out in time."[151] Individuals should not make choices that are a waste of opportunities, failures, irrational or meaningless. Should make decisions rationally as if one were dying and not…

By choosing to donate whether voluntarily or through presumed consent, conscription,

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[147] Finnis, *supra* note 106 at 103
[148] *Id.* at 103
[149] *Id.* at 104
[150] *Id.*
[151] *Id.*

incentives, or mandated choice, one is pursuing this good because he is making effective commitments (to donate his organs while living or at death). This is good is further promoted through organ donation because one is choosing not to live moment to moment but instead making such an important decision for either future plans upon death for his organs or choosing to do a live donation. For the purposes of this analysis we will assume this requirement has been met.

2. No Arbitrary Preferences Amongst Values

Next Finis argues that there must be no arbitrary preference amongst the values.[152] In other words, "there must be no leaving out of account or arbitrary discounting or exaggeration of any of the basic human values."[153] Every value is fundamental is equally, self-evidently a form of good.[154] Consequently, none of the values can be analytically reduced to being merely an aspect of any of the others, or to being merely instrumental in the pursuit of any of the others. There is no objective hierarchy because each value can reasonably be regarded as the most important when we focus on it.[155] Finnis recognizes that "any commitment to a coherent plan of life involves some degree of concentration on or treating one or some of the basic forms of good as of more importance in one's own life at the expense, temporarily or permanently of other forms of good."[156] However, this commitment will only be rational if it is based upon an analysis of one's own abilities, circumstances, opportunities, upbringing, or even one's own taste "not to differences of rank of intrinsic value between the basic values."[157]

In organ donation as noted above every fundamental/basic value is at stake with some being affected more than others. Accordingly, the ability for every individual to attain each value is lost daily as a new person dies waiting on an organ. Therefore, when considering whether or

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[152] *Id.* at 105
[153] *Id.*
[154] *Id.* at 93
[155] *Id.* at 92
[156] *Id.* at 93 and 105
[157] *Id.* at 94 and 105

not to donate organs or whether to change our current legislation to help the shortage, one must ensure that one is not arbitrarily giving preference for one's own good over the community's. Any of the aforementioned Legislation changes that help increase organ donation, would not be an arbitrary preference amongst values.

3. No Arbitrary Preferences Amongst Persons

Next Finnis adds the third requirement of fundamental impartiality among persons who are partaking in the basic human goods.[158] Although one may not be interested in or concerned with another person's survival, creativity, knowledge and well-being one cannot deny that they are good and fit matters of interest and favor for that person as well as those who have to do with him.[159] However, one's own well-being is reasonably the first claim of one's own interest, concern, and effort.[160] However, "the only reason for one to prefer his well-being over another's is through their self-determined and self-realizing participation in the basic goods that one can do what reasonableness suggests and requires."[161] Therefore, there is a reasonable scope of self-preference that is permissible and may indeed be favorable but it cannot be made through "selfishness, special pleading, double standard, hypocrisy, indifference to the goods of others whom one could easily help, and all the other manifold forms of egoistic or group biases. Next, Finnis refers to the Golden Rule: "Do to (or for) others what you would have then do to (or for) you… Do not prevent others from getting for themselves what you are trying to get for yourself."[162] Ignoring these requirements of reason results in being arbitrary amongst persons.[163] "Provided we make the distinctions between basic practical principles and mere matters of taste,

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[158] *Id.* at 107
[159] *Id. at 106*
[160] *Id.* at 107
[161] *Id.*
[162] *Id.* at 108
[163] *Id.* at 109

inclination, or ability we are able (and are required in reason) to favor the basic forms of good and to avoid and discourage their contraries. In doing so we are showing no improper favor to individuals."[164]

Increasing organ donation through conscription, presumed consent, or mandated choice would all be satisfied under this requirement. In all three scenarios if one where a donor it would fall under the same Golden Rule: Do unto others as you would have them do unto you. We all want access to organs if we need them so why should one be allowed to not reciprocate when given the chance. Additionally even any of the incentive programs would help promote this value and the Golden Rule. One still could choose to donate voluntarily through altruism without any incentive given directly to them. Every fundamental value is at stake (even if only at the surface) with the current legislation and organ shortages. The ability to attain each value is lost every time someone dies waiting for an organ to become available because organ donation is not mandatorily routine or even presumed. When someone chooses not to donate they are in turn taking another's life, more specifically several lives since one deceased donor "can save up to eight lives and can also save or improve the lives of up to fifty people by donating tissues and eyes."[165] By not donating, unless strictly prohibited by one's religion or custom, one is arbitrarily giving preference to his own goods over that of the community's. Therefore, choosing not to donate out of self-preference, cruelty, selfishness, or even autonomy would be unreasonable, unmoral, and unjust. Similarly, one cannot justify receiving an organ but not being an organ donor in return as it is in direct violation of preventing others from getting what one is trying to get for themselves. Once an individual has deceased one's own well-being and self-preservation are no longer concerns therefore there would be no longer anything within "the reasonable scope

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[164] *Id.* at 109
[165] New York Organ Donor Network, All About Donation. At http://www.donatelifeny.org/about-donation/quick-facts-about-donation/

of self-preference" that would support unwillingness to donate one's organs.

4. Detachment & 5. Commitment

Finnis essentially combines the fourth (detachment) and fifth (commitment) requirements of practical reasonableness which closely correspond to each other as well as the first requirement.[166] Detachment requires that one must be detached from all the specific and limited projects one undertakes in order to sufficiently be open to all the basic forms of good.[167] Finnis' reasoning for being sufficiently detached from a specific project was so that in case of failure, one would not consider his "life drained of meaning".[168] Consequently not being detached, "irrationally devalues and treats meaningless the basic human good of authentic and reasonable self-determination."[169] Moreover Finnis argues, that "there are often evil consequences of succumbing to the temptation of giving one particular project the overriding and unconditional significance which only a basic value and a general commitment can claim: they are the evil consequences that we call to mind when we think of fanaticism."[170]

Commitment strikes the balance between being too attached to a specific project (fanaticism) and dropping out, apathy, unreasonable failure, or refusal to get involved with anything.[171] Accordingly, it is the requirement that one must not abandon his commitments lightly. Finnis believes that, "one should be looking creatively for new and better ways of carrying out one's commitments, rather that restricting[172] one's horizons and one's effort to the projects, methods, and routines with which one is familiar."

Both the fourth and fifth requirements as well as the first, which are all closely

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[166] Finnis, *supra* note 106 at 109.
[167] *Id.* at 110
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id*

complementary, act more like prerequisites to living a fully flourishing coherent plan of life than they are requirements for the decision making process in practical reasonableness. Therefore, as with a coherent plan of life these requirements will be assumed to have been met.

6. The (Limited) Relevance of Consequences: Efficiency, Within Reason

Finnis' sixth requirement of practical reasonableness he advances, demands that "one bring about good in the world (in one's own life and the lives of others) through actions that are efficient for their reasonable purposes."[173] Finnis argues that, one must not waste his opportunities by employing inefficient methods and that his actions should be judged by their effectiveness, fitness for their purpose, their utility, and their consequence.[174] However, Finnis reminds us that requirement is only one requirement among a number of requirements and that efficiency must also be balanced amongst the other requirements of practical reasonableness.[175] As a general strategy of moral reasoning, Finnis rejects utilitarianism and consequentialism as irrational because no plausible sense can be given to the notions of the 'greatest net good' lesser evil', smallest net harm', or 'greater balance of good over bad than can be expected from any available alternative action' (and related concepts).[176] Utilitarianism or consequentialism cannot properly measure the basic goods without the presumption that human beings have a single, well-defined goal or function (a dominant end) or that differing goals being pursued have some common factor.[177] The requirement of efficiency in pursuing one's own specific goals and avoiding the definite harms one choses to regard as unacceptable, has many indefinite (infinite) applications in moral and legal thinking. However, "its sphere of proper application has limits, and every attempt to make it the exclusive or supreme or even the central principle of practical

[173] *Id.* at 111
[174] *Id.*
[175] *Id.* at 112
[176] *Id.* at 112
[177] *Id.* at 113

thinking is irrational and hence immoral."[178]

In this scenario, changing of legislation to help cure the organ shortage problem, both efficiency and consequences must be considered in the process of practical reasonableness. As discussed above, Finnis argues that "where a choice must be made it is reasonable to prefer basic human goods (such as life) to merely instrumental goods (such as property); that is reasonable to favor basic values like life over instrumental goods like property." Accordingly, under natural law the value of human life (decreasing deaths due to organ shortages) would always take precedent over one's value of property (considering one's own organs as property) or one's own feelings of selfishness, cruelty, or lack of desire to participate in life. In both presumed consent and conscription proposals, one of the strongest objections is that an individual or their family have some type property right in the deceased. Another objection under conscription is that an individual is 'free' and as such should be allowed to choose whether to donate their organs upon death for whatever reason they see fit even if it is an irrational decision (selfish reason-autonomy). These objections under both systems are in direct conflict with Finnis' theory because the inherent value in preserving human life is superior to any concern of property rights or an individual's personal choice (unless for religious reasons) to not always value human life. Additionally, under any of the alternative systems, an individual is still given the choice to donate during his or her lifetime as a living donor.

7. Respect for Every Basic Value in Every Act

Finnis' seventh requirement is that one respect every basic value in every act or one must not choose directly against a basic value.[179] Therefore, one should not choose to do any act that will impede or damage the basic forms of human good except that the good consequences of the

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[178] *Id.* at 118
[179] *Id.* at 123

act outweigh the` damage in and through the act itself."[180] Acts if done intelligently will be a "means of promoting or protecting, directly or indirectly, one or more of the basic goods, in one or more of their aspects."[181] Accordingly, "if one is to act intelligently at all one must choose to realize and participate in some basic value or values rather than others, and this inevitable concentration of effort will indirectly impoverish, inhibit, or interfere with the realization of those other values."[182]

As Finnis explains when one must choose between conflicting values, such as choosing conscription, presumed consent, incentives, or mandated choice in order to remedy the organ shortage, one may act contrary to another basic good (in this case the only good affected negatively is religion) indirectly, in order to promote or protect that good or other basic goods (life, knowledge, friendship, practical reasonableness). While the value of religion may be damaged by the decision to change our current organ procurement system to conscription or any other system, all of the other values would be promoted and therefore the requirements of this principle are met.

8. The Requirements of the Common Good

Finnis argues that term 'the common good' is not the utilitarian view of 'greatest good of the greatest number'.[183] The eighth requirement is that of "favoring and fostering the common good of one's communities."[184] In the first sense, "there is a common good for human beings, inasmuch life, knowledge, play, aesthetic experience, friendship, religion, and freedom in practical reasonableness are good for any and every person."[185] Secondly, each of these human

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[180] *Id.* at 118
[181] *Id.* at 119
[182] *Id.* at 120
[183] *Id.* at 154
[184] *Id.* at 125
[185] *Id.* at 155

values is itself a 'common good' inasmuch as it can be participated in by an infinite number of persons in an endless variety of ways or on an endless variety of occasions.[186] Under the third sense the common good is "a set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realize reasonably for themselves the value(s), for the sake of which they have reason to collaborate with each other (positively and/or negatively) in a community."[187] Under this requirement the community would be the United States and its reasonable objective is that of remedying the organ shortage and increasing both live and cadaveric donations. In order to flourish there must be an effective collaboration in the community working together promoting and protecting the common good and the coordination of many resources. In this analysis the common good of increasing organ donation (which would reduce or eliminate organ shortages) further secures the common good of saving lives. In saving lives the community is strengthened in numbers allowing all of those individuals can go on to participate by pursuing goods, promoting justice and acting reasonable and moral.

What brings this analysis together are the elements and promotion of justice. The requirements of justice are the concrete implications of the basic requirement of practical reasonableness that one is to favor and foster the common good of one's communities. That principle is closely related to both the basic value of friendship and to the principle of practical reasonableness that excludes arbitrary self-preference in the pursuit of good.[188] Finnis' theory of justice includes principles of assessing how one person ought to treat another, regardless of whether or not others are being so treated. Justice has to deal with one's relations and dealings with other persons; it is "inter-subjective", or interpersonal. Justice concerns not every reasonable relationship or dealing between one person and another, but only those relations and

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[186] *Id.*
[187] *Id.* at 155
[188] *Id.* at 164

dealings which are necessary or appropriate for avoiding the wrong. Next, Finnis splits his analysis of justice into two further parts: distributive and communicative.

"For the objective of justice is not equality but the common good, the flourishing of all members of the community, and there is no reason to suppose that this flourishing of all is enhanced by treating everyone identically when distributing roles, opportunities, and resources."[189] According to Finnis this objective is governed by the principles of distributive justice and as such the common good is the object of all justice. Finnis acknowledges "there is no single criterion which could be universally applicable for resolving questions of distribution" of the common good.[190] Finnis argues that "in respect of the realization of basic human goods up to a certain threshold level, in each member of the community, the primary criterion is *need*."[191] Next, Finnis introduces the criterion of "*function*, that is to say need relative... to roles and responsibilities in the community."[192] Additional relevant considerations are "*capacity*, relative not only to roles in communal enterprise but also to opportunities for individual advancement, deserts and contribution (whether from self-sacrifice or meritorious use of effort and ability), and also the fact that costs and loses of communal enterprise fairness will often turn on whether some parties have "*created* or at least *foreseen and accepted avoidable risks*" while others have not.[193]

According to natural law, a private owner of a natural resource or capital good, has a duty in justice to put it to productive use or, if not, dispose of it to someone who will do so.[194] "The point in justice, in private property, is to give owners first use and enjoyment of their thing and its fruits (including tents and profits) for it is this availability that enhances their reasonable

[189] *Id.* at 174
[190] *Id.*
[191] *Id.*
[192] *Id.* at 175
[193] *Id.*
[194] *Id.* at 172

autonomy and stimulates their productivity and care."[195] Under this property theory, it can be argued that each of us are only using our organs for the first use and enjoyment until we can no longer use them then our organs should be disposed of in a way that another individual is able to use it productively. This would still respect autonomy because we would have rights to our bodies and organs until we are deceased and then one would no longer need that right.

Commutative justice...First, Finnis explains that commutative justice may concern relations between ascertained individuals.[196] Second, an individual may have a duty of care to many more or less ascertained individuals.[197] Third, one may have a duty of care to many more or less unascertained individuals.[198] "If one abuses, exploits, or 'free-rides' on some system which is advantageous to the limitation or abandonment of the scheme, one is commutatively unjust to all those who might in future have enjoyed the benefits of the original scheme."[199] Organ recipients who do not wish to donate their organs are "free-riding" on and abusing the system by taking organs when needed for them but not giving back when others in the community are suffering. Therefore those individuals who choose to only "free-ride" and take advantage in organ donation are in violation of commutative justice. This duty seems to support all of the alternative systems because as Finnis argues we should be prepared for unforeseen harms etc., one does not know if he may need an organ so by choosing to donate one is preventing himself from taking advantage. Further, one has a duty to the governing authority in one's community to conform to just (even unjust) laws, while the governing authority owe duties to those subject to their authority.[200] The lawful and regular administration of a new organ

[195] *Id.* at 173
[196] *Id.* at 183
[197] *Id.* at 184
[198] *Id.*
[199] *Id.*
[200] *Id.*

procurement scheme is a matter of commutative justice owed to all those who have ascertainable rights, powers, immunities, or duties under it. Therefore as citizens we are owed a duty from the governing authority to implement an organ procurement system that achieves maximum organ donation and curing the organ shortage, while promoting the seven basic goods, the theories of justice, principles of practical reasonableness, and supporting natural law theory.

9. Following One's Conscience

The ninth and final requirement of Finnis' practical reasonableness is that "one must act accordance with one's conscience."[201] Finnis explains that "it is the requirement that one should not do what one judges or thinks or 'feels'-all-in-all should not be done. That is to say one must act 'in accordance with one's conscience."[202] Finnis relies on the first theorist to formulate this requirement Thoman Aquinas with regards to mistaken co-nscience: "if one chooses to do what one judges to be in the last analysis unreasonable, or if one chooses not to do what one judges to be in the last analysis required by reason, then one's choice is unreasonable, however erroneous one's judgments of conscience may happen to be."[203] This requirement flows from the fact that practical reasonableness is not simply a mechanism for producing correct judgements, by an aspect of personal full-being, to be respected (like all other aspects) in every act as well as 'over-all'- whatever the consequences."[204]

Conclusion

It is clear and evident that our current organ procurement system is in desperate need of change if we are to ever cure the organ shortage and increase donation rates of both living and deceased organ donors. Under the legal analysis and the moral analysis of organ donation law it is

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[201] *Id.* at 125
[202] *Id.* at 125
[203] *Id.* at 125
[204] *Id.*

evident that any change in our current system would promote law, morality, justice, and the theory of natural law. "The donation of organs in a morally acceptable manner, at the end of life, offers the gifts of health and life to those who are most vulnerable and who are at times without hope. It is one of the many pro-life positions an individual can choose in order to foster a culture that values life in our world."[205]

[205] United Network For Organ Sharing, *Theological Perspective on Organ and Tissue Donation* at http://www.unos.org/donation/index.php?topic=fact_sheet_9 (last visited November 13, 2014).