Vanderbilt Journal of Transnational Law

Volume 39
Issue 5 *November 2006*

Article 15

2006

Finding the Winning Combination: How Blending Organ Procurement Systems Used Internationally Can Reduce the Organ Shortage

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Finding the Winning Combination: How Blending Organ Procurement Systems Used Internationally Can Reduce the Organ Shortage

ABSTRACT

The shortage in transplantable organs worldwide not only leads to unnecessary death, but also to grave human rights abuses through illegal methods of procuring organs. The shortage leads some desperate to find an organ through any possible means, including purchasing an organ on the black market. The system for procuring organs in the United States is based on altruism, where potential donors have to opt in to the system in order for their organs to be donated. This creates issues at the time of death for medical professionals or the next of kin to decide whether their patient or loved one had decided to donate. This Note explores organ procurement systems used internationally and details the benefits and drawbacks of each. The Author proposes that a blend of some of the systems used internationally could reduce the illegal and immoral methods of organ procurement. The Author argues that the United States needs to implement a national registration system that tracks the willingness of all individuals to donate and is available to hospitals nation-wide through a database. In addition, the Author suggests that non-monetary incentives, including a paired organ exchange and giving priority to those who are themselves listed as donors, will also help decrease the shortage of organs.

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I. INTRODUCTION

More than 93,000 people in the United States are currently in need of an organ transplant.[1] By contrast, only 14,699 transplants

1. United Network for Organ Sharing: Organ Donation and Transplantation, http://www.unos.org (last visited Oct. 1, 2006) (keeping a daily account of the number of waiting list candidates).

occurred in the year ending September 22, 2006.[2] Approximately nineteen people will die each day waiting for an organ donor.[3] The United States is not the only country facing this problem. In India, about 150,000 patients are diagnosed with kidney disease each year, but the number of kidney transplants fell from an estimated 3,600 per year in 2002 to 2,800 per year in 2003.[4]

A shortage in transplantable organs results not only in unnecessary death, it creates other problems worldwide. Internationally, the attempt to fulfill organ donation requests has led to grave human rights abuses through illegal methods of procuring organs. Some people travel to other countries to purchase organs on the black market. For example, in northeast Brazil, the Pernambuco[5] state legislature's investigative commission uncovered an international organ trafficking ring for transplants performed in South Africa.[6] The members of the trafficking ring recruited people in Brazil to sell their kidneys.[7] The sellers were taken to the South African city of Durban for the surgeries.[8] Most of the recipients of the organs were Israelis.[9] The Brazilian sellers were recruited from impoverished neighborhoods.[10] The first sellers were paid ten thousand dollars per kidney, but as the trafficking ring became more "successful" the payments fell to as low as three thousand dollars.[11]

A recent scandal at the University of California at Los Angeles (UCLA) medical school illustrates the demand for organs for medical research purposes in the United States. As part of the Willed Body Program at UCLA, donated bodies are available to the UCLA community for medical education and research.[12] Some body parts intended for the program were sold illegally to corporations involved in private medical research.[13] The individual selling the body parts

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2. *Id.*
3. U.S. Department of Health and Human Services, Organ and Tissue Donation/Transplantation, http://organdonor.gov (last visited Oct. 13, 2006).
4. Ganapati Mudur, *Indian Doctors Debate Incentives for Organ Donors*, 329 BRIT. MED. J. 938 (2004), *available at* http://bmj.bmjjournals.com/cgi/content/full/329/7472/938-d.
5. Pernambuco is a state in northeast Brazil.
6. Mario Osava, *Poor Sell Organs to Trans-Atlantic Trafficking Ring*, INTER PRESS SERVICE NEWS AGENCY, Feb. 23, 2004, http://www.ipsnews.net/print.asp?idnews=22524.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *UCLA Apologizes for Apparent Sale of Body Parts*, CNN.com, Mar. 8, 2004, http://www.cnn.com/2004/US/West/03/08/ucla.cadavers [hereinafter *UCLA Apologizes*].
13. *Id.*

received more than $700,000 from the sales.[14] The families of the donors were extremely disappointed when they heard of the sales of their loved ones' organs and brought class actions against UCLA.[15]

Few nations are able to meet the organ demand through their domestic organ transplant systems.[16] The existence of the international black market shows that the solution to the organ procurement problem must be dealt with on an international rather than a domestic level.[17] Unfortunately, national programs that cannot provide an adequate supply of organs essentially force citizens to look to alternative markets to get them.[18]

A cohesive organ procurement system that combines the beneficial aspects of current international systems would provide a framework for reducing the illegal and immoral methods of organ procurement. An efficient and effective system implemented in the United States would cut down on human rights violations while increasing the supply of available organs.

Part II of this Note discusses how the shortage of organ supplies across nations has created a black market and has led to human rights violations. Part III explores systems currently in place internationally and discusses the benefits and drawbacks of each of these systems. Part IV concludes with a description of a framework that blends the various systems used worldwide to create an efficient and effective organ procurement system for the United States.

II. ORGAN SUPPLY SHORTAGES CREATE AN INTERNATIONAL BLACK MARKET

Patients waiting to receive organ transplants often live in countries where there is an insufficient supply of organs available for transplant. Moreover, nations with the fewest restrictions on organ procurement often generate a surplus of available organs.[19] This situation has led to the development of an international black market for organ sales. Unfortunately, this international market produces human rights violations, including the sale of organs harvested from

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14. Parker & Waichman, LLP, *Donor Tissue and Organs – Life Savers or Deadly Time Bombs?*, PARKER & WAICHMAN, LLP INJURY ALERT, July 1, 2006, http://www.yourlawyer.com/newsletter/read/62.

15. *UCLA Apologizes*, *supra* note 12.

16. Christian Williams, *Combating the Problems of Human Rights Abuses and Inadequate Organ Supply Through Presumed Donative Consent*, 26 CASE W. RES. J. INT'L L. 315, 322 (1994).

17. *Id.*

18. *Id.*

19. David E. Jefferies, Note, *The Body as Commodity: The Use of Markets to Cure the Organ Deficit*, 5 IND. J. GLOBAL LEGAL STUD. 621, 625 (1998).

the poor.[20] It is often the poorer citizens of developing countries who are supplying organs to members of the upper class, either directly or indirectly.[21] To solve the black market abuses taking place in many nations, it is crucial that other nations increase the supply of available organs.[22]

It is illegal to sell or buy a human organ in all developed nations, but it is legal in Iran and Pakistan.[23] However, despite the alleged ban on selling human organs, many countries do not stringently enforce these laws.[24] Countries with relaxed laws on sales of human organs include: Israel, India, South Africa, Turkey, China, Russia, Iraq, Argentina, and Brazil.[25]

The demand for organs compels people on waiting lists to travel to other countries to procure an organ for transplant. In Israel, removal of cadaver organs is allowed only with specific permission of the family, and donation of organs from living patients (living donors) requires written permission from the ministry after assessment by a hospital committee including a psychologist and a social worker.[26] A national committee must also interview non-relative living donors, but organ donation by living non-relatives is rarely approved.[27] With these stringent restrictions on organ donation, Israel's organ supply cannot meet the demand.[28] Many Israeli patients travel to India and Iraq to receive organs from unrelated living donors.[29] Most of the patients traveling to Iraq for a kidney meet their donors in the street outside the hospital among a group of competing donors.[30] The young, able-bodied men, aged twenty-five to thirty-five years, receive around $500 for a kidney.[31] Reports have shown that some of the patients receiving kidneys in India acquired hepatitis or HIV infections as a result of their organ transplants.[32]

Even U.S. citizens may feel that an organ transplant is hopeless, and some U.S. citizens travel to foreign countries to purchase organs on the black market. Sami, age twenty-three, waited more than

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20. *Id.*
21. Williams, *supra* note 16, at 316.
22. Jefferies, *supra* note 19, at 625.
23. Steve P. Calandrillo, *Cash for Kidneys? Utilizing Incentives to End America's Organ Shortage*, 13 GEO. MASON L. REV. 69, 86 (2004).
24. *Id.* at 86–87.
25. *Id.*
26. Michael M. Friedlaender, Commentary, *The Right to Sell or Buy a Kidney: Are We Failing our Patients?*, 359 THE LANCET 971, 971(Mar. 16, 2002).
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*

eighteen months for a cadaver kidney in the United States.[33] He finally gave up on receiving a transplant in the United States and traveled to Iraq to receive a kidney transplant from a paid, non-related living donor.[34]

Reports have accused China of harvesting the organs of thousands of executed prisoners each year and selling them for transplants.[35] China denies that organs have been procured from non-consenting prisoners but admits that organs from prisoners have been used with the prisoners' prior permission.[36] The British Transplantation Society (BTS) has mounting evidence that suggests "the organs of thousands of executed prisoners in China are being removed for transplants without consent."[37] In fact, the BTS notes that the speed of matching donors and patients, sometimes in as little as a week, suggests that the prisoners are being selected before execution.[38] The BTS commented that "transplant tourism" often lures British patients in need of a transplant to China.[39]

Black markets in organs will continue to produce human rights abuses if the organ shortage continues. These abuses—usually of poor citizens in developing countries—could be diminished by establishing a cohesive, successful organ procurement system.

III. APPROACHES TO ORGAN PROCUREMENT

This Part looks at a variety of organ procurement approaches currently used around the globe. The first is the altruistic model, which is used in the United States, where potential donors have to opt in to the system in order to donate organs. The second model is presumed consent, used in many European countries, where it is assumed that the organs will be donated unless the patient has opted out of the system. Finally, this Part discusses the incentives associated with organ sales and trade. While organ procurement systems are ultimately an attempt to fulfill the increasing demand for organs, it is necessary to keep in mind the moral, ethical, and religious issues that often arise in this setting.

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33. *Id.*
34. *Id.*
35. Jill McGivering, *China 'Selling Prisoners' Organs'*, J. TURKISH WKLY., Apr. 19, 2006, http://www.turkishweekly.net/news.php?id=30074.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*

A. *The Altruistic Model*

The United States focuses its organ procurement system on an altruistic model. Organ procurement in the United States is set out in two legislative acts: the Uniform Anatomical Gift Act (UAGA) and the National Organ Transplant Act (NOTA).[40] This legislation is an attempt to remedy the current organ shortage. The organ donation system in the United States is built on altruistic principles and volunteerism. This Section outlines the current organ donation system in the United States and suggests reasons why the current system does not produce the desired results.

1. The Uniform Anatomical Gift Act

In 1968, the National Conference of Commissioners on Uniform State Laws (NCCUSL) drafted the UAGA of 1968, setting forth uniform guidelines on the principles and procedures for donating, procuring, and transplanting organs.[41] The primary purpose of the Act was to increase the organ supply to combat organ shortages.[42] Nevertheless, a severe shortage of organs still exists today, and it is clear that the UAGA has not, and will not, remedy this problem.

The UAGA provides that an individual at least eighteen years of age who is mentally competent may designate whether he will donate his organs for transplantation after death.[43] Organs can only be donated under the UAGA if the decedent has expressed his wishes to donate, or in the case where the decedent has not expressed his wishes, if the next of kin decides to donate the organs.[44] Therefore, if the decedent failed to express his wishes, and the next of kin is not located, then the organs will only be procured if certain conditions under the UAGA Section 4 are met.[45] The original Act did not

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40. UNIF. ANATOMICAL GIFT ACT (1968), *superseded by* UNIF. ANATOMICAL GIFT ACT (1987); Nat'l Organ Transplant Act of 1984, Pub. L. No. 98-507, 98 Stat. 2339.

41. Lisa E. Douglas, Note, *Organ Donation, Procurement and Transplantation: The Process, The Problems, The Law*, 65 U. MO. KAN. CITY L. REV. 201, 215 (1996).

42. UNIF. ANATOMICAL GIFT ACT (1968) at Refs. & Annots.

43. *Id.* § 2(a). A person's wish to donate is evidenced through a will or a signed donor card. *Id.* § 4(a)(b).

44. *Id.* § 2(a), (b). "[C]ivil and criminal immunity is granted for any person acting in good faith in accordance with the guidelines for granting third-party consent." Douglass, *supra* note 41, at 215 (citing UNIF. ANATOMICAL GIFT ACT (1968) § 7; UNIF. ANATOMICAL GIFT ACT (1987) § 11(c), (d)).

45. *See id.* §§ 2(b), 3. "The persons who may make an anatomical gift are divided into the individual donor (new Section 2) and next of kin or guardians of the person (new Section 3)." *Id.* § 2, cmt.; *see also id.* § 3(a). Even if one of the classes of persons from Section 3 is not available, the coroner or medical examiner may still harvest the organs if the requirements of Section 4 are met. *Id.* § 4. The requirements of Section 4 include, among other requirements, an official request for the organ "from

expressly prohibit human organ sales, but the use of the word "gift" in the statute's title was interpreted to outlaw them.[46]

By 1973, all fifty states and the District of Columbia had adopted the UAGA.[47] Despite its adoption, the organ shortage continued. In response, the NCCUSL drafted a new version of the UAGA designed to address some of the problems with the original UAGA.[48] The UAGA was amended in 1987 to place more emphasis on the need for transplantation rather than using organs for research or educational purposes.[49] The two main purposes of the amended version were to appeal to altruism, and to make donating organs an easier process by reducing formalities.[50]

First, the UAGA was amended to make sure that the donor's wishes are followed upon death rather than overridden by her next of kin.[51] The UAGA states that an anatomical gift that has not been revoked by the donor before death "is irrevocable and does not require the consent or concurrence of any person after the donor's death."[52]

Second, the amended UAGA explicitly bans the sale of organs: "A person may not knowingly, for valuable consideration, purchase or sell a part for transplantation or therapy, if removal of the part is intended to occur after the death of the decedent."[53] The penalties for selling organs include a felony conviction, with potential for imprisonment for a maximum of five years and a monetary fine of up to $50,000.[54] Despite its prohibition on selling organs, the amended UAGA does not place any restrictions on "valuable consideration" for the "removal, processing, disposal, preservation, quality control, storage, transportation or implantation" of human organs.[55]

Additionally, the amended UAGA includes provisions requiring routine inquiry. These provisions require hospitals to discuss the option of organ donation with adult patients and to inform family members of their authority to consent to organ donation for a

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a hospital, physician, surgeon, or procurement organization" and a reasonable effort by the official to "locate and examine the decedent's medical records and inform persons listed in Section 3(a) of their option to make, or object to making an anatomical gift." *Id.*

46. Lloyd R. Cohen, *Organ Transplant Market Would Save Lives,* NAT'L L.J., Jan. 29, 1996, at A19.

47. *Id.*

48. UNIF. ANATOMICAL GIFT ACT (1987) at Refs and Annots.

49. *Id.* §§ 6(a)(1)–(3), cmt.

50. Linda C. Fentiman, *Organ Donation as National Service: A Proposed Federal Organ Donation Law,* 27 SUFFOLK U. L. REV. 1593, 1596 (1993).

51. UNIF. ANATOMICAL GIFT ACT (1987) § 2(h).

52. *Id.*

53. *Id.* § 10(a).

54. *Id.* § 10(c).

55. *Id.* § 10(b).

deceased relative.[56] The problem with routine inquiry is that organs need to be harvested quickly from a donor's body, leaving little time for the family to grieve before the medical professional has to inquire about donation. It is difficult for health care personnel to bring up this delicate topic. One study found that only 30% of families were asked about consenting to donation, despite the legal obligation of doctors to do so.[57]

Finally, the amended UAGA simplifies the requirements for donation. In the original Act, a donor card would only be valid if two witnesses were present at the time the donor signed the card.[58] The amended version deleted this requirement.[59] Furthermore, the amendments make clear that a gift of one organ is not a limitation on the gift of other organs.[60] The comments indicate that, in order to limit the donor's gift for a specific purpose, the limitation must be clearly stated.[61] For example, if a donor only wants to donate his eyes, he will have to indicate "eyes only."[62]

2. The National Organ Transplant Act

The primary federal regulation on organ procurement in the United States is NOTA, which Congress passed and President Reagan signed in 1984.[63] The Act was an attempt to increase organ donation, while clarifying the acceptable bounds of procurement practices.[64] At the time, Congress realized the need to pass legislation about organ donation due to medical advancements in human organ transplantation.[65] When the Act was passed, it was estimated that 20,000 people died annually under circumstances that would allow for organ transplantation but that organs were procured from less than 15% of them.[66] NOTA prohibits the purchase of organs in interstate commerce and provides grants to organ procurement agencies.[67]

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56. *Id.* § 5.
57. Fred H. Cate, *Human Organ Transplantation: The Role of Law*, 20 J. CORP. L. 69, 82 (1994).
58. UNIF. ANATOMICAL GIFT ACT (1968) § 2.
59. *Id.*
60. *Id.* § 2(j).
61. *Id.* § 2, cmt.
62. *Id.*
63. *See generally* Douglass, *supra* note 41, at 207–08; Nat'l Organ Transplant Act, Pub. L. 98-507, 98 Stat. 2339 (1998).
64. Calandrillo, *supra* note 23, at 79.
65. S. REP. NO. 98-382, at 2 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3975, 3976.
66. *Id.*
67. *See* Nat'l Organ Transplant Act §§ 301, 371.

Title One of NOTA establishes a Task Force for organ procurement and transplantation.[68] The Task Force is required to conduct comprehensive examinations of the "medical, legal, ethical, economic, and social issues presented by human organ procurement and transplantation."[69] The Task Force is also required to make an assessment of immunosuppressive medications.[70] Immunosuppressive medications are used to suppress the body's immune system during an organ transplantation, which prevents the recipient's body from rejecting the new organ.[71] The Act also provides that the Task Force is to prepare a report including an assessment of public and private efforts to procure organs and to assess the problems associated with coordinating the procurement of viable organs.[72]

The Task Force pushed for the development of organ transplant policies that would promote "the value of social practices that enhance and strengthen altruism and our sense of community."[73] To implement that goal, the Task Force recommended that hospitals be required to ask the next of kin of deceased patients about organ donation.[74] This has been referred to as routine inquiry or required request.[75] In response to the Task Force report, Congress included a required request provision in the Omnibus Budget Reconciliation Act of 1986.[76] Under the Act, hospitals participating in Medicare or Medicaid must make sure "that families of potential organ donors are made aware of the option of organ or tissue donation and their option to decline."[77]

Title Two of NOTA establishes grants for qualified organ procurement organizations (OPOs).[78] Among other criteria, an OPO must (1) have a system to identify potential organ donors and have substantial support in the service area, (2) conduct systematic efforts to acquire all useable organs, and (3) provide quality standards for the acquisition of organs consistent with the standards adopted by

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68. *Id.* §§ 101–105.

69. *Id.* § 101(b)(1)(A).

70. *Id.* § 101(b)(2).

71. University of Alabama at Birmingham Health System, Heart and Vascular Health Glossary, http://www.health.uab.edu/default.aspx?pid=23563 (last visited Oct. 21, 2006).

72. Nat'l Organ Transplant Act § 101(b)(3)(A)–(B).

73. TASK FORCE ON ORGAN TRANSPLANTATION, U.S. DEP'T OF HEALTH & HUM. SERV., ORGAN TRANSPLANTATION: ISSUES AND RECOMMENDATIONS 28 (1986) [hereinafter TASK FORCE ISSUES AND RECOMMENDATIONS].

74. John A. Sten, *Rethinking the National Organ Transplant Program: When Push Comes to Shove*, 11 J. CONTEMP. HEALTH L. & POL'Y 197, 209 (1994).

75. TASK FORCE ISSUES AND RECOMMENDATIONS , *supra* note 73, at 3.

76. Sten, *supra* note 74, at 209–10.

77. 42 U.S.C. 1320b–8(a)(1)(a)(i) (2001).

78. Nat'l Organ Transplant Act § 371(a).

the Organ Procurement and Transplantation Network (OPTN).[79] The OPTN, which was created under NOTA, establishes a national list of individuals who need organs and a national system to match recipients and donors.[80] Additionally, the OPTN adopts standards of quality for the acquisition and transportation of organs and coordinates the transportation of organs from organ procurement locations to transplant centers.[81] The OPTN is also charged with providing information to physicians and other health care professionals regarding organ donation and collecting data concerning organ donation and transplants.[82]

Title Three of NOTA expressly prohibits the sale of organs. It states: "It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce."[83] The maximum penalty set for illegally selling organs is a fine of up to $50,000 and imprisonment of not more than five years.[84] Like the UAGA, valuable consideration does not include "reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ or the expenses of travel, housing, and lost wages incurred by the donor of a human organ in connection with the donation of the organ."[85]

The legislative history addressing NOTA's prohibition of commercial transactions involving human organs shows that it intended to avoid the "destructive impact" that market schemes would have on the altruistic system.[86] Congress was worried that a market-based system would create opportunism against indigent members of our society or developing nations.[87] This legislation clearly reflects Congress's disapproval of compensating organ donation.[88]

Despite the enactment of NOTA and the UAGA, organ shortage remains as problematic today as it was when the Acts were established. A 1999 survey revealed that while 81% of people in the United States are supportive of the concept of voluntary organ donation, only about one quarter of them are actually registered

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79. *Id.* § 371(b).
80. *Id.* § 372(b)(2)(A).
81. *Id.* § 372(b)(2)(D), (F).
82. *Id.* § 372(b)(2)(G), (H).
83. *Id.* § 301(a). This is codified in 42 U.S.C. § 274(e)(a) (2001).
84. Nat'l Organ Transplant Act § 301(b).
85. *Id.* § 301(c)(2).
86. Sten, *supra* note 74, at 208.
87. *Id.* at 208–09.
88. *Id.*

donors.[89] Problems administering the system and difficulties associated with getting people to donate have created the organ shortage in the United States.

3. Problems with the Altruistic Model in the United States

One thing is very clear about organ procurement regulations in the United States: they are based on altruistic ideals.[90] The comments to § 10 of the UAGA cite the Hastings Center Report:[91]

> Altruism and a desire to benefit other members of the community are important moral reasons which motivate many to donate. Any perception on the part of the public that transplantation unfairly benefits those outside the community, those who are wealthy enough to afford transplantation, or that it is undertaken primarily with an eye toward profit rather than therapy will severely imperil the moral foundations, and thus the efficacy of the system.[92]

The problem with the altruistic model is that, while it sounds like an appropriate solution in theory, it simply does not lead to desirable results. The lack of participation in the organ procurement system is at least partially due to an individual's uneasiness with the concept of organ harvesting and his own mortality.[93] Economists posit that rational actors will do things if there is an incentive attached.[94] However, the values of morality and ethics are so entrenched in the current system of organ procurement that discussion of incentives is taboo.[95]

Logistical problems with implementing the organ procurement system in the United States result in significantly lower organ procurement than would otherwise be possible. One problem is that the U.S. system places the duty on physicians and emergency

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89. Calandrillo, *supra* note 23, at 83.

90. *See* Alexander Tabarrok, *Life-Saving Incentives: Consequences, Costs and Solutions to the Organ Shortage*, LIBR. OF ECON. & LIBERTY, Apr. 5, 2004, www.econlib.org/library/Columns/y2004/Tabarrokorgans.html.

91. The Hastings Center Report, http://www.thehastingscenter.org/publications/hcr/hcr.asp (last visited Oct. 21, 2006). The Hastings Center Report is a periodical that discusses the ethical and social issues of medicine and medical science. *See id.*

92. UNIF. ANATOMICAL GIFT ACT (1987) § 10, cmt.

93. Gilbert Mileander, *Organ Procurement: What are the Questions?* (The President's Council on Bioethics: Organ Transplantation, Discussion Paper, June 2006 meeting), *available at* http://www.bioethics.gov/background/meilaender_organs.html.

94. Edward L. Glaeser, *Psychology and the Market*, at 1, 7 (Harv. Inst. of Econ. Research, Discussion Paper No. 2023, 2003), *available at* http://www.economics.harvard.edu/hier/2003papers/HIER2023.pdf.

95. *See* James F. Blumstein, *The Use of Financial Incentives in Medical Care: The Case of Commerce in Transplantable Organs*, 3 HEALTH MATRIX 1, 8–9 (1993).

personnel to ascertain consent and to inquire about organ donation from the family of the deceased.[96]

The amended UAGA states that the wishes of the deceased, if expressly indicated, should not be contradicted by the will of the next of kin.[97] Nevertheless, physicians will often seek consent from the next of kin regardless of the donor's expressed intent.[98] Some doctors follow the wishes of the family instead of adhering to the donor's express wishes, because they fear for their reputations or the reputation of the medical community.[99] Likewise, the current system places a lot of pressure on emergency personnel to discover written directives.

Ohio implemented a new statewide registry in 2002 to alleviate some of the problems associated with ascertaining the wishes of the deceased.[100] Ohioans can declare their wish to become an organ donor or tissue donor online through a registry.[101] Kent Holloway, the Chief Executive Officer of Lifeline of Ohio and Chairman of Ohio's Second Chance Trust Fund stated: "Joining the Ohio Donor Registry ensures that each individual's decision to be an organ and tissue donor is known, and carried out."[102] Holloway also opined, "Many people are unprepared to make such an important decision during a visit to the BMV. This registry gives Ohioans the option to seek the information they need to make an informed, personal decision about donation."[103] The Ohio Donor Registry is a confidential database that allows Ohioans to clearly state their commitment to donate organs by signing up.[104] More than 3.5 million citizens have joined the Ohio Donor Registry.[105]

The purpose of the required request rule was to make sure that all persons willing to donate organs are aware of their options.[106] Despite this requirement, reports indicate that hospitals fail to

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96. UNIF. ANATOMICAL GIFT ACT (1987) § 2(a)–(c); Douglass, *supra* note 41, at 215–16.

97. UNIF. ANATOMICAL GIFT ACT (1987) § 2(b) ("An anatomical gift may be made only by a document of gift signed by the donor.").

98. Monique C. Gorsline & Rachelle L.K. Johnson, *The United States System of Organ Donation, the International Solution, and the Cadaveric Organ Donor Act: "And the Winner is . . . "*, 20 J. CORP. L. 5, 32 (1994).

99. *Id.*

100. Press Release, Ohio Bureau of Motor Vehicles, BMV Launches Online Organ Donor Registry (July 8, 2005), *available at* http://bmv.ohio.gov/pdf_files/07082005.pdf.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. 42 U.S.C. § 1320b–8.

request organ donation.[107] This is especially detrimental to the organ procurement system because evidence suggests that 60% of people who are asked choose to donate.[108] Physicians fail to request consent because of the delicate nature of the situation, because of the difficulty in stepping back from their objective of saving life rather than accepting death, and because enforcement of the required request rule is nonexistent.[109]

B. *The Presumed Consent Model*

The presumed consent model of organ donation starts with a basis of consent by assuming people will donate their organs unless they take affirmative steps to reject organ donation. By contrast, the altruistic model has a starting point of non-consent because, under that model, people have to take affirmative steps to donate their organs.[110] Under a presumed consent system, the burden of determining the decedent's wishes is lifted from the medical provider and rests with the potential donor and the family.[111] France, Austria, Belgium, Denmark, Finland, Italy, Norway, and Sweden, among others, have adopted the presumed consent model, and have seen some success in decreasing the organ shortage.[112] Even in the United States, which follows an altruistic model of organ donation, some states have adopted presumed consent-like features into their organ donation systems.[113]

There are various approaches to the presumed consent model.[114] A pure system of presumed consent requires a decedent to opt out during his lifetime, otherwise organ donation is assumed.[115] In this pure system, the family's wishes are neither considered nor requested.[116] In less formalistic presumed consent systems, the physician does not actively seek out the wishes of the family or decedent but is required to act on those wishes if made known.[117] The following Sections explore some of the models for presumed consent and analyze the benefits and pitfalls of that scheme.

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107. Gorsline & Johnson, *supra* note 98, at 33.
108. *Id.*
109. *Id.* at 33–34.
110. Melissa N. Kurnit, *Organ Donation in the United States: Can We Learn From Successes Abroad*, 17 B.C. INT'L & COMP. L. REV. 405, 418 (1994).
111. *Id.* at 419.
112. Shari Roan, *Organ Shortage has Officials Looking at Presumed Consent*, L.A. TIMES, Dec. 28, 2005.
113. Kurnit, *supra* note 110, at 419.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*

1. The United States

Although the United States generally operates on the altruistic model of organ donation that requires request, some states have adopted presumed consent-like features for their organ donation schemes. Several states allow the removal of corneas and pituitary glands without requiring a coroner or examiner to determine the preferences of the deceased or next of kin.[118] Most of these states allow for removal as long as the coroner or examiner knows of no objections by the deceased or next of kin.[119] Some states even have a heightened presumed consent standard for corneas and pituitary glands.[120] For example, Hawaii allows a coroner to remove any tissues regardless of whether there is a known objection.[121] Vermont allows for pituitaries to be removed absent a showing of religious reasons for non-removal.[122]

2. France

France operates on a presumed consent model for organ donation. The Caillavet Law and the Bioethics Law created a system whereby it is presumed that the deceased will donate organs unless the individual has opted out of donation.[123] The Caillavet Law provides, in pertinent part:

> An organ to be used for therapeutic or scientific purposes may be removed from the cadaver of a person who has not during his lifetime made known his refusal of such procedure. If, however, the cadaver is that of a minor or a mentally defective person, organ removal for transplantation must be authorized by his legal representative.[124]

The law grants the Council of State, France's highest advisory and dispute-resolving judicial body, the authority to determine how the law is administered.[125] The Council of State has decreed that an individual could object to donation by any means, either at the time of admission to the hospital or at any other time.[126] Objections are to be

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118. *Id.* at 419–20.
119. *Id.*
120. *Id.* at 419.
121. *Id.* at 420.
122. *Id.*
123. Alberto Abadie & Sabastien Gay, *The Impact of Presumed Consent Legislation on Cadaveric Organ Donation: A Cross Country Study*, 30 (Nat'l Bureau of Econ. Research, Working Paper No. 10604, 2004), *available at* http://www.nber.org/papers/w10604.
124. Kurnit, *supra* note 110, at 421.
125. *Id.*
126. *Id.*

recorded in a hospital register reflecting the individual's wishes.[127] The decree also authorizes anyone else who has witnessed the patient's objections to register the patient's wishes.[128]

Physicians, in turn, have a duty to check the registry for the patient's wishes.[129] The law in France does not place an affirmative duty on the physician to obtain consent from the family of the deceased.[130] In 1978, a Circular of the Ministry of Health and Social Security sought to refine the procedural requirements of Caillavet Law.[131] The Circular prohibited a physician from removing organs if the doctor obtained direct knowledge of an objection, regardless of whether the objection was in the registry.[132] Family members could easily impose their own wishes on the decedent under the guise of the decedent's wishes to circumvent the Law.[133] Therefore, the Council of State issued another decision in 1983 which prohibited family members from preventing organ removal when the deceased patient had not objected to donation while alive.[134]

France also established a non-donor registry in 1990 as well as a donor card system.[135] The computerized refusal system, set up by the Etablissment Francais des Greffes, allows hospitals to know instantly whether a patient has opted out of donation.[136] Anyone over the age of thirteen is encouraged to carry a donor card.[137] In the absence of a donor card or evidence of opting-out in the register, the principle of presumed consent will hold, but often doctors will still inform families of their option to refuse and inquire whether the family objects to donation.[138]

3. Belgium

In 1986, Belgium passed a presumed consent law and implemented a computerized system to track the organ donation wishes of individuals.[139] The Health Authority registry is

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127. *Id.*
128. *Id.* at 421–22.
129. *Id.* at 422.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *See* Abadie & Gay, *supra* note 123, at 30.
136. Alexander Dorozynski, *France Creates Opt Out Register for Organ Donation*, 317 BRIT. MED. J. 234 (July 25, 1998), *available at* http://bmj.bmjjournals.com/cgi/content/full/317/7153/234/a.
137. *Id.*
138. *Id.*
139. Kurnit, *supra* note 110, at 422–23.

continuously accessible to transplant centers.[140] Residents can register their objections at the local town hall.[141] Belgium has also instituted nationwide informational campaigns to educate individuals and physicians about medical advancements in transplant technology.[142]

Like France, Belgium has a soft presumed consent system.[143] Doctors in Belgium are encouraged to approach all families and inform them of their option to refuse donation.[144] Belgium also gives doctors the choice not to harvest organs if they determine that such action would prove too distressful for the family.[145] However, Belgian doctors are allowed to remove organs without family consent, even though they typically inform families of their option to refuse donation.[146]

While many families in Belgium are given an option about organ donation, fewer than 10% of families object, compared to 20-30% in the rest of Europe.[147] This variance has been explained as a difference in the perspective of the family member in making the decision.[148] Families in opt-in countries may not want to make a decision about organ donation on behalf of the deceased family member, whereas families in opt-out countries, like Belgium, may believe that they are following the will of the deceased.[149]

Belgium is often cited as an example of the benefits that can come from a presumed consent model.[150] When the new legislation for the opt-out system was passed, the transplant center at Antwerp opposed the new system and retained the old opt-in system.[151] Meanwhile, another transplant center in Leuven adopted the new legislation.[152] Over a three year period, rates of donation at Antwerp remained constant, while rates at the Leuven center increased from fifteen donors per year to forty donors per year.[153] However, some

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140. *Id.*

141. Kathleen Robson, *Systems of Presumed Consent for Organ Donation – Experiences Internationally* 9 (Scottish Parliament Info Center (SPICe), Briefing No. 05/82, Dec. 16, 2005), *available at* http://www.scottish.parliament.uk/business/research/briefings-05/SB05-82.pdf.

142. Kurnit, *supra* note 110, at 422–23.

143. Robson, *supra* note 141, at 9.

144. *Id.*

145. *Id.*

146. Kurnit, *supra* note 110, at 423; *see also* Abadaie & Gay, *supra* note 123, at 30.

147. Robson, *supra* note 141, at 9.

148. *Id.*

149. *Id.*

150. *Id.* at 10.

151. *Id.*

152. *Id.*

153. *Id.*

argue that Belgium's data is not an accurate depiction of presumed consent's success, because Belgium's new laws came into effect when Europe's organ donation rate was increasing independently.[154]

4. Austria

Austria has had a pure presumed consent system in place since 1982.[155] Under this system, individuals can object to having their organs donated through a written statement, but relatives of the deceased may not object to the donation of the deceased's organs.[156] Moreover, an Austrian citizen's rejection of organ donation is only legally enforceable if the rejection is in writing.[157] Physicians in Austria have no affirmative duty to search for documents indicating non-consent, and if there is doubt as to whether the patient has objected, removal is permitted.[158] Medical personnel do not even have to inform family members that the organs are being removed.[159] Additionally, an Austrian citizen who has registered his objection, and later needs a transplant himself, is placed at the bottom of the waiting list.[160]

There is some disagreement over whether this law applies to non-residents who die in Austria.[161] One report indicates that foreigners are covered under the strict presumed consent laws of Austria by stating that the organs will be donated unless "the physicians are in possession of a declaration in which the deceased person, or prior to his death his legal representative, has expressly refused consent to organ donation."[162] Even those who argue that the strict presumed consent laws apply to foreigners as well as Austrian nationals admit that the incidence of organs procured from foreign tourists is very low.[163]

Austria has reportedly seen an increase of organ donors since the legislation was passed.[164] The number of donors per million per year

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154. *Id.*
155. *Id.*
156. *Id.*; Kurnit, *supra* note 110, at 423.
157. Kurnit, *supra* note 110, at 423.
158. *Id.*
159. Robson, *supra* note 141, at 11.
160. *Id.*
161. *See* Kurnit, *supra* note 110, at 423 n.141 (stating that some reports indicate that there are exceptions made for foreigners, while others contend that the law is applicable to foreigners who die in Austria).
162. Robson, *supra* note 141, at 10 (quoting W. Kokkedee, *Kidney Procurement Policies in the Eurotransplant Region*, 35 SOC. SCI. AND MED. 177 (1992)).
163. Kurnit, *supra* note 110, 423 (citing W. Land & B. Cohen, *Postmortem and Living Organ Donation in Europe: Transplant Laws and Activities*, 24 TRANSPLANT PROCEEDINGS 2165, 2165–66 (1992)).
164. Robson, *supra* note 141, at 11.

(PMP/y) rose from an average of 4.6 PMP/y before the legislation to an average of 27.2 PMP/y between 1986 and 1990.[165] Some claim that an increase in the number of car accidents, rather than the strict presumed consent model, accounts for the increase in donation.[166] Others argue that Austrians are more accepting of the concept of presumed consent because the new laws are actually rooted in laws dating back to the eighteenth century.[167] These eighteenth century Austrian laws allowed dissection of bodies if there was a general or scientific interest.[168]

5. Spain

Spain's organ transplant system has been widely acknowledged as the most successful system in all of Europe.[169] "Spain operates a 'soft' system of Presumed Consent," similar to some of the systems mentioned above.[170] The aspect of Spain's system that is most recognized for increasing organ transplants is the establishment of the Organización Nacional de Transplantes (ONT).[171] The ONT is a network of transplant coordinators located in 139 intensive care units across Spain.[172] The ONT professionals closely monitor potential organ donors and tactfully speak with families about potential donation.[173] A study conducted in Spain found that of the two hundred families that initially rejected organ donation 78% changed their minds after the process was adequately explained to them.[174]

6. Singapore

Singapore has one of the more advanced systems of presumed consent in the world.[175] In 1987, Singapore became the first Asian country to adopt presumed consent legislation through its Human Organ Transplant Act (HOTA).[176] HOTA creates a presumption that citizens aged twenty-one to sixty who are mentally competent and permanent residents of Singapore will donate their kidneys unless

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165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*; *see also* Mary Helen Spooner, *More Countries Hope to Copy Spain's Organ-Donation Success*, 169 CAN. MED. ASSOC. J. 952 (2003), *available at* http://www.cmaj.ca/cgi/reprint/169/9/952.
172. *Id.*
173. *Id.*
174. *Id.*
175. Kurnit, *supra* note 110, at 425.
176. *Id.* at 424.

they have registered objections to donation during their lifetimes.[177] The presumed consent laws in Singapore only cover cadaveric kidneys and are only applied if the patient has been a victim of a fatal accident.[178]

HOTA defines death as an irreversible cessation of all brain functions and sets forth conditions a hospital must meet before removal may occur.[179] HOTA imposes specific procedures that hospitals and coroners must follow before removing organs.[180] The coroner must determine whether the accident was a fatal accident and sign off on removal.[181] Also, two senior physicians must determine that the patient is brain dead after conducting a series of tests.[182] To ensure the diagnosis is not biased, the law requires that the authorized physicians are not associated with the transplant team or with the proposed recipient.[183] Hospitals must conduct "reasonable and proper" inquiries for registered objections before removal.[184]

Individuals not covered under HOTA are subject to the Medical (Therapy, Education and Research) Act of 1972, under which there is a framework for the voluntary donation of all other organs. Muslims are automatically considered to have dissented from kidney donation, but they may make a voluntary pledge through the Medical Act of 1972.[185] To harvest organs from potential donors under the age of twenty-one and of unsound mind, there must be consent of a parent or legal guardian.[186]

Singapore also offers some significant incentives to citizens to not opt out of organ donation. Individuals who have not opted out are given priority on transplant lists above those who have opted out.[187] Individuals who remove their registered dissent after they encounter a need for a transplant themselves will only be given priority two years after they remove their dissent.[188] Additionally, immediate family members of an organ donor receive a 50% subsidy in medical expenses for the five years following donation.[189]

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177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.* at 425.
183. *Id.*
184. *Id.* at 424–25.
185. Robson, *supra* note 141, at 12.
186. Kurnit, *supra* note 110, at 424.
187. Robson, *supra* note 141, at 12.
188. *Id.*
189. *Id.*

The presumed consent model followed in Singapore seems more widely accessible than the systems of France, Belgium, and Austria.[190] Singaporeans can easily obtain opt-out forms at post offices and other public institutions.[191] Also, just before their twenty-first birthdays, Singaporeans receive a letter in the mail informing them of their choice to opt out.[192] Rejections are sent to the director of medical services and processed within twenty-four hours.[193] The rejections are posted on a confidential computer registry, which is accessible to the five major hospitals in Singapore.[194]

7. Considerations for Implementing a Presumed Consent System

Comparing presumed consent to other methods of organ procurement shows that nations following the presumed consent model have higher levels of donation.[195] There is some debate about whether these direct comparisons can be attributed to presumed consent legislation alone, since there are many other factors that influence organ donation rates.[196] Some factors include: the predominant cause of death, the availability of trained staff and transplant surgeons, and the number and characteristics of patients on the waiting lists.[197] A study conducted in 2003 indicated that prevalence of the following factors leads to higher rates of organ donation: the number of transplant centers per million people, the percentage of the population enrolled in higher education, and the percentage of the population that is Roman Catholic.[198] Assuming that presumed consent does actually increase organ supply, there are still other considerations.

Some critics of the presumed consent model have claimed that a presumption of organ donation takes away an individual's freedom.[199] Polls have shown that, in general, society accepts the idea of organ donation and supports transplantation as a therapy for organ failure.[200] Since society does not object to organ donation, and people

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190. Kurnit, *supra* note 110, at 425.

191. *Id.* Singaporeans can also withdraw a previous objection by filing a form similar to the original objection form. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. Robson, *supra* note 141, at 14.

196. *Id.*

197. *Id.*

198. *Id.* at 14–15 (citing R.W. Gimbel et al., *Presumed Consent and other Predictors of Cadaveric Organ Donation in Europe*, 13 PROGRESS IN TRANSPLANTATION 17 (2003)).

199. Williams, *supra* note 16, at 361.

200. *Id.* at 362 (stating that polls in Singapore, Canada, Great Britain, and the United States show support for organ donation).

can opt out of the system, there is arguably no real threat to freedom. Singapore's presumed consent legislation states that:

> [presumed consent] is not against individual freedom. Instead it reaffirms the individual Singaporean's ownership of and responsibility for his own body. People are therefore better able to ensure that their wishes are followed because their and not their next of kin's acceptance or objection has to be respected.[201]

If anything, presumed consent allows for increased personal freedom because it makes sure that an individual's wishes are actually carried out, rather than circumvented by the family's choices.[202]

Another way to cut back on potential infringement on an individual's choice to donate organs is through the infrastructure of the system. It is imperative that the option to object to organ donation is well known to citizens. An interconnected system is also important so that physicians can be certain that an individual did not register an objection before removing the organs. If the presumed consent model is well implemented, individual freedom is less likely to be affected and, as mentioned above, is more likely to be protected.

C. *Incentives for Organ Donation*

Supporters of organ sales claim that providing incentives is the only way to reduce the organ deficit. Merrill Matthews, Jr., Vice President of the National Center for Policy Analysis,[203] believes that altruism is a noble motive, but it will not be enough to remedy an organ deficit. [204] He has stated that simple "economic theory clearly recognizes that when demand is high for a good or service, its price will increase until the supply and demand reach equilibrium."[205] If the price is prevented from increasing, a deficit will occur.[206] Matthews has further stated that commercializing the organ donation system would not necessarily jeopardize that system's idealism, and he compared organ donors to teachers who, despite their noble profession of teaching youth, still require payment for their services.[207]

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201. *Id.* at n.297 (citing Human Organ Transplant Act, 1987, pt. IV, § 14 (Singapore), *as reprinted in* REPORT OF THE SELECT COMMITTEE ON THE HUMAN ORGAN TRANSPLANT BILL [Bill No. 26/86] at A8–A9).

202. Williams, *supra* note 16, at 362.

203. The National Center for Policy Analysis is a nonpartisan, nonprofit research institute based in Dallas, Texas. Merrill Mathews Jr., *Have a Heart, But Pay for It*, INSIGHT MAGAZINE, Jan. 9, 1995, at 18.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

1. Monetary Incentives

Perhaps the most controversial organ procurement system that has been proposed is that of organ sales. There are many variations of legalized organ sales models, from live organ brokerage and organ futures markets, to incentives through tax or health insurance reductions.[208] Also, an organ sales approach does not automatically encompass the idea of living donors; instead, an organ selling system could be limited to cadaveric organs. There are two types of financial incentive schemes for an organ sales approach: forward-looking approaches and on-the-spot approaches.[209]

a. Forward-Looking Incentives

Forward-looking approaches create an incentive for people to become part of an organ donor registry so that if their organs are procurable upon death, their organs will be recovered.[210] Examples of forward-looking incentives are discounts on driver's licenses and tax incentives.

i. Futures Markets

Another example of a forward-looking approach is a futures market.[211] Under this system, firms would be able to buy the rights to organs in the event of the donor's death.[212] There are two types of futures markets: one where payment is made today for the promise to donate organs upon death and another where payment is made to the estate upon the recovery of organs.[213]

The payment-made-today futures market would allow people to sell the right to harvest their organs upon their death for immediate economic incentives.[214] This type of market would work to alleviate the pressures on poor individuals to sell their organs on a black market.[215] Under this system, an individual could receive compensation today without having to undergo the risks and potential health problems of donating an organ while living.[216] An example of the type of compensation under a payment-made-today futures contract could be a reduction in health insurance

208. Williams, *supra* note 16, at 344.
209. Tabarrok, *supra* note 90, at 3.
210. *Id.* at 4.
211. *Id.*
212. Tabarrok, *supra* note 90, at 4.
213. *Id.*
214. Calandrillo, *supra* note 23, at 108.
215. *Id.*
216. *Id.* at 74, 108.

premiums.[217] Under this type of contract, the donor should be allowed to decide annually his decision to opt in to being an organ donor.[218]

Under the second futures system, payment would be made to a beneficiary who the donor will have designated at the time of entering the futures contract.[219] Like the payment-made-today contract, the donor should be able to periodically review his decision on whether to be a donor.[220]

The benefits of an options market over a license discount or tax plan, are (1) firms would have incentives to promote donation, and (2) the amount of compensation would increase as organ shortages become more severe.[221]

ii. Tax Breaks

Tax deductions could also be used as an incentive to get citizens to become organ donors during their lives. In 2004, Wisconsin passed a law that gives living organ donors a $10,000 deduction for expenses related to their organ donation.[222] The law allows Wisconsin donors to deduct up to $10,000 for surgery-related transportation, lodging, and lost wages after donating organs.[223] Governor Jim Doyle claimed "[t]his ensures that people who are donating so much to help others will not have to suffer financial hardship as they recover from surgery."[224] He was also optimistic that the new law would increase organ donation.[225]

Other states have looked into similar tax breaks, including Georgia (its law went into effect in January 2005), Connecticut, Illinois, Indiana, Massachusetts, Minnesota, New Jersey, New York, Pennsylvania, Rhode Island, and South Carolina.[226] Israel is another

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217. *Id.* at 109.
218. *Id.*
219. *Id.* at 108.
220. *Id.*
221. Tabarrok, *supra* note 90, at 4.
222. Kawanza L. Griffin, *Donors Get Tax Break*, MILWAUKEE J. SENTINEL, Jan. 30, 2004, *available at* http://www.jsonline.com/news/state/jan04/203958.asp. Other states have also adopted similar tax deductions including: Arkansas, Georgia, Iowa, Minnesota, New Mexico, New York, North Dakota, and Utah. *See* TRANSPLANT LIVING, *available at* http://www.transplantliving.org/livingdonation/financialaspects/statetax.aspx (last visited Oct. 26, 2006) [hereinafter TRANSPLANT LIVING].
223. WIS. STAT. § 71.05(10)(i); *see also* TRANSPLANT LIVING, *supra* note 222.
224. *Id.*
225. *Id.*
226. Erin Madigan, *States Offer Tax Breaks to Spur Organ Donation*, STATELINE.ORG, Aug. 26, 2004, *available at* http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=15749.

country that has considered providing financial reimbursement to donors for their time, discomfort, and inconvenience.[227]

Obviously, critics have argued that living owner tax breaks are a violation of prohibitions against organ selling.[228] As Howard M. Nathan, President and Chief Executive of the Gift of Life Donor Program, noted, "When you get as high as $10,000 you start to wonder what that means to people and if there is some coercion that goes on with that."[229]

iii. Discounted Driver's License Fees

U.S. citizens have the option to opt into the altruistic system by stating that they want to be an organ donor on their driver's license.[230] Even though most citizens support the idea of organ donation, most still choose not to opt in.[231]

As an incentive to opt in, Georgia provided drivers' licenses at eight dollars if an individual opted in to organ donation, and fifteen dollars if an individual did not opt in.[232] Unfortunately, Georgia rescinded the program in July 2005 in order to increase state revenues.[233] State records showed that individuals who qualified for the donor discount were 40% more likely to sign up as potential donors than those who did not qualify for the discount, such as veterans who receive their licenses for free.[234] The Governor of Georgia, Sonny Perdue, claimed that there was no hard evidence indicating that people who initially signed up to be a donor actually ended up donating their organs in the future.[235]

b. On-the-Spot Incentives

Another potential incentive to increase organ donation rates is to provide reimbursement for the medical care and burial expenses of donors.[236] Payments of this type can be a way of thanking the donor and have been analogized "to the death benefit offered to the families

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227. Calandrillo, *supra* note 23, at 112. Great Britain has a similar tax advantage. *Id.*

228. *Id.* at 111–12.

229. *Id.* at 111 (citing Jo Napolitano, *Wisconsin Senate Approves Tax Deduction for Organ Donors*, N.Y. TIMES, Jan. 23, 2004, at A12).

230. Calandrillo, *supra* note 23, at 113.

231. *Id.*

232. Brian Basinger, *Discount Ends for Organ Donors*, AUGUSTA CHRON., July 2, 2005, at B05; *see also* Tabarrok, *supra* note 90, at 4.

233. Basinger, *supra* note 232, at B05; Tabarrok, *supra* note 90, at 4.

234. Basinger, *supra* note 232, at B05.

235. *Id.*

236. Taborak, *supra* note 90, at 4–5.

of servicemen who die in the line of duty."[237] As it stands now, the transplant teams and the nonprofit transplant coordination agency arranging transfers profit from a donation, but the actual donor receives nothing.[238] Professor Fred Cate from Indiana University likened this to the sale of organs: "we sell body parts all the time; we just don't call it that."[239] He advocates not excluding the donor or the donor's family from a market that is profitable for every other party involved.[240]

Pennsylvania has established the first Death Benefit Program in the United States.[241] Act 102, enacted in 1994, has increased Pennsylvania's efforts to encourage organ donation and inform citizens of the option to donate.[242] The Act provides some coverage for expenses incurred by families of donors and provides for compliance reviews of Pennsylvania's hospitals to ensure that families of the deceased are given the opportunity to elect donation.[243] The Organ Donation Awareness Trust Fund permits residents to make a voluntary one dollar contribution aimed at offsetting the medical and funeral expenses of donors.[244] Donors families receive three hundred dollars, and the remainder of the fund is used for developing organ donation awareness programs within the state.[245]

2. Non-Monetary Incentives

Since some financial incentives raise issues about the ethics of organ selling, non-monetary incentives may be a way to motivate people to donate without raising the delicate issues posed in financial incentive settings.

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237. *Id.* at 5.

238. Calandrillo, *supra* note 23, at 115. In the article, Calandrillo describes the tragic story of Susan Sutton, a twenty-eight year-old who shot herself after a fight with her boyfriend. Her parents made the decision to donate her organs. Her heart, liver, corneas, and some of her bones and skin were used for transplantation. The hospital and medical teams along with the nonprofit transplant agency made profit off the donation, but the family received nothing. The family had to bury Susan in an unmarked grave because they were unable to afford a gravestone. *Id.*

239. *Id.* (citing Peter S. Young, *Moving to Compensate Families in the Human-Organ Market*, N.Y. TIMES, July 8, 1994, at B7).

240. Calandrillo, *supra* note 23, at 115.

241. *Id.* at 116–17.

242. State of Pennsylvania Department of Health, Bureau of Health Promotion and Risk Reduction, *Organ Donation Awareness*, http://www.dsf.health.state.pa.us/health/cwp/view.asp?a=174&Q=198229&healthPNavCtr=%7C (last visited Oct. 21, 2006).

243. *Id.*

244. Calandrillo, *supra* note 23, at 116.

245. *Id.*

a. Transplant Priority for Donors

Some have proposed to give priority for transplants to those who have signed up to donate organs themselves.[246] This incentive would work by inspiring people who have not previously signed up for organ donation to sign up for a self-motivated reason. This is the incentive used in Singapore, as mentioned above, to create an incentive for its citizens to not opt out of its presumed consent system.[247] There is potential for abuse of this incentive, however, if people sign up to be organ donors only when they realize they themselves are in need of an organ. This abuse would have to be curtailed by implementing a waiting period after an individual signs up to donate their organs before they are given priority status on the waitlist.

LifeSharers, a nonprofit organization started in 2002, has put this concept of priority to donors into practice.[248] Members of LifeSharers agree to donate to other members of the network through a form of directed donation.[249] LifeSharers members get access to the organs of over 3,300 members.[250] According to a press release from LifeSharers, about 70% of the organs transplanted in the United States have gone to recipients who were not donors themselves.[251] Steve Calandrillo, a professor at the University of Washington Law School, stated on the LifeSharers website:

> It is a fundamental issue of fairness that people who agree to donate organs should get priority if they need one. It is an irony that most organs go to people who haven't signed up as donors. Thousands of people are dying needlessly every year—not because life-saving organs don't exist, but because we don't incentivize people properly to make them available in the first place. LifeSharers is helping to fix that.[252]

b. Paired Organ Exchanges

Another non-financial incentive that has been proposed is paired organ exchanges.[253] Paired organ exchanges would facilitate transplantation in a situation where a friend or family member of Patient A is incompatible with him, but would be compatible with some other person on the waiting list, Patient B, and a close family

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246. *Id.* at 119.

247. Robson, *supra* note 141, at 12.

248. Calandrillo, *supra* note 23, at 119.

249. Press Release, LifeSharers: Organs for Organ Donors, U.S. Transplant Wait List Tops 90,000 – LifeSharers Offers Hope, (Oct. 31, 2005), *available at* http://www.lifesharers.org/pressrelease20051031.htm. Directed donation is legal in all fifty states and under federal law. *Id.*

250. *Id.*

251. *Id.*

252. LifeSharers People, LifeSharers: Organs for Organ Donors, http://www.lifesharers.org/people.htm.

member or friend of Patient B is a match for Patient A.[254] The willing donor for Patient A would donate the nonvital organ to Patient B on the condition that the willing donor for Patient B will donate her organ to Patient A.[255] Scholar Michael Morley proposes that paired organ exchanges should be permitted under federal law.[256] To facilitate paired organ exchanges, Morley advocates that the United States expand its existing national database of patients in need of organs to include information about individuals potentially willing to donate on behalf of a patient.[257] This data could then be used to identify cross-matches.[258]

Some hospitals have already begun using paired organ exchanges to find matches. Dr. Robert Montgomery, director of John's Hopkins University's Comprehensive Transplant Center, believes that "creating a national 'paired kidney exchange' would allow transplants for about half of the six thousand patients yearly who have willing donors with incompatible kidneys."[259] Johns Hopkins began a paired organ exchange program in 2001, and some twenty-two patients have benefited from the program.[260] Johns Hopkins also completed the first three-way swap, bringing together six people to complete the transplant.[261]

Sheldon Zink, Director of the University of Pennsylvania's Program for Transplant Policy and Ethics, thinks it is likely that a national paired organ exchange will be established.[262] Zink has warned that a policy like this should be implemented carefully, so as to avoid coercion into participating.[263] She also has stated that recovery times tend to be longer, and transplant-related emotional difficulties tend to be heightened, when the donor is not related or lives far from the recipient, and these problems could be exacerbated if a national paired organ exchange program is implemented.[264]

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253. Calandrillo, *supra* note 23, at 121; *see also*, Michael T. Morley, Note, *Increasing the Supply of Organs for Transplantation Through Paired Organ Exchanges*, 21 YALE L. & POL'Y REV. 221, 224 (2003).

254. Morley, *supra* note 253, at 224.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Specialists Push for Organ Swap Program*, FoxNews.com, Mar. 3, 2005, http://www.foxnews.com/story/0,2933,149355,00.html [hereinafter *Specialists Push*].

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

IV. BLENDING APPROACHES TO CREATE AN EFFECTIVE ORGAN PROCUREMENT SYSTEM

Failure of organ procurement systems around the globe have led not only to unnecessary deaths but also to human rights abuses against people who are coerced into giving up organs for immediate payment. By providing more incentives to individuals to donate their organs and creating a more efficient allocation system, more individuals can be saved and people will be less desperate to seek out alternative, unethical sources for organs. The United States can improve its organ procurement system by implementing some non-economic incentives and creating a more efficient organ procurement system. These suggestions still hinge on altruistic ideals and therefore blend well with the current system. The following sections outline a plan to create an organ procurement system that is efficient and provides adequate incentives to donate.

A. *Producing a More Efficient Organ Procurement System*

One major problem with the organ procurement systems explored in this paper is that medical personnel do not always follow the wishes of the deceased, even if those wishes are expressly stated. Under the UAGA, the wishes of the deceased, if expressly indicated, should not be contradicted by the next of kin.[265] Reputational concerns encourage doctors and hospitals to be compassionate during these delicate times, and therefore, they will often request the family's permission before removing organs. It is such a delicate time for the deceased's family that it is easier to just decline than to fully consider organ donation.

This has not only been a problem with the altruistic model in the United States, because some presumed consent countries still allow next of kin to contradict the presumption of donation. Belgium an example of a soft presumed consent country, allows the next of kin to refuse of organ donation if there is no known objection by the deceased..[266]

Often the family of the deceased is either not aware, or unwilling to acknowledge, the wishes of the deceased family member. There must be a more concrete system in place to acknowledge the wishes of individuals upon their death. If the wishes of the deceased were clear and unmistakable, the next of kin would be less likely to contradict those wishes. Similar to registries in Ohio and Singapore, the United States should adopt a nation-wide registry wherein each individual

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265. UNIF. ANATOMICAL GIFT ACT (1987) § 2(b).
266. Robson, *supra* note 141, at 4, 9.

can indicate his or her decision to donate. The system should require everyone to register—whether it is to donate or not to donate—so that there is no confusion at death as to whether an individual has actually declined to donate or whether the individual simply did not get entered into the registration system. There are a variety of ways the national registration system could be implemented.

Probably the most effective way to get people signed up in the registry would be to require each individual to indicate his or her intent through a registration card on the individual's eighteenth birthday. This would be similar to the federal law requiring all men who are eighteen years of age to be registered with the selective service.[267] The registration card should not only indicate the individual's intent to donate but also which organs an individual is willing to donate—leaving no questions about the individual's wishes. Of course, a registrant should be able to change his mind during his lifetime and submit a new registration statement. This would simply involve filling out a new registration card and submitting it in the same way that individuals file their first registration card. The computer registry should be confidential, like the one in Singapore, and accessible to all hospitals throughout the country. This would ensure that, if an individual dies while out of his home state, it would not be difficult to determine the individual's preference regarding organ donation.

Other options for the nation-wide registration system are to have the state Departments of Motor Vehicles (DMVs) register individuals as they get their drivers' licenses, or to require individuals to indicate their donation preferences on their tax returns. Since many citizens file a tax return,[268] the decisions of these individuals regarding donation would be clearly updated yearly. Moreover, since the intent to donate would most likely have been indicated within the year of death, the next of kin would be reassured about following the will of the deceased. Similarly, drivers' licenses have to be renewed on a regular basis, so an individual's intent to donate would be fairly current through that scheme as well.

These options would not require as much administration as the required registration card but may not be as effective. With the required registration card an individual is focused on the decision of whether to donate organs and is more likely to undertake the careful consideration and research required to make an informed decision;

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267. Selective Service Act of 1948, 50 U.S.C. App. § 451 (1948).

268. In 2006, 136 million federal tax returns were filed. Scott A. Hodge, *Number of Americans paying zero federal income tax grows to 43.4 million,* THE TAX FOUNDATION, FISCAL FACTS, Mar. 30, 2006, http://www.taxfoundation.org/publications/show/1410.html.

people trying to fill out their tax returns or waiting in the line at the DMV may not make that decision as carefully.

B. *Creating Proper Incentives to Increase Donation Rates*

In any context, both parties need to receive something in order to effectuate an exchange. Organ donation is no different. As we have seen, the altruistic model currently in place in the United States does not create sufficient incentives for people to become organ donors.[269] Although the altruistic model is ideal where everyone has a desire to help others, this is unfortunately not a reality of society and will not suffice to alleviate the organ shortage problem.

Creating a market for organs, like other goods sold in our economy, would probably create the greatest incentive for people to donate organs. However, the express ban on organ sales in the United States—which is shared by numerous other countries—and ethical dilemmas about selling body parts, make creating an actual market for organs unrealistic. Plans to give tax benefits to organ donors or decreasing driver's license fees may be met with some resistance because these incentives are analogous to providing cash for organs, which some view as unethical or coercive.

Short of adopting a plan to sell organs in a market setting, there are other incentives, driven by a person's desire to help others or himself, that may alleviate the organ shortage in much the same way as a market for organs. Adopting a paired organ exchange program and giving transplant priority to those who have agreed to donate will create proper incentives to encourage people to participate in organ donation.

Organizing a paired organ exchange will help more people in need of organs find a matching donor. In the situation where a family or friend of a patient is willing but unable to donate an organ, an effective organ procurement system would capitalize on this willingness to donate. A paired organ exchange could potentially find organs for three thousand of the six thousand people with a willing, but incompatible, kidney donor.[270] Additionally, a paired organ exchange would not be too difficult to administer. According to Morley, the paired organ exchange program could be implemented by expanding the already existing organ waiting list to include information about willing but incompatible donors.[271] Having this information about a willing donor on the waiting list will allow people to discover potential matches more easily.

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269. *See* discussion *supra* Part III.A(iii).
270. *Specialists Push*, *supra* note 259.
271. Morley, *supra* note 253, at 224.

Some critics may argue that a paired organ exchange is coercive because once a match is identified, donors will be called on to give their organs to strangers, and the pressure of saving a loved one will virtually force them to donate. This may be true, but it is also true that the donors will have previously decided to donate an organ to a loved one. Thus, the end result is the same in that a willing donor has donated, and the loved one in need has received an organ. Most people would probably still view this exchange as donating an organ to save the loved one and feel that the means by which this happens are inconsequential.

The other incentive aimed at reducing the shortage of organs would be giving transplant priority to those willing to donate their own organs. This incentive would not be difficult to implement after the registration system is in place, because it would be easy to determine whether an individual has registered to donate.

To prevent potential abuses, an individual should only receive priority after a post-registration waiting period. However, this waiting period should not apply to people who recently turned eighteen and registered to donate because they were unable to register previously. Singapore imposes a similar restriction on its priority to donors by imposing a two-year waiting period.[272] The LifeSharers network imposes a six-month waiting period.[273] A two-year waiting period seems too harsh and may cause people to rethink their organ donation, whereas a six-month period may be too short because people who realize they need an organ may be able to wait six months to get one. A one-year waiting period seems reasonable for people who did not originally sign up for organ donation upon turning eighteen or who did not agree to organ donation when the new system was implemented.

V. CONCLUSION

The ideas and systems used internationally for alleviating organ shortages can be blended together with the ideals of the current system in the United States to create a more efficient and effective organ procurement system. A national registry would create a more efficient system because wishes of donors would be clearly indicated, and would not be contradicted by their next of kin. Creating a paired organ exchange and giving priority to those who intend to donate will create incentives for individuals to become organ donors without treading heavily on the ethical issues involved with selling organs. A

272. Robson, *supra* note 141, at 12.
273. Calandrillo, *supra* note 23, at 119–20.

more efficient and effective system would not only save lives of those in need of transplants but would reduce human rights abuses created by the current shortage in the organ supply.

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