

CADAVERIC ORGAN DONATION AND CONSENT: A COMPARATIVE ANALYSIS OF THE UNITED STATES, JAPAN, SINGAPORE, AND CHINA

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I. INTRODUCTION	74
II. ORGAN PROCUREMENT IN THE UNITED STATES	75
A. <i>The 1968 Uniform Anatomical Gift Act</i>	75
1. <i>Who may make a gift?</i>	76
2. <i>Manner in which to make a gift.</i>	77
3. <i>Revocation or amendment.</i>	78
4. <i>Check-and-balance system.</i>	78
5. <i>Requirement of good faith.</i>	78
B. <i>The National Organ Transplant Act and The Uniform Determination of Death Act.</i>	79
C. <i>The 1987 Uniform Anatomical Gift Act.</i>	81
1. <i>The differences between the 1968 and the 1987 UAGAs.</i>	81
2. <i>Most of the adopted versions of the 1987 UAGA are not exact replicas.</i>	83
D. <i>Current Problems</i>	84
E. <i>The 1998 DHHS Referral and Request Regulation.</i>	85
III. THE JAPANESE ORGAN DONATION LAW.	86
A. <i>Japan's social and religious obstacles to brain death and cadaveric organ procurement.</i>	87
B. <i>Japan's stringent method of cadaveric organ procurement.</i>	89
C. <i>Japan's new law's success and problems.</i>	90
IV. SINGAPORE'S LAW: A COMBINATION OF PRESUMED AND VOLUNTARY CONSENT.	93
A. <i>Presumed consent</i>	93
B. <i>Voluntary Consent</i>	95
C. <i>How does HOTA stack up to other presumed consent laws?</i>	96

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D. <i>Is presumed consent a viable option in the United States?</i>	98
V. CHINA'S METHOD OF ORGAN PROCUREMENT:	
AN INHUMANE HARVEST?	100
A. <i>Organ procurement from a freshly executed corpse.</i>	100
B. <i>Chinese organs for sale.</i>	103
C. <i>The viability of China's method in the United States.</i>	104
VI. CONCLUSION	105

I. INTRODUCTION

Due to the remarkable advances in medical science, the overall success in organ transplantation has led to one major problem — a shortage of human organs for transplantation. As a result, many patients have died while awaiting organ transplantation surgery. Since 1968, the United States responded to this problem by attempting to establish a uniform system with respect to cadaveric organ donation. One aspect of cadaveric organ procurement in the United States is requiring voluntary consent before organ procurement is authorized. Other countries, however, have adopted or followed different methods of procuring cadaveric organs for transplantation. This paper will not address the allocation of procured organs, nor will it address organ procurement from living donors. Instead, it will focus on the different methods of cadaveric organ procurement in the United States and in some Asian countries. In addition, this paper will evaluate the application and the relative success of each country's method of organ procurement. Ethical implications of each method will also be discussed.

Part II will chronicle the evolution of cadaveric organ procurement law in the United States. In addition, this part will focus on the method of voluntary consent and the ways in which consent is requested. Part III will review Japan's new organ procurement law, which requires a more stringent form of consent than the United States. Part IV will examine Singapore's presumed consent law and will compare it to presumed consent laws of other countries. In addition, Part IV will address the viability of adopting a similar law in the United States. Part V will describe China's method of organ procurement, which includes harvesting organs from many of its non-consenting executed criminals. In addition, Part V will briefly discuss some of the views in the United States regarding procurement of organs from its executed criminals. Finally, Part VI will provide the reader with a brief summary of the various methods of organ procurement. In conclusion, Part VI will suggest a path to follow which will increase cadaveric organ supply in the United States.

II. ORGAN PROCUREMENT IN THE UNITED STATES

Since 1968, advances in organ transplantation along with the need for more human organs to save lives led the United States to pass laws and regulations dealing specifically with cadaveric organ procurement. This part will chronicle the evolution of those current laws. Part II(A) will provide the foundation of uniformity among the states regarding cadaveric organ procurement—the 1968 Uniform Anatomical Gift Act.¹ Part II(B) will discuss the segment of the National Organ Transplant Act that banned the sale of human organs.² It will also describe the Uniform Determination of Death Act and how that act enabled physicians to pronounce a person brain dead.³ Part II(C) will address some of the problems associated with the 1968 Uniform Anatomical Gift Act. Next, this part will describe how the National Conference of Commissioners on Uniform State Laws (the Commissioners) sought to solve those problems when they approved the 1987 Uniform Anatomical Gift Act (1987 UAGA).⁴ Although a number of states adopted the 1987 UAGA, many problems continue to hinder cadaveric organ supply. Part II(D) will disclose those current problems. Finally, Part II(E) will discuss the most recent attempt to increase cadaveric organ supply — the 1998 DHHS Referral and Request Regulation.⁵

A *The 1968 Uniform Anatomical Gift Act*

In 1968, the Commissioners approved the Uniform Anatomical Gift Act (1968 UAGA).⁶ During this period, transplant surgery became an increasingly viable option to save lives. By utilizing the advances in transplant surgery techniques, the Commissioners clearly intended to increase the supply of organs to help save lives.⁷ To facilitate this increase, the Commissioners were required to harmonize various competing interests.⁸ Thus, the Commissioners were

1. UNIF. ANATOMICAL GIFT ACT (1968) §§ 1-7, 8A U.L.A. 63 (1993 & Supp. 1998).

2. THE NATIONAL ORGAN TRANSPLANT ACT, 42 U.S.C.A. §§ 273, and 274(e) (West 1991).

3. UNIF. DETERMINATION OF DEATH ACT §§ 1-3, 12A U.L.A. 589 (1996).

4. UNIF. ANATOMICAL GIFT ACT (1987) §§ 1-15, 8A U.L.A. 19 (1993 & Supp. 1998).

5. PUBLIC HEALTH, 42 C.F.R. § 482.45 (1998).

6. *Supra* note 1, at § 1-7.

7. *See id.* Prefatory Note. "It is said that 6,000 to 10,000 lives could be saved each year by renal transplants if a sufficient supply of kidneys were available."

8. *See id.* Those interests were: (1) the wishes of the deceased during his lifetime concerning the disposition of his body; (2) the desires of the surviving spouse or next of kin; (3) the interest of the state in determining by autopsy, the cause of death in cases involving crime or violence; (4) the need of autopsy to determine the cause of death when private legal rights are dependent upon such cause; and (5) the need of society for bodies, tissues and organs for medical education, research, therapy and transplantation.

required to answer several legal questions to balance those competing interests.⁹ Many states already tried to answer those questions. When they passed their own legislation, the Commissioners sought to eliminate the uncertainties that existed when applying the law from state to state.¹⁰ At one time, all fifty states enacted their own versions of the 1968 UAGA.¹¹ Presently, only thirty states and the District of Columbia have retained versions of the 1968 UAGA.¹²

1. *Who may make a gift?*

The 1968 UAGA answered one of the questions about who is authorized to make an anatomical gift.¹³ The 1968 UAGA answered that question by authorizing any individual of sound mind over the age of eighteen to make an anatomical gift.¹⁴ Absent the decedent's intent, the 1968 UAGA also authorized the decedent's next-of-kin to substitute their consent to make an anatomical gift, provided there was no contrary indication by the decedent.¹⁵ This theory is in accord with cases which hold that the testamentary wishes of

9. *See id.* These questions included the following: (1) who may during his lifetime make a legally effective gift of his body or a part thereof; (2) what is the right of the next of kin, either to set aside the decedent's expressed wishes, or themselves to make the anatomical gifts from the dead body; (3) who may legally become donees of anatomical gifts; (4) for what purposes may such gifts be made; (5) how may gifts be made, can it be done by will, by writing, by a card carried on the person, or by telegraphic or recorded telephonic communication; (6) how may a gift be revoked by the donor during his lifetime; (7) what are the rights of survivors in the body after removal of donated parts; (8) what protection from legal liability should be afforded to surgeons and others involved in carrying out anatomical gifts; (9) should such protection be afforded regardless of the state in which the document of gift is executed; (10) what should the effect of an anatomical gift be in case of conflict with laws concerning autopsies; (11) should the time of death be defined by law in any way; [and] (12) should interest in preserving life by the physician in charge of a decedent preclude him from participating in the transplant procedure by which donated tissues or organs are transferred to a new host.

10. *See id.* For example, a valid anatomical gift in one state may not be valid in another.

11. *See* UNIF. ANATOMICAL GIFT ACT (1987) Prefatory Note, 8A U.L.A. 19, 20 (1993 & Supp. 1998); *see also* Cate, Symposium, *Human Organ Transplantation: The Role of Law*, 20 IOWA J. CORP. L. 69, 71 (1994).

12. *See* UNIF. ANATOMICAL GIFT ACT (1968) Table of Jurisdiction Wherein Act has Been Adopted.

13. *See* UNIF. ANATOMICAL GIFT ACT (1968) Prefatory Note.

14. *Id.* § 2(a).

15. *Id.* § 2(b). For cases holding that a decedent's next-of-kin possesses some kind of property right for burial purposes, *see* *Whaley v. Tuscola*, 58 F.3d 1111, 1115 (6th Cir. 1995) (holding that next-of-kin have the right to possess the body for burial and prevent its mutilation); and *Perry v. Saint Francis Hosp. & Medical Center, Inc.*, 886 F. Supp. 1551, 1563-64 (D. Kan. 1995) (holding that next-of-kin is the owner of a quasi-property right over the decedent's body for the limited purposes of preserving and burying it). For an in-depth analysis about how different jurisdictions have handled the property right issue, *see* Annotation, *Validity and Effect of Testamentary Direction as to Disposition of Testator's Body*, 7 A.L.R. 3D 747 (1996 & Supp. 1998).

a decedent to be buried or cremated after death will be binding over contrary wishes by the decedent's next-of-kin.¹⁶ The 1968 UAGA also established a priority of persons who could substitute their consent in the place of their decedent loved one.¹⁷ An individual at the same or higher priority level of one who actually gives consent, may nullify an otherwise valid anatomical gift.¹⁸

2. *Manner in which to make a gift.*

One who wishes to make an anatomical gift must do so by executing either a will or a document other than a will.¹⁹ If the gift was made by a document other than a will, the donor and the witnesses must sign the document.²⁰ If the decedent's intentions were unknown, the decedent's next-of-kin may substitute their consent by "telegraph, recorded telephonic, or other recorded message."²¹

16. See *Matter of Moyer's Estate*, 577 P.2d 108, 109 (Utah 1978) (held that so long as decedent's wishes are within the limits of reason and decency, the decedent's interests are binding after death); and *Dumouchelle v. Duke University*, 317 S.E.2d 100 (N.C. 1984) (held that the right to the possession of a dead body for the purpose of preservation and burial belongs, in the absence of any testamentary disposition, to the surviving next-of-kin). For a complete analysis about how different jurisdictions have handled this issue, see Frank D. Wagner, Annotation, *Enforcement of Preference Expressed by Decedent as to Disposition of His Body after Death*, 54 A.L.R. 3d 1037 (1973 & Supp. 1998); and 7 A.L.R. 3d 747, *supra* note 15; and see generally, William Boulier, Note, *Sperm, Spleens, and other Valuables: The Need to Recognize Property Rights in Human Body Parts*, 23 HOFSTRA L. REV. 693 (1995). For other views about how property interests can or should affect cadaveric organ procurement, see Monique C. Gorsline & Rachele 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 IOWA J. CORP. L. 5, 9-13 (1994); Chad D. Naylor, Note, *The Role of the Family in Cadaveric Organ Procurement*, 65 IND. L.J. 167, 174-78 (1989); and Theodore Silver, *The Case for a Post-Mortem Organ Draft and a Proposed Model Organ Draft Act*, 68 B.U. L. REV. 681, 687-94 (1988).

17. See UNIF. ANATOMICAL GIFT ACT (1968) § 2(b). The order of priority is as follows: "(1) the spouse, (2) an adult son or daughter, (3) either parent, (4) an adult brother or sister, (5) a guardian of the person of the decedent at the time of his death, [and] (6) any other person authorized or under obligation to dispose of the body."

18. *Id.*; see also *Mansaw v. Midwest Organ Bank*, No. 97-0271-CV-W-6, 1998 WL 386327, at *8 (W.D. Mo. 1998) (where one of the parents who objects to an anatomical gift is silent and the other parent voices her consent to such gift, the parent giving consent was presumed to have spoken for the other silent parent).

19. See UNIF. ANATOMICAL GIFT ACT (1968) § 4; see also *Dumouchelle*, 317 S.E.2d at 104 (held that if a will is later declared invalid, the anatomical gift remains valid to the extent that it has been acted upon in good faith).

20. See UNIF. ANATOMICAL GIFT ACT (1968) § 4(b).

21. *Id.* § 4(e). This provision enables next-of-kin—who may be far away—to give their consent to donate the decedent's organs in a quick manner. See *id.* § 4(e) at Comment.

Once a proper gift has been made, the 1968 UAGA sets out the manner of delivery to the donee.²²

3. *Revocation or amendment.*

In order to carry out the ultimate desires of the donor, the 1968 UAGA prescribed how a donor could amend or revoke an anatomical gift.²³ If an individual executed a signed statement, made an oral statement witnessed by two persons, or made a statement during a terminal illness addressed to an attending physician, the amendment or revocation of a gift would be enforced.²⁴ Those statements must also be conveyed to the donee.²⁵ In addition, revocation or amendment is permitted if someone found a signed card or document identifying the decedent's objection or amendment.²⁶ If a gift was not delivered to a donee, all copies of the document of gift must be destroyed before revocation or amendment.²⁷

4. *Check-and-balance system.*

The 1968 UAGA has also established a type of check-and-balance system, meaning that the physician who pronounced death could not participate in the organ procurement process.²⁸ Naturally, as with any proper check-and-balance system, the physician who became a donee was unable "to participate in the procedures for removing or transplanting a part."²⁹

5. *Requirement of good faith.*

Perhaps the strength of the 1968 UAGA lies in the provision that created civil and criminal immunity for those who acted in good faith.³⁰ Absent malice, or the intent either "to defraud or to seek an unconscionable advantage," so long as medical personnel honestly believed they were acting in accordance with the 1968 UAGA, the good-faith defense was available.³¹ Whether one acts in good

22. See *id.* § 5. Delivery, however, is not required to validate a gift.

23. *Id.* § 6(a).

24. *Id.*

25. UNIF. ANATOMICAL GIFT ACT (1968) § 6(a).

26. *Id.* § 6(a)(4).

27. *Id.* § 6(b).

28. *Id.* § 7(b). For determination of death discussion, see *infra*, Part II(C).

29. *Id.* § 4(c).

30. UNIF. ANATOMICAL GIFT ACT (1968) § 7(c).

31. See *Rahman v. Mayo Clinic*, 578 N.W.2d 802, 805-06 (Minn. 1998); citing BLACK'S LAW DICTIONARY 623 (5th ed. 1979), construed in *Perry*, 886 F. Supp. at 1558, *Lyon v. United States*, 843 F.

faith is a question of law.³² Physicians, hospitals, their employees, and other organ procurement organizations frequently rely on good-faith immunity to defend tort and contract claims brought by either the estate of a decedent or the decedent's next-of-kin.³³ A good-faith defense, however, is limited to only the procurement process and cannot be extended to treatment of the donor prior to death.³⁴ Although the 1968 UAGA provided many answers to cadaveric organ transplantation, some questions were left unresolved.

B. *The National Organ Transplant Act and The Uniform Determination of Death Act.*

The 1968 UAGA failed to answer two questions: (1) would the sale of human organs be permitted; and (2) how would the death of a potential donor be determined?³⁵ In 1984 the United States answered the first question in the negative by passing the National Organ Transplant Act (NOTA).³⁶ Section

Supp. 531, 533 (D. Minn. 1994), *Kelly-Nevils v. Detroit Receiving Hosp.*, 526 N.W.2d 15, 20 (Mich. App. 1995), *Nicoletta v. Rochester Eye & Human Parts Bank, Inc.*, 519 N.Y.S.2d 928, 930 (N.Y. Sup. Ct. 1987).

32. See *Kelly-Nevils*, 526 N.W.2d at 417; see also *Brown v. Delaware Valley Transplant Program*, 615 A.2d 1379, 1383 (Pa. Super. Ct. 1992); and *Nicoletta*, 519 N.Y.S.2d at 931-32.

33. See *Jacobsen v. Marin General Hosp.*, 963 F.Supp. 866, 871-72 (N.D. Cal. 1997) (because time is of the essence in securing donated organs at the time of the donor's death, the court held that the hospital was not liable for procuring organs after it had conducted a reasonable search for the decedent's next-of-kin); *Lyon*, 843 F. Supp. at 534 (good faith defense was available to eye bank that acted on a routine notice from a medical center that the decedent's eyes had been donated); *Ramirez v. Health Partners of Southern Arizona*, No. 2 CA-CV 97-0083, 1998 WL 345103, at 1 (Ariz. Ct. App. 1998) (holding that Arizona's version of the Uniform Anatomical Gift Act included a presumption that one acts in good faith when procuring cadaveric organs); *Kelly-Nevils*, 526 N.W.2d at 19-20 (affirmative defense of good faith available when the hospital relied on the consent of an individual who claimed to be the decedent's brother, and hospital need not conduct an independent investigation to ascertain that the signatory is legally authorized to consent); see generally, *Rahman*, 578 N.W.2d at 806; *Nicoletta*, 519 N.Y.S.2d at 928; *Callsen v. Temple University Hosp.*, 652 A.2d 824 (Pa. 1995); *Brown*, 615 A.2d at 1383-84; *Hinze v. Baptist Memorial Hosp.*, No. 9, No. 27253 T.R., 1990 WL 121138 (Tenn. Ct. App. 1990); and *Seamans v. Harris County Hosp.*, 934 S.W.2d 393, 395 (Tex. Ct. App. 1996) (failed notification attempt was held not to be construed as bad faith).

34. See *Williams v. Hoffmann*, 223 N.W.2d 844, 847 (Wis. 1974) (good faith immunity did not extend to treatment of potential donor while the patient was still alive).

35. See generally, UNIF. ANATOMICAL GIFT ACT (1968). For arguments supporting the sale of organs, see Jason Altman, *Organ Transplantations: The Need for an International Open Organ Market*, 5 *TOURO INT'L L. REV.* 161 (1994); Lloyd R. Cohen, Article, *Increasing the Supply of Transplant Organs: The Virtues of a Futures Market*, 58 *GEO. WASH. L. REV.* 1 (1989); and Silver, *supra* note 16, at 693-728; but see, Emanuel D. Thorne, Book Review, *When Private Parts are Made Public Goods: The Economics of Market-Inalienability*, 15 *YALE J. ON REG.* 149, 164 (1998) (arguing that banning a market on the sale of organs "allows everyone access to its free value and, in effect, creates a man-made common property resource").

36. See National Organ Transplant Act, 42 U.S.C.A. § 274(e) (West 1991). A significant reason Congress passed NOTA was due "largely in response to a plan by H. Barry Jacobs, who established a company in Virginia to broker human kidneys." See Cate, *supra* note 11, at 80.

274e of NOTA provided that: “[i]t 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.”³⁷ The term “valuable consideration” does not include reasonable payments associated with the organ procurement process.³⁸ “Reasonable payments” do not include risks of living donors, difficulties of procurement, or increased costs of insurance resulting from organ donation.³⁹ Nonetheless, whether an individual donor can sell his or her organs is heavily debated.⁴⁰

Another question left unresolved in the 1968 UAGA was “when could a physician legally declare death so that cadaveric organ procurement could begin?”⁴¹ In 1980, the Commissioners approved the Uniform Determination of Death Act to codify the preexisting common law requiring total failure of the cardiopulmonary system.⁴² In addition, at the recommendation of the American Medical Association, the Commissioners added whole brain death.⁴³ The Commissioners defined death as when “[a]n individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem.”⁴⁴ Presently, forty-four states and the District of Columbia recognize whole brain death.⁴⁵

37. *Id.* “Human organ” includes: “kidney, liver, heart, lung, pancreas, bone marrow, cornea, eye, bone, and skin or any subpart thereof,” including organs from a fetus.

38. *Id.*

39. *See Wilson v. Adkins*, 941 S.W.2d 440 (Ark. Ct. App. 1997) (invalidating the contract where sister offered to donate bone marrow for \$101,500 for the risk, difficulties, and insurance consequences of donation because it violated the National Organ Transplant Act).

40. *See generally*, Altman, *supra* note 35; Cohen, *supra* note 35; and Thorne, *supra* note 35.

41. *See UNIF. ANATOMICAL GIFT ACT* (1968) § 7(b). Although Section 7(b) provides that the physician who determines death shall not participate in organ procurement, it does not address how the physician is to determine death.

42. *See UNIF. DETERMINATION OF DEATH ACT* §§ 1-3, 12A U.L.A. 589 (1996).

43. *See id.* Recognition of brain death is very important to cadaveric organ procurement. *See Cate, supra* note 11, at 75. “In order for organs to be viable for transplantation, both circulation and respiration must be maintained in the host body.”

44. *UNIF. DETERMINATION OF DEATH ACT* § 1, 12A U.L.A. 589 (1996).

45. *See Cate, supra* note 11, at 75. While the United States relies on brain dead donors for organs such as hearts, livers and pancreas, the pool of those pronounced brain dead—whose bodies contain medically acceptable organs—is decreasing. The majority of this pool is derived from those who have been declared brain dead due to either motor vehicle accidents—61%—or gunshot wounds to the head—16%. *See Yoshio Watanabe, Why do I Stand Against the Movement for Cardiac Transplantation in Japan*, 35 JAPAN HEART J. 701, 705 (1994). Due to the increasingly stringent laws concerning drunk driving and seat belt use, the United States has begun to enjoy fewer highway deaths. *Id.* An additional reduction factor stems from the auto-makers’ production of safer vehicles. *Id.* This is good news for drivers, but conversely bad news for

Legal brain death does not include “neocortical death” nor “persistent vegetative state.”⁴⁶ Similar to the 1968 UAGA, the Uniform Determination of Death Act granted civil and criminal immunity to persons acting in good faith who were either authorized to determine death or who relied on another’s authorized determination of death.⁴⁷

C. *The 1987 Uniform Anatomical Gift Act.*

Despite the efforts to increase cadaveric organ donation, nineteen years after the Commissioners approved the 1968 UAGA, “the issue of organ procurement was brought back into the center stage of public policy concern.”⁴⁸ The advent of cyclosporine along with the improvements in surgical techniques for transplanting organs helped to increase the demand for cadaveric organs.⁴⁹ Also, a 1985 Hastings Center Report pointed out several key problems with the 1968 UAGA.⁵⁰ The Commissioners tried to remedy those problems by approving the 1987 UAGA.⁵¹

1. *The differences between the 1968 and the 1987 UAGAs.*

The 1987 UAGA differs significantly from the 1968 UAGA in several

those awaiting suitable organs. See also Carey Goldberg, *A Not Entirely Happy Anniversary*, N.Y. TIMES, Nov. 11, 1998, at A14.

46. See *id.* Prefatory Note; see also *People v. Selwa*, 543 N.W.2d 321, 328 (Mich. Ct. App. 1995) (error for doctor to rely on higher brain death to determine that baby was born dead where evidence existed supporting the inference of brain stem activity).

47. See UNIF. DETERMINATION OF DEATH ACT, Prefatory Note.

48. See UNIF. ANATOMICAL GIFT ACT (1987) Prefatory Note, 8A U.L.A. 29 (1993 & Supp. 1998).

49. See *id.* For the benefits of cyclosporine, see Borel & Z. L. Kis, *The Discovery and Development of Cyclosporine (Sandimmune)*, 23 TRANSPLANTATION PROC. 1867 (1991).

50. See UNIF. ANATOMICAL GIFT ACT (1987) Prefatory Note. Those key problems were as follows: (1) failure of persons to sign written directives; (2) failure of police and emergency personnel to locate written directives at accident sites; (3) uncertainty on the part of the public about circumstances and timing of organ recovery; (4) failure on the part of medical personnel to recover organs on the basis of written directives; (5) failure to systematically approach family members concerning donation; (6) inefficiency on the part of some organ procurement agencies in obtaining referrals of donors; (7) high wastage rates on the part of some organ procurement agencies in failing to place donated organs; (8) failure to communicate the pronouncement of death to next of kin; and (9) failure to obtain adequate informed consent from family members. *Id.* Another problem was that only one third of Americans surveyed in a 1985 Gallop Poll indicated that “they would be very likely to donate their own organs.” See Cate, *supra* note 11, at 71-72. The Gallop Poll survey disclosed that 93% of the Americans surveyed knew about organ transplantation. Although 75% approved of the concept of organ donation, only 27% indicated they would be very likely to donate their own organs. Seventeen percent stated that they had actually completed donor cards, and of those people, about half did not tell their family members their intentions to donate. *Id.*

51. *Id.*

ways. First, the 1987 UAGA simplified the manner in which one is required to make a gift.⁵² Witnesses are not required on the document of a gift.⁵³ This change also permits states to distribute driver's licenses or identification cards that can double as legally valid anatomical gifts.⁵⁴ The 1987 UAGA also imposes a duty on police, rescue workers, and hospital personnel to search for the document.⁵⁵

The 1987 UAGA requires hospitals to designate personnel to inquire about their patients' wishes to donate — "routine inquiry" — and who are also required to request for an anatomical gift from next-of-kin — "required request."⁵⁶ Moreover, failure to make an anatomical gift of one part is not a presumption against making a gift of another part.⁵⁷ Also, revocation or amendment of an anatomical gift does not have to be communicated to a donee.⁵⁸ If a valid gift has not been revoked, consent is not required.⁵⁹ In addition, the 1987 UAGA recognizes a limited presumption that an individual consents to donate organs after death. Absent any knowledge that a decedent or a decedent's next-of-kin has objected to organ donation, and if an authorized request for a needed anatomical gift has been made, a medical examiner or coroner may authorize procurement of the needed anatomical gift from the decedent.⁶⁰ Finally, the 1987 UAGA codified the National Organ Transplant

52. See *id.* § 2(b), Prefatory Note.

53. *Id.* § 2(b); compare with UNIF. ANATOMICAL GIFT ACT (1968) § 4.

54. See *id.* § 2(c). Anatomical gifts remain valid despite the expiration of an individual's driver's license.

55. See UNIF. ANATOMICAL GIFT ACT (1987) § 5(c), Prefatory Note. For example, emergency response personnel believing that an injured person is dead or near death, are required to search for documentation indicating whether the injured person intended either to donate or to not donate his or her organs. *Id.* § 5(c)(1). A similar duty exists for hospitals when they admit an injured patient. *Id.* § 5(c)(2).

56. *Id.* §§ 5(a)-(b).

57. *Id.* § 2(j).

58. *Id.* § 2(f); compare with UNIF. ANATOMICAL GIFT ACT (1968) § 6(a).

59. See UNIF. ANATOMICAL GIFT ACT (1987) § 2(h). Although consent was not required under the 1968 UAGA, this provision is set out more clearly in the 1987 UAGA; see generally, UNIF. ANATOMICAL GIFT ACT (1968) § 6.

60. See UNIF. ANATOMICAL GIFT ACT (1987) §§ 4(a)-(b), Prefatory Note. Most states that have adopted this section have required a reasonable search for the decedent's next-of-kin. See Cate, *supra* note 11, at 84. For case law addressing the validity and constitutionality of these types of presumptions, see *Brotherton v. Cleveland, M.D.*, 923 F.2d 477, 482 (6th Cir. 1990) (requiring predeprivation process before coroner was authorized to take deceased's corneas); *State v. Powell*, 497 So.2d 1188, 1191 (Fla. 1986) (recognizing reasonable relationship to state's objective to provide sight for the blind); and *Tillman v. Detroit Receiving Hosp.*, 360 N.W.2d 275 (Mich. App. 1984) (dismissing plaintiff's claim because a medical examiner may retain body portions for investigation and plaintiff/next-of-kin did not have a property right in decedent's body).

Act when it prohibited the sale of organs.⁶¹ The 1987 UAGA did, however, retain the good faith immunity defense.⁶²

2. *Most of the adopted versions of the 1987 UAGA are not exact replicas.*

Presently, twenty-one states have adopted a version of the 1987 UAGA.⁶³ Some of those adopting states have not, however, adopted the 1987 UAGA word for word. Many states, for instance, omitted the routine inquiry section.⁶⁴ Other states either have failed to adopt or have changed the hospital's duty of required consent.⁶⁵ A few states have omitted the limited presumption provision.⁶⁶ Other states changed the definition of "good faith" to include gross negligence.⁶⁷ Some states have even reduced the age requirement to make a

61. *See id.* § 10; *see also supra* Part II(B). Other differences between the 1987 UAGA and the 1968 UAGA will not be addressed. For potential donees *id.* § 6. For the requirements of hospitals to coordinate and set up agreements with their local organ procurement organizations. *Id.* § 9.

62. *See id.* § 11(c). "A hospital, physician, surgeon, [coroner], [medical examiner], [local public health officer], enucleator, technician, or other person, who acts in accordance with this [Act] or with the applicable anatomical gift law of another state [or foreign country] or attempts in good faith to do so is not liable for that act in a civil action or a criminal proceeding." *Id.* *See also id.* § 11(d). Neither an individual nor the individual's estate are liable for any injury or damage that may result from making an anatomical gift. *See id.* § 11(d).

63. *See id.* Table of Jurisdictions Wherein Act has Been Adopted.

64. Those states and their respective statutes are as follows: Arizona, *see* ARIZ. REV. STAT. ANN. § 36-845(A); Arkansas, *see* ARK. CODE ANN. § 20-17-605(a); Idaho, *see* IDAHO CODE § 39-3406; Iowa, *see generally*, IOWA CODE ANN. §§ 142C.1 to 142C.16; Minnesota, *see* MINN. STAT. ANN. § 525.9214; Montana, *see* MONT. CODE ANN. § 72-17-213(1); Nevada, *see* NEV. REV. STAT. § 451.577; New Mexico, *see* N.M. STAT. ANN. § 24-6a-2; North Dakota, *see* N.D. CENT. CODE § 23-06.2-05; Oregon, *see* OR. REV. STAT. § 97.958; Rhode Island, *see* R.I. GEN. LAWS § 23-18.6-5; Vermont, *see* VT. STAT. ANN. § 5241; Virginia, *see* VA. CODE ANN. § 32.1-292.1; and Wisconsin, *see* WIS. STAT. ANN. § 157.06-5.

65. Those states and their respective statutes are as follows: Iowa, *see generally*, IOWA CODE ANN. §§ 142C.1 - 142C.16; and Virginia, *see* VA. CODE ANN. §32.1-292.1. California's statute requires that either the hospital or their local organ procurement organization make the routine inquiry and the required request. *See* CAL. HEALTH & SAFETY CODE § 7184.

66. Those states that have omitted this provision are as follows: New Mexico, *see generally*, N.M. STAT. ANN. §§ 24-6A-1 - 15; and Vermont, *see generally*, VT. STAT. ANN. tit. 18 §§ 5238 - 5247. Other states either omitted this provision, or modified it by limiting procurement to eyes, corneas, or pituitary tissue. Connecticut's statute permits qualified personnel to procure only pituitary tissue and corneas. *See* CONN. GEN. STAT. ANN. § 19(a)-281. Nevada's statute permits procurement of only eyes. *See* NEV. REV. STAT. § 451.583. And Washington's statute permits the procurement of only corneal tissue. *See* WASH. REV. CODE ANN. § 68.50.630.

67. Virginia's and Washington's statutes substitute "gross negligence or wilful and wanton conduct" as an exception to good faith. *See* VA. CODE ANN. §32.1-295(E); and WASH. REV. CODE ANN. § 68.50.510.

valid anatomical gift.⁶⁸ Two states have omitted the duty to search for a donor card.⁶⁹ Although many states have changed the 1987 UAGA to reflect their local concerns, those states are trying to make positive steps toward increasing the supply of cadaveric organs for transplantation.

D. *Current Problems*

For nearly thirty years, all fifty states have had some version of the Uniform Anatomical Gift Act on their books. Yet thousands of patients continue to die each year while they wait for life saving organs.⁷⁰ This subpart will address many of the problems that are presently hindering cadaveric organ procurement in the United States. First, medical personnel frequently refuse to procure the decedent's organs without first obtaining consent from next-of-kin, even when the decedent properly executed a valid anatomical gift.⁷¹ A second problem is that hospital personnel sometimes fail to request consent from next-of-kin, even when their state's required-request provision requires them to do so.⁷² Third, although the 1987 UAGA imposes a duty on emergency and hospital personnel to search for legal documents of gifts, many valid documents of gift are not retrieved.⁷³

Other problems are related to the would-be donor or the next-of-kin or both. A fourth contributing problem is that despite the overwhelming public support for organ donation, individuals have not executed anatomical gifts.⁷⁴ A fifth unfortunate problem is that many next-of-kin refuse to consent to the

68. Washington's statute lowers the age of those who are able to make a gift to 16. *See id.* at 68.50.540. Other states lowering the age requirement are Iowa and New Mexico. *See* IOWA CODE ANN. § 142C.3-2; and N.M. STAT. ANN. § 24-6A-2.

69. Those states are Iowa and New Mexico. *See generally*, IOWA CODE ANN. §§ 142C.1 to 142C.16; and *see generally*, § N.M. STAT. ANN. §§ 24-6A-1 -15.

70. *See Organ and Eye Donation, Number of Transplants Performed Remained Flat in 1996 in U.S., Europe*, TRANSPLANT NEWS, Apr. 29, 1997, at 1. Available in LEXIS, News Library. Of the 70,000 patients waiting for organ donations in 1996, 3,926 died.

71. One author notes that "donor cards are legally binding in 48 states and health professionals who act on them are immune from liability in every state." Cate, *supra* note 11, at 82. Reasons for this extra consent requirement include the following: (1) fear of professional criticism and legal action; (2) psychological unwillingness; and (3) resentment held by physicians about being told what they must do by legislators and bureaucrats. *See* Cate, *supra* note 11, at 82; and Naylor, *supra* note 16, at 181-82.

72. *See* Cate, *supra* note 11, at 82.

73. *See* Andrew C. MacDonald, Feature, *Organ Donation: The Time Has Come to Refocus the Ethical Spotlight*, 8 STAN. L. & POL'Y REV. 177, 180 (1997).

74. Although 85% of Americans support organ donation, many "are reluctant to contemplate and plan for their own death." *Id.* That is, many either procrastinate until it is too late or they exhibit an unwillingness to think about their own mortality.

procurement of their deceased loved ones' organs.⁷⁵ Some of the reasons a decedent's next of kin have refused to consent in the past are as follows:

- (1) fear that death might be hastened by an eagerness to procure organs;
- (2) objections that stem from being dismembered, such as aesthetic or religious concerns;
- (3) lack of education; and
- (4) lack of satisfaction the decedent's next-of-kin may have over the hospital's treatment and care of their loved one.⁷⁶

E. *The 1998 DHHS Referral and Request Regulation.*

In light of the current problems regarding the lack of supply of suitable cadaveric organs, on December 15, 1997, Vice President Al Gore along with the Department of Health and Human Services (DHHS) launched a national initiative to increase organ donation by twenty percent.⁷⁷ One element of the national initiative was to propose a rule ensuring that next-of-kin are asked to consent to the procurement of their loved ones' organs.⁷⁸ As a result, the DHHS passed a Referral and Request regulation in August of 1998.⁷⁹

The new regulation provides that hospitals wishing to receive Medicare payments must refer their patients who died along with their patients whose deaths are imminent to a local Organ Procurement Organization (OPO).⁸⁰ Consequently, the OPO would provide personnel trained and experienced in obtaining consent to consult with the patient's next-of-kin and request consent to procure their loved one's organs.⁸¹ This regulation, in essence, removes the

75. See MacDonald, *supra* note 73, at 180; and see Cohen, *supra* note 35, at 15, n.54.

76. See *One in Five Families Regret Decisions to Donate, or Not Donate, According to a New Study*, TRANSPLANT NEWS, Mar. 31, 1998, at 1. Available in LEXIS, News Library; and *Families Satisfied With Hospital Care Donate Organs of Loved One More Often*, TRANSPLANT NEWS, Feb. 13, 1998, at 1. Available in LEXIS, News Library. For some of the more frequently cited problems, see MacDonald, *supra* note 73, at 180; see also Watanabe, *supra* note 45, at 705.

77. For all the elements of this initiative, see *HHS Launching National Organ/Tissue Donor Initiative; Goal is Increasing Donation Twenty Percent After HCFA Regulation Final*, TRANSPLANT NEWS, Dec. 17, 1997, at 1. Available in 1997 WL 8941217.

78. *Id.*

79. See Public Health, 42 C.F.R. § 482.45 (1998).

80. *Id.*

81. See *id.* This new regulation was modeled after a Pennsylvania law that increased donation rates forty percent in three years. See Elizabeth Neus, *Order: Report all Deaths to Organs Procurers*, U.S.A. TODAY, June, 18 1998, § News, at 1A, available in LEXIS, News Library. This same type of regulation is practiced in Spain—a country with the highest success rate of any cadaveric organ donation system. See Richard H. Nicholson, *The Good is Received, the Giver is Forgotten; Moral and Ethical Aspects of Organ Donation is Deliberated in Several Court Cases in Europe*, HASTINGS CENTER REP., July 1994, at 5.

duty of required request from hospitals and places it in the hands of those more motivated to obtain consent.⁸²

In addition to the national initiative to increase the supply of cadaveric organs, some experts have suggested other methods to increase the supply of cadaveric organs for transplantation.⁸³ In their search for answers, many have looked abroad.⁸⁴ The remainder of this paper will examine and describe how some Asian countries have attempted to increase the supply of cadaveric organs in their own countries.

III. THE JAPANESE ORGAN DONATION LAW.

Before 1997, Japan was the only developed country where procurement of cadaveric organs from brain-dead donors was not officially recognized.⁸⁵ As a result, a large percentage of Japanese patients waiting for suitable organs have died.⁸⁶ Those who have received suitable organs have received them from either live donors or another country's donors.⁸⁷ Consequently, some people

82. For the actual duty imposed under the 1987 UAGA, see UNIF. ANATOMICAL GIFT ACT (1987) §§ 5(a)-(b), 8A U.L.A. 19 (1993 & Supp. 1998). Forty-one states had previously enacted similar request laws—some weaker than others. See Arthur L. Caplan, *Professional Arrogance and Public Misunderstanding; over Required Request Legislation on Organ and Tissue Donation*, HASTINGS CENTER REP., Apr. 1988, at 34. Already, the new regulation has come under fire. See Stephanie Stapleton, *Physicians, States, Hospitals Challenge Transplant Rules*, 41 AM. MED. NEWS, Oct. 19, 1998, at 1, 35. An American Hospital Association (AHA) spokesperson has argued that the regulation is "too broad a net for too little a gain." See U.S.A. TODAY, *supra* note 81. The AHA fears that the new regulation could potentially "preclude social workers, clergy, family members, physicians, nurses or others who aren't trained by organ procurement organizations from seeking a family member's consent." See Chris Casteel, *Istook Gets Birth Control Stipulation into Spending Bill Teen Contraceptives Measure Seeks to Protect Parents' Right to Know*, SUNDAY OKLAHOMAN, July 19, 1998, § News, at 9. Representative Ernest Istook is attempting to overturn the regulation because he believes family members should not be bothered at such an emotional time. See *Life Saving Gift*, INDIANAPOLIS STAR, Aug. 3, 1998, § Editorial, at A06, available in LEXIS, News Library.

83. For example, one expert has placed the duty on attorneys to help "investigate alternatives to current transplant practices and, where necessary, participate in altering the existing legal structure to make it possible for new procedures to be implemented." Cate, *supra* note 11, at 87-9. Cate also suggests that the attorney-client relationship be used to provide clients accurate information, to counsel and act on behalf of the client to "assure that a decision to donate is followed when medically appropriate; and to act to maintain the integrity of the transplantation system." *Id.*

84. See generally, *infra* Part IV.

85. See Motshi Takao, *Brain-death and Transplantation in Japan*, 340 LANCET 1164, 1164 (1992).

86. For example, 30% of Japanese patients who were waiting for a liver transplant died in 1993. See David Forster, Comment, *When Body is Soul: The Proposed Japanese Bill on Organ Transplantations from Brain-Dead Donors*, 3 PAC. RIM L. & POL'Y J. 103, 109-11 (1994).

87. Of the patients remaining from *supra* note 86, about 13% received organs from living donors, 11% received their organs from overseas, and 40% remained on the waiting list. *Id.* Also, of all the kidneys

have correctly argued that legal and public support of brain death was necessary to increase Japan's supply of cadaveric organs.⁸⁸

This part will review how Japan has tried to increase the supply of cadaveric organs to meet increasing demands. Part III(A) will examine the many social and religious beliefs that have traditionally rejected brain death and the procurement of organs from those whose brains have indeed expired. Part III(B) will introduce Japan's new law as the world's most stringent cadaveric organ procurement law. In addition, this part will compare Japan's new law to similar laws in the United States. Part III(C) will explain the success and problems with Japan's new organ procurement law.

A. *Japan's social and religious obstacles to brain death and cadaveric organ procurement.*

Until very recently, Japan's strongly held social and religious beliefs against brain death and organ procurement were impenetrable barriers to the formal recognition of organ procurement from those who were brain dead. For example, although most Americans view the body and soul as separable, the Japanese "view individuals as 'completely integrated mind-body units.'"⁸⁹ In addition, the United States recognizes inherent individual rights in life and in death. Japan, on the other hand, views the individual as "a social being who is regarded as part of a collective reality,"⁹⁰ a collective to which the family also belongs.⁹¹ Also, Japanese people view the belly as the master organ of the body, not the brain.⁹² Yet another social problem stems from the Japanese demand for perfection—false positives, no matter how remote their possibility,

donated in 1989, 70% were donated from living relatives and the remaining 30% came from cardiac-dead donors. See Takao, *supra* note 85, at 1164.

88. See Forster, *supra* note 86, at 109; and Takao, *supra* note 85, at 1164. For one Japanese doctor's view that recognition of brain death is a bad idea in Japan, see Watanabe, *supra* note 45. Many of Watanabe's problems are with the side effects of cyclosporine and the medical problems associated with heart surgery. *Id.* at 703-4. Watanabe stated that "[s]ustaining the life of a transplant patient is said to be a tightrope walk between infection and rejection." *Id.* Another problem this author has is that although Japan averages about 7,000 people per year who have succumbed to brain death, the majority of those are over the age of 60. See *id.* at 704. Consequently, there are not as many suitable organs as the proponents brain death believe. *Id.* at 705.

89. See Forster, *supra* note 86, at 115-16.

90. *Id.* at 116-17. This communal identity is demonstrated by, for instance, "traditional birth and funeral rituals."

91. *Id.* The decedent's body and organs equally belong to the family, who must give their approval before organ procurement may begin.

92. See Haruko Akatsu, *The Heart, the Gut, and Brain Death in Japan*, HASTINGS CENTER REP., Mar./Apr. 1990, at 2. "For example, a Japanese Samurai warrior, when committing suicide plunged the sword into his belly, not into his heart or his brain." *Id.*

are unacceptable.⁹³ Many Japanese believe that it is unnatural to declare one brain dead while that person's chest is still moving.⁹⁴

Many of the social barriers can be further explained by the various Japanese religions. Buddhists believe, for instance, that to be declared brain dead while one's heart continues to beat is wrong and that "until the body is wholly dead, there is no oneness at death."⁹⁵ Also, in order to reach attainment, a deceased must remain "in this world for forty-nine days ..."⁹⁶ Thus, many fear that removing one's organs during this attainment period will disrespect the spirit "who is still present."⁹⁷ Another religion practiced in Japan, Shintoism, proscribes that one's spirit will be content so long as the individual did not die a violent death.⁹⁸ Taking one's organs while the heart is still beating constitutes a violent death.⁹⁹ Ancestor worship, which is a combined form of Shinto, Confucian, and Buddhist beliefs, is yet another example of strong religious beliefs against brain death and cadaveric organ procurement. Those who practice Ancestor worship believe that after they die they enter a community of spirits and then, thirty-two years after death, they become ancestors through a series of rituals.¹⁰⁰ During the thirty-two year ritual period, the decedent's family commits to making their loved one's spirit happy and comfortable.¹⁰¹ Family members believe that procuring organs from their decedent loved one is contrary to their obligation, as the spirit may become unhappy.¹⁰² Although Ancestor worship appears to be declining in practice, the other religious beliefs will preclude many Japanese from accepting brain death and cadaveric organ transplant.¹⁰³

93. *Id.* Compounding these concerns are the public's mistrust of medical personnel due to poor quality control and lack of accountability. See Leflar, *infra* note 131, at 69-70; see also *infra* Part III(C).

94. See Akatsu, *supra* note 92.

95. Forster, *supra* note 86, at 116, 118. The Buddhists feel that declaring one dead while one's body contains living cells is contradictory to death. *Id.* at 118.

96. *Id.*

97. *Id.* Some commentators feel, however, that organ donation "supports True Offering, a gift of compassion which has no feelings of regret or self-praise attached."

98. *Id.* Also, "injuring a corpse is taboo."

99. *Id.* at 118-19. Although one may consent to organ donation, family members would rather ignore one's living will than injure the corpse.

100. *Id.*

101. Forster, *supra* note 86, at 118-19.

102. *Id.*

103. *Id.*

B. *Japan's stringent method of cadaveric organ procurement.*

Despite the obstacles, on June 17, 1997, Japan passed its first law that formally recognized brain death.¹⁰⁴ Under the new law, however, brain death is only recognized by those "who have previously expressed a willingness to donate their organs."¹⁰⁵ The law was passed for the sole purpose of facilitating organ procurement, rather than as a rigid declaration that brain death indicates the end of human life.¹⁰⁶

At first glance, the new organ transplant law appears similar to the United States' laws with the overall theme of voluntary consent.¹⁰⁷ Also, Japan's new law appears to clear the obstacles that, at one time, hindered its cadaveric organ supply. A thorough examination of the new organ transplant law, however, reveals some substantial hurdles. First, the voluntary requirement of Japan's new law is more stringent than the consent requirement in the United States.¹⁰⁸ Would-be donors, for instance, not only consent to organ procurement, but they also must consent to the pronouncement of brain death — all of which must be in writing.¹⁰⁹ This provision helps to explain that brain death will only be recognized by consenting would-be donors. In addition to the individual donor's consent, and in contrast to the 1968 and 1987 UGAGs, next-of-kin must give their consent to organ procurement and the pronouncement of brain death.¹¹⁰ A significant difference that helps make this new law one of the "most stringent in the world,"¹¹¹ is that a would-be donor must be at least fifteen years old.¹¹²

104. *See Organ Transplant Law Not Really a Panacea*, DAILY YOMIURI, June 18, 1997, at 6, available in LEXIS, News Library, A-WLD File.

105. *Id.*

106. *Id.*

107. *See generally*, UNIF. ANATOMICAL GIFT ACT (1968) §§ 1-7, 8A U.L.A. 63 (1993 & Supp. 1998); and UNIF. ANATOMICAL GIFT ACT (1987) §§ 1-15, 8A U.L.A. 19 (1993 & Supp. 1998).

108. *Id.*

109. *Id.*; *see also Organ Transplant*, MAINICHI DAILY NEWS, Sept. 28, 1997, at 7, available in LEXIS, News Library, A-WLD File.

110. *Id.* Experts fear that one objection from any of a would-be donor's next-of-kin would be sufficient to preclude organ procurement.

111. *See Ready, Set—No Go on Organ Transplants*, DAILY YOMIURI, Nov. 12, 1997, at 7, available in LEXIS, News Library, A-WLD File.

112. Not even a child's parents may substitute their consent. Compare Japan's requirement with the 1968 and 1987 UAGAs, both of which authorize next-of-kin consent for minors. *See* UNIF. ANATOMICAL GIFT ACT (1968) §2, 8A U.L.A. 63 (1993 & Supp. 1998); and UNIF. ANATOMICAL GIFT ACT (1987) §3, 8A U.L.A. 19 (1993 & Supp. 1998).

Also, at least two doctors not involved in the procurement process are to confirm brain death.¹¹³

C. *Japan's new law's success and problems.*

Japan's stringent organ transplant law is defined by some as the "Organ Transplant Prohibition Law."¹¹⁴ Presently, the new law has enjoyed little success and has endured much criticism. One of the problems that hinders the new transplant law's success is the relatively few Japanese who have died carrying donor cards.¹¹⁵ Of the individuals who had donor cards, some did not consent to the pronouncement of brain death, and one other filled out his card improperly.¹¹⁶ In one instance, stringent donor card interpretations led authorities to deny procurement of the heart and liver of Japan's first donor card carrying cadaver — a fifty-year-old male.¹¹⁷ Because the man failed to check one of the options on his donor card, doctors were precluded from procuring the man's organs until after his heart stopped beating.¹¹⁸

Another problem hindering cadaveric organ procurement is the fear in the Japanese medical community of criminal prosecution against those who procure organs from brain-dead cadavers.¹¹⁹ This fear stems from a murder complaint against a doctor, who in 1968, performed Japan's first and only heart

113. See MAINICHI DAILY NEWS, Sept. 28, 1997, *supra* note 109.

114. For example, because of the age minimum, some children will be deprived of their chances to undergo organ transplant operations. See *id.*; and see 1997: *An Annus Mirabilis for Science*, DAILY YOMIURI, Jan. 7, 1998, at 7, available in LEXIS, News Library, A-WLD File.

115. Although four million donor cards were distributed, only nine people died with organ donor cards during the first six months of the new law's tenure. See *Steep Hurdles Continue to Block Easy Organ Transplants*, JAPAN ECON. NEWswire, Apr. 13, 1998, at 1. Available in LEXIS, News Library, A-WLD File. "Of the nine, two opted for donation after heart stoppage, one gave no clear position, while the other six chose to donate all their organs after brain-death. However, in all but one case, the donors died of causes that did not result in brain death only." *Id.*

116. *Id.*

117. See *Card Error Blocked Heart, Liver Transplants*, JAPAN ECON. NEWswire, Jan. 6, 1998, available in LEXIS, News Library, A-WLD File.

118. *Id.* Although he marked that he consented to donate his heart, liver, lung, pancreas and kidney, he failed to mark the section asking whether to donate his organs before or after brain death. Once his heart stopped beating, however, doctors were able to procure the man's kidney, cornea and portions of his skin. *Id.* Another reason for the failure to procure his organs at brain death, was the man "became brain dead at a hospital that was not designated as eligible to take and provide organs from brain-dead donors." *Id.* Another article implies that a would-be donor's family members must also sign the donor card. See *Transplant Refused After Donor Card Judged Invalid*, DAILY YOMIURI, Jan. 7, 1998, at 2, available in LEXIS, News Library, A-WLD File.

119. See JAPAN ECON. NEWswire, Apr. 13, 1998, *supra* note 115.

transplant.¹²⁰ Since this incident, “eight transplant operations in which organs from brain-dead donors were used have come under the scrutiny of law enforcement officials, with criminal complaints filed in each of the eight cases.”¹²¹

The lack of social acceptance of the new law presents a significant problem.¹²² Prior to the approval of the new Japanese organ transplant law, one newspaper reported that a majority of the public wished to have their organs donated after they were pronounced brain dead and that “they would approve organ donations from brain-dead family members who previously gave their consent ...”¹²³ After the new law went into effect, however, other newspapers reported that social acceptance has declined.¹²⁴

Other social problems concerning this new law stem from the way Japanese family members assist their loved ones while their loved ones are treated in a hospital.¹²⁵ Because the Japanese family normally takes the predominant role of the nurse when their loved ones are in a hospital, Japanese doctors are reluctant to ask family members for their consent to remove organs, “especially when the brain-dead person is still breathing and warm.”¹²⁶ Also, because there is no policy of informed consent in Japan, “patients and family are kept outside of the medical decision-making process.”¹²⁷ In addition, strong

120. *Id.* Although a complaint was filed, the doctor was not prosecuted.

121. *Id.* In 1968, family members filed a murder complaint against a hospital in which doctors procured the kidneys from a patient whose heart stopped beating. Other problems the article cites to are that brain death accounts for only one percent of Japan’s deaths, and only a small number of Japanese hospitals are authorized to perform transplantation proceedings from brain-dead donors. *Id.*

122. See *Organ Transplants Take Longer to Realize*, JAPAN ECON. NEWSWIRE, Apr. 13, 1998, at 1. Available in LEXIS, News Library, A-WLD File; and see *Transplant Law a Month Old, but No Operations Performed*, NIKKEI WKLY., Nov. 24, 1997, § Politics & Society, at 4, available in LEXIS, News Library, A-WLD File; see also *supra* Part III(A).

123. The poll consisted of 1,256 computer randomly selected adults. See *Poll: Public Support for Organ Transplants Growing*, MAINICHI DAILY NEWS, July 5, 1997, § Domestic, at 18, available in LEXIS, News Library, A-WLD File. “Fifty-six percent expressed a willingness to donate their organs, 32% did not; 67% were willing to approve donations of organs of family members, while twenty-two said no.” Of the people who were willing to donate their own organs, 83% stated “they would approve transplants of organs of family members who had previously given consent.” In a similar poll conducted in 1991, “53% were willing to donate their organs, while 43% were not.” *Id.*

124. See JAPAN ECON. NEWSWIRE, Apr. 13, 1998, *supra* note 122; see also NIKKEI WKLY., Nov. 24, 1997, *supra* note 122.

125. See Forster, *supra* note 86, at 119-21.

126. *Id.*

127. See Forster, *supra* note 86, at 120; see also DAILY YOMIURI, *supra* note 104.

fears among the Japanese that a doctor might declare a patient brain dead when that patient is still alive is another problem hindering the new law's success.¹²⁸

Despite Japan's attempt to increase its supply of cadaveric organs, many legal questions must be answered and public scrutiny must be minimized before its new law will achieve much success.¹²⁹ One of the questions that must be addressed if Japan expects its citizens to consent to organ procurement of their loved ones is informed consent.¹³⁰ Informed consent is not practiced the same way in Japan as in the United States.¹³¹ Rather, Japanese doctors practice more of a paternalistic approach towards their patients.¹³² Important medical information that is necessary to make an informed decision is usually withheld for the good of the patient.¹³³

In light of all the problems, patients continue to go abroad for life-saving organs.¹³⁴ Clearly, it will take some time to break through Japan's social and

128. See Forster, *supra* note 86, at 120-22; see also Akatsu, *supra* note 92.

129. "It is unclear, for instance, who should be brought in to confirm that a patient is brain dead, who would actually donate a body from which organs would be removed, and the timing of transplants." DAILY YOMIURI, Jan. 7, 1998, *supra* note 114. Other uncertainties include, "who will explain to the patient's family about the need to confirm brain death and under what authority. The law also fails to address the dignity of and respect for those who are at the point of death." *Id.*

130. The public should know about the care that their terminally ill loved ones may receive. *Id.*

131. For a comparative analysis of informed consent between Japan and the United States, see Robert B. Leflar, *Informed Consent and Patients' Rights in Japan*, 33 HOUS. L. REV. 1, 45-61. (1996). For a thorough explanation of informed consent in the United States, see BARRY R. FURROW ET AL., HEALTH LAW §§ 6-9 to 6-19, at 265-88 (1995).

132. Informed consent in the United States grew out of a strong deference towards individual autonomy. See FURROW, *supra* note 131, § 6-9 at 265-66. This deference stemmed from the "prevalent belief that an individual has a right to be free from non-consensual interference with his or her person, and a basic moral principle that it is wrong to force another to act against his or her will." *Id.* Japan, however, adheres to more of a group orientated view, and many times medical information is withheld from the patient. See Leflar, *supra* note 131, at 18. Rather than deferring towards individual autonomy, in Japan, there is a stronger deference towards medical custom. *Id.* at 48-61.

133. The diagnosis of cancer, for instance, is withheld from the patient; but as a substitute, the patient's physician discusses treatment and a limited prognosis with the patient's family. See Leflar, *supra* note 131, at 20-27. Presently, there is an ongoing debate over informed consent, and there have been hints of a gradually developing trend towards a more western style of informed consent; however, this style is far away. *Id.* at 110-112.

134. Since the law's approval, two children traveled to the United States for organ transplants, "and two adults died while preparing to leave for treatment abroad." See JAPAN ECON. NEWSWIRE, Apr. 13, 1998, *supra* note 122. One of the parents, when referring to the current age minimum of 15 under the new law said: "I hope the age limit will be abolished, because going overseas for a transplant is too much for parents to bear..." *Id.* One Japanese woman who was suffering from cardiomyopathy said, "I really wish I could have it in Japan, but I have no choice [but to do it elsewhere]." *Id.* One Japanese man died from complications of his illness one month before he was scheduled to travel to the United States to receive an organ. If he

religious barriers before Japan will achieve success in its cadaveric organ program.

IV. SINGAPORE'S LAW: A COMBINATION OF PRESUMED AND VOLUNTARY CONSENT.

While Japan's method of procuring cadaveric organs is very strict, Singapore has adopted quite a different approach — presumed/voluntary consent.¹³⁵ Singapore, a small city-state with 2.7 million people, performed its first kidney transplant in 1970.¹³⁶ Originally, Singapore used a voluntary system of organ donation.¹³⁷ During its tenure, Singapore enjoyed a good track record with its renal transplants. Nonetheless, this voluntary system was producing little, if any, cadaveric kidneys.¹³⁸ In June 1987, in an effort to remedy its cadaveric kidney shortage, Singapore passed the Human Organ Transplant Act (HOTA).¹³⁹

This section will examine HOTA along with some of the other countries that have adopted similar laws. Part IV(A) will discuss each of HOTA's presumed consent provisions. Next, Part IV(B) will describe the other part of Singapore's organ procurement law—the voluntary requirement of those whom HOTA does not presume to consent. Part IV(C) will compare Singapore's presumed consent provision to some of the other countries' versions of presumed consent. Finally, Part IV(D) will consider the viability of adopting presumed consent in the United States.

A. *Presumed consent*

Singapore's HOTA, commonly referred to as a system of presumed/voluntary consent, presumes one group of its citizens consent to donate their organs, but presumes another group does not.¹⁴⁰ Under HOTA, the law "presumes that all mentally competent citizens or permanent residents between the ages of twenty-one and sixty who are victims of fatal accidents are kidney

would have lasted another month, the trip to Utah would have cost him 40 million yen. *Id.* Another Japanese woman traveled to Australia for a lung. *See* NIKKEI WKLY., Nov. 24, 1997, *supra* note 122.

135. *See* Gorsline & Johnson, *supra* note 16, at 24-25.

136. In 1990, it performed its first heart and liver transplant. *See* Bernard Teo, *Organs for Transplantation: The Singapore Experience*, HASTINGS CENTER REP., Nov. 1991, at 10.

137. *Id.*

138. Between 1970 and 1976, Singapore averaged only three kidneys per year. *Id.* "None were available for 1977, 1979, 1980, and 1981; two for 1978, six for 1982, seven for 1983, 14 for 1984, and only one for 1985." *Id.*

139. *Id.*

140. *Id.*; *see also* Gorsline & Johnson, *supra* note 16, at 25.

donors unless they have registered prior dissent. Next-of-kin do not have to consent.”¹⁴¹ What puts teeth into the law and makes HOTA a law of presumed consent is the language, “... *unless registered prior dissent*.” [Emphasis added].¹⁴² HOTA’s presumed consent provision, however, relates only to kidneys and not to any other organs.¹⁴³ In addition, HOTA limits the age to consent, and it also limits the manner in which a would-be donor has died-by fatal accident.¹⁴⁴ Finally, consent from next-of-kin is unnecessary.¹⁴⁵

When first adopted, HOTA enjoyed an early success. Recently, however, this trend has regrettably reversed. Singapore was the first Asian country to adopt presumed consent with respect to cadaveric organ procurement.¹⁴⁶ When Singapore adopted HOTA, it did not impose presumed consent status immediately, but rather implemented the presumed consent provision smoothly over time.¹⁴⁷ After Singapore adopted HOTA, the average number of kidneys procured per year jumped from 4.7 before HOTA to 31.3.¹⁴⁸ More recently, however, one article reported that the number is closer to twenty per year — eight kidneys per million people.¹⁴⁹ The early success of HOTA, therefore, has not stabilized, but rather it has reversed. One doctor believes the reversing trend is due to the reliance on HOTA’s presumed consent provision.¹⁵⁰ If this

141. Teo, *supra* note 136, at 10.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. See Gorsline & Johnson, *supra* note 16, at 25.

147. See Teo, *supra* note 136, at 10. For example, dissenters were given six months in which to register their dissent by completing an Objection-to-Kidney-Removal card, which was made readily available. Also, widespread media attention was directed at informing Singaporean citizens about the new law. *Id.* Presently, Singapore notifies its citizens, and just prior to turning 21, the government mails them a letter “informing them of their duty to opt-out if they so desire.” Melissa N. Kurnit, Note, *Organ Donation in the United States: Can We Learn from Success Abroad?* 17 B.C. INT’L & COMP. L. REV. 405, 425 (1994).

148. See Gorsline & Johnson, *supra* note 16, at 25. “Of those organs procured, 58.5% were attributed to HOTA and 41.5% to voluntary donation.” *Id.* at 25, n.203.

149. See Indrani Nadarajah, *No Donors, So List for Kidney Transplants Grows*, STRAITS TIMES, May 12, 1997, § News Focus, at 3, available in LEXIS, News Library, A-WLD File. During the two-year period from 1994 to 1996, the number of kidneys procured dropped from 84 in 1994 to 44 in 1996—nearly a 50% drop. *Id.* In 1995, 53 kidneys were procured. *Id.* Singapore’s average of eight million cadaveric donors per year was actually less than half of the average of the United States’ figures in 1995. See *United Network for Organ Sharing* (visited Sep. 19, 1998) <<http://traders.co.uk/insulintrust/unos.htm>> [hereinafter *UNOS Report*]. The average cadaveric donor per million persons in the United States was 20.9 per million. *Id.*

150. See *Public Education Drive to Get More Organ Donors*, STRAITS TIMES, Nov. 20, 1995, § Home, at 33, available in LEXIS, News Library, A-WLD File.

reliance were true, Singapore would ignore a large population of its potential donors — those exempt under the presumed consent provision.¹⁵¹

B. *Voluntary Consent*

Along with HOTA's strong presumed consent provision, its success also depends on individuals who have not consented under the law.¹⁵² Indeed, one doctor pointed out that "[t]he bulk of organs available for transplant, however, come from donors who have opted to donate their organs upon death ..."¹⁵³ But in the past, only a fraction of those available to opt-in actually carried donor cards.¹⁵⁴ Under HOTA, Muslim Singaporea — a large part of Singapore's population — "are automatically considered objectors to HOTA on religious grounds."¹⁵⁵ Consequently, Singapore's sole reliance on HOTA's presumed consent provision excluded nearly half of its potential supply of cadaveric organs.¹⁵⁶

To realize its potential supply, Singapore was required to address the factors that hindered voluntary consent. A significant factor, precluding most Muslims from donating their organs, was the belief that Islamic law forbade organ donation.¹⁵⁷ Such a belief led to a Singaporean education drive directed at Muslims, in which Islamic leaders acknowledged that organ donation was not illegal so long as the parts saved lives.¹⁵⁸

151. *See, eg.*, Teo, *supra* note 136, at 10.

152. *Id.*

153. STRAITS TIMES, Nov. 20, 1995, *supra* note 150, at 33.

154. *Id.* In 1995, "only 29,000 out of 1.5 million Singaporeans above the age of 18 [held] the donor card." *Id.*

155. *Id.*

156. *See* Teo, *supra* note 136, at 10.

157. *See* Christina Williams, Note, *Combating the Problems of Human Abuses and Inadequate Organ Supply through Presumed Consent*, 26 CASE W. RES. J. INT'L L. 315, 339 (1994). Also, fears concerning medical and legal safeguards, similar to those realized in the United States, were among other influential factors that hindered voluntary consent. *See Organ Donors Less Wary "If They Knew Safeguards,"* STRAITS TIMES, June, 21, 1992, § Home at 16, available in LEXIS, News Library, A-WLD File; STRAITS TIMES, Nov. 20, 1995, *supra* note 150, at 33. And for similar fears in the United States, *see infra* Part II(D). Most of these fears, however, could be lessened with a program designed to educate the public. *See also* STRAITS TIMES, June, 21, 1992, *supra*.

158. *Id.* at 339-40, nn.155-56. "The object of transplanting a kidney from the body of a deceased Muslim to that of a donee is primarily and exclusively to save lives. On no account can a kidney be allowed to be removed from the body of a Muslim for other purposes..." *Id.* at n.155 (citing HUMAN ORGAN TRANSPLANT ACT, 1987, pt. IV, S14 (Sing.), reprinted in REPORT OF THE SELECT COMMITTEE ON THE HUMAN ORGAN TRANSPLANT BILL (Bill No. 26/86)). For an article discussing a new Bioethics course in which Singaporean law students learn about the intricacies of organ donation, *see* Serena Toh, *Law Students*

Another helpful practice, although not required by HOTA, is that many hospitals notify transplant coordinators about those patients “who are dying from causes other than fatal trauma and who have not made voluntary pledges.”¹⁵⁹ This practice is similar to the Referral and Request regulation in the United States.¹⁶⁰ Another similarity to the United States’ recent regulation is that once a transplant coordinator is notified, “[t]he next of kin are then tactfully approached for consent to post mortem removal of their loved one’s organs.”¹⁶¹

C. *How does HOTA stack up to other presumed consent laws?*

All presumed consent laws have one thing in common — without an expressed statement to the contrary, one is presumed to consent to donate his or her organs. But some of these laws are more stringent than others.¹⁶² Austria, for instance, strictly adheres to its presumed consent law.¹⁶³ In Austria, so long as a decedent previously did not object to organ procurement, the procurement of the decedent’s organs will be permitted without considering the decedent’s next-of-kin’s wishes.¹⁶⁴ This is called “pure presumed consent.”¹⁶⁵

in HUS to Have New Course on Bio-ethics, STRAITS TIMES, May 18, 1992, § News Focus, at 3, available in LEXIS, News Library, A-WLD File.

159. See Teo, *supra* note 136, at 10.

160. See PUBLIC HEALTH, 42 C.F.R. pt. 482.45 (LEXIS through Aug. 18, 1998 Reg. Sess.).

161. Teo, *supra* note 136, at 10. Since this practice is not unanimous, HOTA should be amended to mandate either routine inquiry by the hospitals or notification to a transplant coordinator and required request. *Id.* For another problem where the author suggests HOTA’s priority principle and incentive provisions undermine its humanitarian purpose, see PUBLIC HEALTH, 42 C.F.R. § 482.45.

162. For example, two economists defined both ends of the presumed consent spectrum as follows: the most stringent form of presumed consent includes conscription or organ draft, which when applied, organs are procured without obtaining consent from anyone; at the other end of the spectrum are those presumed consent laws that give a right to object to organ procurement by the would-be donor and the surviving next-of-kin. See A.H. Barnett & David L. Kaserman, *The Shortage of Organs for Transplantation: Exploring the Alternatives*, 9 ISSUES L. & MED. 117, 123 (1993). The less stringent method includes personnel informing the would-be donor or the surviving next-of-kin of their right to object. Actually, the less stringent end of the spectrum appears to more accurately reflect the classic opt-in system. *Id.*

163. See Kurnit, *supra* note 147, at 423.

164. See Gorsline & Johnson, *supra* note 16, at 22. The objection must be in writing and it must accompany the body. See *id.*; and see Kurnit, *supra* note 147, at 423.

165. For a more in-depth discussion about Austria’s pure presumed consent law, see Gorsline & Johnson, *supra* note 16, at 22; Kurnit, *supra* note 147, at 423; and Williams, *supra* note 157, at 340-44. Austria does not discriminate when it comes to procuring one’s organs—it includes foreigners as well. See Dr. James Le Fanu, *Review: Gifts of Life Cannot be Left to Chance Dr. James Le Fanu Considers the Options for Doctors Facing a Shortage of Donors*, SUNDAY TELEGRAPH, July 19, 1992, at 108, available in LEXIS, News Library, A-WLD File. The article suggested the following warning to those who plan a

Despite Austria's somewhat barbaric approach to cadaveric organ procurement, its method enjoys more success than its European counterparts, as well as the United States.¹⁶⁶

Austria is not the only European country with a presumed consent law. In fact, thirteen European countries have such a law in effect, though not as strict as Austria's.¹⁶⁷ France, for instance, practices a less stringent method of presumed consent.¹⁶⁸ It allows an objection to organ donation made in any manner, which is then registered in a hospital.¹⁶⁹ In practice, the strength one would expect to find under the auspices of presumed consent is missing. For example, next-of-kin cannot prevent the organ procurement of their deceased loved one if their loved one failed to object to organ donation; however, it is not practiced by France's physicians.¹⁷⁰ Instead, "physicians rarely remove organs if the family objects."¹⁷¹ Also, the presumed consent law bears even less bite when one considers the requirement that — prior to organ procurement — any physician participating in the procurement process must make reasonable efforts to locate a decedent's possible objection.¹⁷² This requirement is similar to the 1987 UAGA, which requires that a coroner or a medical examiner must conduct a reasonable search for a decedent's next-of-kin to request their consent to procure the decedent's organs.¹⁷³

skiing holiday in Austria: "[I]f you fall over a precipice and end up in the intensive care unit of the nearest hospital with irreversible brain damage, by the time your corpse is flown home it will be sans kidneys, sans heart, sans lung—indeed, sans virtually everything." *Id.*; see also Graham Lees & Peter Hoffer, *Dead Climber's Organs Taken for Transplants*, DAILY TELEGRAPH, Sept. 7, 1991, § International, at 9, available in LEXIS, News Library, A-WLD File. This article reported that Austrian hospitals may "remove organs from any foreigner who dies in an accident unless the dead person is carrying a letter forbidding such action ... " *Id.*

166. See Williams *supra* note 157, at 341. In a more recent list provided by the United Network for Organ Sharing, however, the difference in the average cadaveric donors per million persons between Austria and the United States was about three donors per million persons. See UNOS Report, *supra* note 149.

167. *Id.* at 338, n.146. Some of the countries that have adopted presumed consent and their respective cadaveric donors per million persons are as follows: *Spain—27.0, Austria—24.0, Belgium—19.0, *Portugal—20.0, Finland—19.4, France—15.5, *Italy—10.1, *Luxembourg—10.0, and *Greece—5.6. See UNOS Report, *supra* note 149. * Those countries with presumed consent laws that do not practice "pure presumed consent."

168. See Kurnit, *supra* note 147, at 421-22.

169. *Id.* at 421.

170. *Id.* at 422.

171. *Id.*

172. *Id.* A hospital register, for instance, would be one place to search. See *id.* It does not require reasonable efforts to obtain consent from next-of-kin. See *id.*

173. See UNIF. ANATOMICAL GIFT ACT (1987) §§ 4(a)-(b), 8A U.L.A. 19 (1993 & Supp. 1998).

D. *Is presumed consent a viable option in the United States?*

Although the numbers mildly suggest that adoption of a presumed consent law will increase the supply of cadaveric organs, most states in this country will not rely merely on numbers.¹⁷⁴ Rather, they are forced to deal with the prevalent views that support the current voluntary system.¹⁷⁵ Both the 1968 and the 1987 UAGAs respect personal autonomy over one's body.¹⁷⁶ Indeed, it is personal autonomy's attractiveness that may drive the stake through the heart of presumed consent in the United States. Personal autonomy stems from the encouragement of voluntary altruism and benevolence.¹⁷⁷ Encouraging altruism and benevolence will likely foster generosity among others, promoting a "better human community in which giving and receiving is the rule."¹⁷⁸ A system such as presumed consent clearly will not foster an individual's generosity. Thus, the ideal spirit of a civilized community may indeed dwindle to callousness.¹⁷⁹

The altruism and benevolence of America's public with respect to giving their organs after death seemed clear after a recent survey in which the majority said they would consent to donate their organs.¹⁸⁰ In reality, however, quite the contrary exists.¹⁸¹ So many people support organ donation, yet because so few actually consent when it really counts, some commentators have argued that adopting a presumed consent law in the United States will simply coerce where

174. Actually many of the countries, which have adopted presumed consent laws, are experiencing a success rate at or even less than the success rate in the United States. See UNOS Report, *supra* note 149.

175. For commentaries on the possibility of adopting presumed consent in the United States, see Gorsiline & Johnson, *supra* note 16; Kurmit, *supra* note 147; Naylor, *supra* note 16; Silver, *supra* note 16; and Williams, *supra* note 157.

176. See generally, UNIF. ANATOMICAL GIFT ACT (1987); and UNIF. ANATOMICAL GIFT ACT (1968) §§ 1-7, 8A U.L.A. 63 (1993 & Supp. 1998).

177. See Kurmit, *supra* note 147, at 426.

178. See Silver, *supra* note 16, at 696.

179. *Id.* at 696-97.

180. See *1993 Gallup Poll: Majority of Americans Support Organ Donation*, <<http://www.transweb.org/partnership>> [hereinafter *1993 Gallup Poll*] In this recent Gallup poll, 85% of the Americans surveyed answered that they supported organ donation. See *id.* Thirty-seven percent were very likely to consent to donate their own organs after death; 32% were somewhat likely to do the same, and 25% were not likely to donate their organs after death. See *id.* Ninety-three percent indicated that they would indeed support a family member's request to donate, but less than half—47%—indicated it would not matter if donation was not discussed beforehand. *Id.*

181. Referring to a 1985 Gallup Poll survey, one author noted, "[t]hat 75% say 'yea' to organ donation from an armchair, while 83% say 'nay' from the deathbed, suggests that most people believe they should donate their organs post-mortem but cannot bring themselves to do so." Silver, *supra* note 16, at 697.

voluntary incentive is lacking.¹⁸² A careful analysis of current law suggests that the coercion has indeed begun.

The limited presumed consent provision — section four of the 1987 UAGA — has already taken the first step towards presumed consent.¹⁸³ Of the states adopting the 1987 UAGA, most adopted this limited presumption and others either omitted it or further limited it to the procurement of corneas or pituitary tissue or both.¹⁸⁴ All of these states require qualified medical personnel to make a reasonable search for the decedent's next-of-kin prior to organ procurement.¹⁸⁵ Some have exempted certain religious groups.¹⁸⁶

Many of these limited presumptions have been challenged on property and personal rights grounds.¹⁸⁷ Although many courts have not recognized a complete property right over a loved one's body, courts recognized that a decedent's next-of-kin possesses a quasi-property right for the purpose of burial.¹⁸⁸ Consequently, presumed consent appears to pass any legal or constitutional barriers in the United States. Indeed, a jurisdictional determination that next-of-kin possess only quasi-property rights may be another step towards presumed consent.¹⁸⁹

The barrier of autonomy, however, remains. It is a barrier that many physicians have not crossed even in countries that have adopted presumed consent laws. Many physicians, for instance, continue to request consent from the decedent's next-of-kin, even though they are not required to do so.¹⁹⁰ Under

182. *Id.*

183. See UNIF. ANATOMICAL GIFT ACT (1987) §§ 4(a)-(b), 8A U.L.A. 19 (1993 & Supp. 1998); see also *supra* Part II(C).

184. For states that have either omitted section four or modified it, see *supra* note 66.

185. For the language creating this duty, see UNIF. ANATOMICAL GIFT ACT (1987) §4(b). If the only parts that are going to be procured are corneas, California's statute does not impose a duty search. See CAL. HEALTH & SAFETY CODE § 7151.5.

186. Those states that have adopted religious exceptions are Connecticut and Iowa. See CONN. GEN. STAT. ANN. § 19(a)-281; and IOWA CODE ANN. § 142C.6.

187. See *supra* Part II(C).

188. See generally, *supra* notes 33, 60.

189. So long as a decedent's next-of-kin can perform a proper and decent burial for their loved one, case law suggests that this quasi-property right has been satisfied. See *supra* note 60.

190. For example, Singaporean doctors request family consent when ever possible, even though the law does not require it. See Teo, *supra* note 136, at 10. Other countries where doctors request consent from next-of-kin are France and Belgium. See Gorsline & Johnson, *supra* note 16, at 23-24; Kurnit, *supra* note 147, at 421-23; and Williams, *supra* note 157, at 340-41. These softer versions of presumed consent appear to be more in line with the 1968 and 1987 UAGAs concerning personal autonomy; that is, when a decedent's intention about whether he or she consented to organ donation is unknown, the present law requires physicians and hospital staff to honor the decedent's autonomy through the decedent's next-of-kin. See UNIF.

a pure system of presumed consent, the decedent's autonomy, if unexpressed, is replaced by the government's and public's interests in saving lives.¹⁹¹ In the United States, the majority of Americans said they would consent to organ donation.¹⁹² Cloaking the opt-out provision into the form of autonomy assumes, however, that all who object will take the initiative and register their dissents.¹⁹³ But if the various states' legislatures were to consider the viability of presumed consent in the United States, they must undoubtedly be willing to find that state and public interests outweigh the interests of personal autonomy. For a presumed consent system to enjoy appreciable success, all those involved in the procurement process must presume one consents without consulting with next-of-kin.¹⁹⁴ Although presumed consent is acceptable in other countries, it will most likely not be so acceptable in the United States.

V. CHINA'S METHOD OF ORGAN PROCUREMENT: AN INHUMANE HARVEST?

The lack of personal autonomy, even in the purest form of presumed consent, is merely a brick in the Great Wall compared to the shocking manner in which China procures/harvests its citizens' organs. This part will expose China's disturbing practice. Part V(A) will unveil perhaps the most inhumane method of organ procurement in the world, which is killing for organs. Part V(B) will disclose what China does with the cadaveric organs once harvested. And finally, Part V(C) will attempt to shed some light on some of the views in the United States about the procurement of its own executed criminals' organs.

A. *Organ procurement from a freshly executed corpse.*

Imagine a loved one is yanked out of bed in the middle of the night by the

ANATOMICAL GIFT ACT (1968) §2(b), 8A U.L.A. 63 (1993 & Supp. 1998); and UNIF. ANATOMICAL GIFT ACT (1987) §3, 8A U.L.A. 19 (1993 & Supp. 1998).

191. This may actually prove emotionally beneficial, because of the added emotional stress that emerges when deciding whether to consent to the procurement of a loved one's organs. See I. Kennedy et al., *The Case for "Presumed Consent" in Organ Donation*, 351 LANCET 1650, 1651 (1998), available in 1998 WL 14104066.

192. See 1993 Gallup Poll, *supra* note 168.

193. This seems unlikely in a country where procrastination is so prevalent. Some critics assert: "that presumed consent will 'lead to a situation where the poor, the uneducated, and the legally disenfranchised might bear a disadvantageous burden, and only the more advantaged groups would be able to exercise autonomy,' since only the more advantaged groups would be aware of their right to opt-out." Williams, *supra* note 157, at 343.

194. Unless strict penalties were imposed on medical personnel involved in the procurement process, in the United States—where so many doctors continue to request consent from a would-be donor's next-of-kin—it seems unlikely that a presumed-consent law would be very successful at all. See *supra* Part II(D) and *supra* note 74.

FBI and taken to their headquarters for interrogation. Your loved one is arrested and charged with tax evasion and then immediately locked up in a dark cell. A few days later, your loved one is found guilty of tax evasion and sentenced to death. After the sentence is read, he or she spends the night handcuffed to a chair. The next day your loved one is shot in the head, pronounced dead, then instantly carried off in a van to have his or her organs harvested and sold to the highest bidder. According to many sources, this is exactly what happens in China.¹⁹⁵

In China each year, about 100,000 Chinese are estimated to need organ transplantation surgery.¹⁹⁶ How can China attempt to supply this excessive demand? Through a program of voluntary consent? Absolutely not. Credible sources have unveiled that China's program of cadaveric organ procurement involves the most inhumane practice of all, which is harvesting organs from its executed prisoners.¹⁹⁷ Presently, China's criminal laws recognize sixty-eight crimes that are punishable by death, including car theft and tax evasion.¹⁹⁸ Although a high court perfunctorily reviews capital crimes cases, "the time between arrest and conviction is often days, and reviews have consistently

195. But if your loved one's eyes are needed, he or she will be shot in the heart instead. See Prepared Testimony by T. Kumar Advocacy Director for Asia and Pacific Amnesty International U.S.A. before the House International Relations Committee House Government Reform and Oversight Committee, FED. NEWS SERV., June 16, 1998, § In the News, available in LEXIS, News Library, A-WLD File [hereinafter Testimony by T. Kumar]; Prepared Statement of the Honorable John Shattuck Assistant Secretary of State Democracy Human Rights and Labor before the House International Relations Committee House Government Reform and Oversight Committee, FED. NEWS SERV., June 16, 1998, § In the News, available in LEXIS, News Library, A-WLD File [hereinafter Statement by Hon. John Shattuck]; Prepared Testimony of Tsuyoshi Awaya Professor of Law and Sociology Tokuyama University before the House International Relations Committee House Government Reform and Oversight Committee, FED. NEWS SERV., June 4, 1998, In the News, available in LEXIS, News Library, A-WLD File [hereinafter Testimony by T. Awaya]; see also Lynne O'Donnel, *Organs Ripped from Executed Chinese Prisoners Make Money*, REUTER LIBR. REP., Nov. 21, 1991, at 110, available in LEXIS, News Library, A-WLD File.

196. See Daniel Kwan, *Shortage of Organ Donors*, S. CHINA MORNING POST, July 21, 1997, at 7, available in LEXIS, News Library, A-WLD File.

197. See Testimony by T. Kumar, *supra* note 195; Statement by Hon. John Shattuck, *supra* note 195; Testimony by T. Awaya, *supra* note 195; and see Harry Wu Hongda, *A Grim Organ Harvest in China's Prisons; Kidneys Removed after Executions; Reprinted from 'Open Magazine' January 1995*, WORLDPRESS REV., June 1995, at 22, available in LEXIS, News Library, A-WLD File.

198. Some of the offenses include: "... reselling value added-tax receipts, theft, burglary, hooliganism, seriously disrupting public order, pimping, trafficking of women, taking of bribes, corruption, forgery and tax evasion." Testimony by T. Kumar, *supra* note 195. After arrested and charged with a crime, it takes only days to convict. *Id.* "Condemned prisoners tend to be paraded at mass rallies or through the streets before being privately executed." *Id.* Once sentenced to death, the condemned prisoner is usually handcuffed to a chair overnight, and watched by others in case the condemned prisoner attempts suicide. The next day, the condemned is shot either in the back of the head or in the heart. *Id.*

resulted in confirmation of sentence.”¹⁹⁹ In 1997, China carried out 4,367 executions of its citizens who allegedly committed one of the sixty-eight capital crimes.²⁰⁰

About ninety percent of those executed were used as non-consenting cadaveric organ donees.²⁰¹ China officials vehemently deny this practice,²⁰² and declare that a China regulation expressly prohibits organ procurement from its executed prisoners unless one of the following three criteria have been satisfied: (1) “nobody claims the body or the family refuses to bury it;”²⁰³ (2) “the prisoner voluntarily donates the body for use by medical facilities;”²⁰⁴ or (3) “the inmate’s family consents to its use after death.”²⁰⁵ In regards to the individual consent requirement, it is difficult to imagine that even if a condemned prisoner consented to the harvest, such consent was informed and given freely and voluntarily.²⁰⁶ Nevertheless, China’s system of cadaveric

199. See Statement by Hon. John Shattuck, *supra* note 195. China does not consider its prisoners’ extenuating circumstances of the crime when it imposes the death penalty.

200. See Statement by Hon. John Shattuck, *supra* note 195. Because of the secrecy in China, the actual number of those who were executed may be up to 10 times the amount reported. See Teresa Poole, *China’s Executioners Work Overtime; International Outcry over Organ Transplant Grows as Car Thieves Join Rising Toll of Those Shot after Summary Trials*, INDEPENDENT, Oct. 30, 1994, § World Page, at 16, available in LEXIS, News Library, A-WLD File.

201. See Testimony by T. Kumar, *supra* note 195.

202. Officials argue that most of the information or evidence proving this practice is circumstantial and that the allegations are being made for the sole purpose of interrupting international relations between China and the United States. See *Official Reiterates Denial of Prisoners’ Organs in Transplant Allegations*, BBC SUMMARY OF WORLD BROADCASTS, July 6, 1998, § Part 3 Asia-Pacific; China; Internal Affairs; FE/D3271/G, available in LEXIS, News Library, A-WLD File. Although there appears to be some truth to this, the circumstantial evidence and hearsay relied upon, some argue, was indeed from credible sources. See Statement by Hon. John Shattuck, *supra* note 195. “Credible sources include public statements by patients who have had transplants in China and testimony by doctors and former Chinese officials who claim to have witnessed or taken part in such practices or to have seen incriminating evidence.” *Id.* Also, an arrest in the United States in which two Chinese nationals allegedly offered to sell organs that were removed from Chinese executed criminals helps bolster the evidence that this practice indeed exists. *Id.* Another credible source supporting the alleged practice came from the statement of a Chinese delegate, Sin Yongjin, when he admitted that China harvested its executed prisoners’ organs. See *Awaya, supra* note 195.

203. Statement by Hon. John Shattuck, *supra* note 195. Lack of notice to a family about the imminent execution of their loved one sometimes precludes this category from stopping the harvest process. Another obstacle is the long distances a family must travel to get the body. *Id.* Also, generally the executed are cremated. See Testimony by T. Kumar, *supra* note 195. But when a family requests that their loved one’s body be returned intact, their requests are met with a bill for the expenses incurred for the upkeep while their loved one was in prison. *Id.* Thus, many families cannot afford these bills and must accept the cremated remains of their loved one. *Id.*

204. See Statement by Hon. John Shattuck, *supra* note 195.

205. *Id.*

206. *Id.* According to the Amnesty International report, however, consent is rarely requested. *Id.*

organ procurement truly lies at the most inhumane end of the spectrum — killing for organs.

B. *Chinese organs for sale.*

Once the organs have been harvested, foreigners pay a lot of money and travel to China in order to undergo organ transplantation surgery. According to a Japanese law professor, at least twenty-six Japanese travel to China for the purpose of transplantation surgery.²⁰⁷ Some patients have paid as much as \$70,000 to Chinese hospitals.²⁰⁸ Sales of China's executed prisoners' organs have not been limited to Asia. In 1998, two Chinese citizens were arrested in New York on charges of conspiring to sell human organs.²⁰⁹ They allegedly offered to arrange for kidney transplants inside of China and to export corneas and other body parts to the United States.²¹⁰ In regards to that incident, a Chinese spokesman stated that if the allegations were true, "the relevant departments will punish [them] according to the law."²¹¹

Condemned Chinese prisoners do have the right to voice their objections to organ donation in the form of a written will. However, the chances of the will surviving the censoring process, the handling by prison guards and officials, and finally arriving to the condemned family's residence before the condemned is executed, are very low. *Id.* Extensive and invasive medical examinations are given to those condemned prisoners whom doctors subsequently prepare for harvest, even prior to execution. *Id.* The condemned prisoners are not told the true reasons for these examinations. *Id.* For a more in-depth analysis about the inability of the Chinese condemned prisoner to consent, see Statement by Hon. John Shattuck, *supra* note 195.

207. See Testimony by T. Awaya, *supra* note 195. For an in-depth comment on China's practice, see generally, Kelly M. Brown, Comment, *Execution for Profit? A Constitutional Analysis of China's Practice of Harvesting Executed Prisoners' Organs*, 6 SETON HALL CONST. L. J. 1029, 1061-78 (1996). For China's official response to these allegations, *id.* at 1073-78.

208. See Testimony by T. Awaya, *supra* note 195. Japanese brokers stated that the money paid to Chinese hospitals is distributed to "the related police, military, court, etc. ..." *Id.* In 1991, one Hong Kong citizen paid \$20,000 for a kidney from an executed Chinese prisoner. See O'Donnel, *supra* note 195. A former Chinese police officer was quoted as saying, "[i]f you have the right connections you can arrange to obtain organs for transplant from executed prisoners." *Id.* And the money paid to Chinese hospitals is just part of the money paid for these operations. Patients must pay travel expenses, broker fees, and if they want their own physician to perform the surgery, they must pay his or her expenses and fees. *Id.*

209. See Erik Eckholm, *Arrest Puts Focus on Human Organs from China*, N.Y. TIMES, Feb. 25, 1998, at B4. Allegedly one of the Chinese detainees used to work in China as a criminal prosecutor. *Id.*

210. *Id.*

211. *Id.* Evidently, in 1997, the Chinese government passed a law that banned the sale of organs. *Id.* Hypothetically, if the United States concedes to a probable extradition request, because of the number of relatively minor crimes that are punishable by death, it is at least conceivable that the two prisoners may soon be executed and have their organs harvested and sold to the highest bidder.

C. *The viability of China's method in the United States.*

Presently, an executed prisoner can only donate an organ while alive and the donee must be a family member. Organ procurement at death is prohibited by the Federal Bureau of Prisons.²¹² Some commentators, however, have suggested that condemned prisoners ought to be given the chance to consent to donate their organs before they are executed.²¹³ Just recently, one Missouri state representative proposed a bill that would effectively commute a condemned prisoner's death sentence to life without parole, provided the prisoner consents to donate either a kidney or bone marrow; the proposed bill is called "Life for Life."²¹⁴ Before the various states are able to adopt such a law, they will most likely have to create valid safeguards to ensure that a condemned prisoner's consent is informed and freely given. But even if these safeguards were in place, the National Organ Transplant Law — which prohibits the sale of organs — may prove fatal to any such acts, especially if states offer their condemned life sentences in consideration for organs.²¹⁵

212. See Statement by Hon. John Shattuck, *supra* note 195. This prohibition appears to be practiced in other countries as well.

213. See Laura-Hill M. Patton, Note, *A Call For Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387 (1996). The author suggests that donation would not ensue unless the ill-fated prisoner fully consents. In support of her recommendation, the author chronicles the history of how unidentified bodies and executed prisoners were used as basic anatomical models to the most advanced forms of transplantation. *Id.* Because the current methods of carrying out death penalties across the United States do not foster healthy organs for transplant, the author suggests an alternative method of carrying out these sentences. *Id.* Her proposed method is called the "anesthesia-induced brain death." *Id.*; see also Phyllis Coleman, "Brother, Can You Spare A Liver?" *Five Ways to Increase Organ Donation*, 31 VAL. U. L. REV. 1, 26-38 (1996). Dr. Jack Kervorkian added his own sort of spin-off from this idea. See *Kervorkian Riles Transplant Community by Offering Kidney of Assisted Suicide Client for Transplantation*, TRANSPLANT NEWS, June 15, 1998 available in LEXIS, News Library. As the title suggests, Dr. Kervorkian offered a kidney of a 45-year old male who was a quadriplegic. *Id.* Despite his offer, no physician wanted to use the kidney. *Id.*

214. See *Missouri Legislature Considers Organ Donation from Death Row Inmates*, CORRECTIONS PROF., Apr. 17, 1998, at 1. Available in LEXIS, News Library. Any person sentenced may request to participate in the program between one and two years after the person has been sentenced. In addition, the prisoner must voluntarily give up all rights to appeal. *Id.* Health concerns of an inmate donor are among the noted problems; however, in order to be accepted as a donor, each inmate requesting to participate must pass a thorough physical. Other more significant considerations are, "the difficulty of acceptance of non-family donations, security issues for moving dangerous inmates, and ethical concerns that organs are not for sale." *Id.* Also, the article noted one benefit would be that "possible savings could occur by reducing the number of death sentence appeals." *Id.* For the actual text of the proposed bill, see LIFE FOR LIFE, 1998 Mo. House Bill No. 1670 (SN) (West, WESTLAW through 1998 Mo. 89th General Assembly) (Proposed Official Draft 1998).

215. See CORRECTIONS PROF., Apr. 17, 1998, *supra* note 214; and see generally, National Organ Transplant Act, 42 U.S.C.A. § 274(e) (West 1991).

VI. CONCLUSION

The United States and the various states have passed many laws and regulations to try to increase the supply of cadaveric organs. Unfortunately, thousands continue to die while waiting for suitable life saving organs. Many experts look abroad for help. Japan's law, which is the most stringent, is of no real help. China's practice of killing prisoners and harvesting their organs without informed and voluntary consent is clearly no option. Singapore's and the other countries' presumed consent laws may indeed prove useful. The various states, however, will have to declare that the interests of saving lives outweigh personal autonomy. Although this may be conceived of at least legally, lack of public support may caution those holding public office to back off of their constituents' personal autonomy.

The United States should let the new Referral and Request regulation run its course, as it is directed at solving the many problems that currently hinder cadaveric organ supply.²¹⁶ A significant problem is that many times the decedent's next-of-kin are either not requested to consent, or when they are questioned, they refuse to consent.²¹⁷ Those refusals are sometimes based on common fears that their loved one's doctors will hasten death in order to procure desperately needed organs to save another's life.²¹⁸ Other refusals stem from the way in which they were asked to consent or the quality of care their loved one received before the pronouncement of death.²¹⁹ The new Referral and Request regulation will provide well-trained and experienced organ procurement staff who will help to alleviate many of these fears.²²⁰ The staff will alleviate these fears by educating and counseling the decedent's next-of-kin in order to obtain consent. Also, the Referral and Request regulation was just one of four elements of a joint initiative to increase the supply of cadaveric organs.²²¹ Once the other elements are implemented, other problems related to the public's fears and misunderstandings may also be resolved.²²² Sticking to this initiative will help facilitate an increase in cadaveric organs without trammeling personal autonomy.

216. *See supra* Part II(E).

217. *See supra* Part II(D).

218. *Id.*

219. *Id.*

220. *See supra* Part II(E).

221. *Id.*

222. *See* TRANSPLANT NEWS, *supra* note 77.