NOTE

INCENTIVIZING ORGAN DONATION: A PROPOSAL TO END THE ORGAN SHORTAGE

I. INTRODUCTION

As of October 6, 2008, over 100,000 people in the United States were waiting for a potentially lifesaving organ transplant.[1] Tragically, each day an average of eighteen people die waiting.[2] A major portion of the organ shortage stems from the fact that the United States prohibits compensation for organ donations, eliminating all incentive short of altruism to donate. The ban on financial compensation thus dramatically reduces the number of potential organ donors and increases the chance that a patient will die before an organ becomes available.

At the same time, in the United States, female eggs are sold on a free market. As such, unlike in other countries where compensation for egg donations is restricted,[3] in America there is no shortage of eggs for use in assisted reproduction. Many women altruistically donate their eggs for little or no compensation, while at other times the price tag has been as high as $100,000.[4] So, why is the sale of organs prohibited when both society and the government sanction the sale of ova? The same policy concerns that led the United States to ban the sale of organs exist in the free market for eggs. Nevertheless, the market in eggs thrives giving thousands of women the chance to carry a child to term each year while, at the same time, nearly an equal number of people die waiting for an organ transplant because eligible donors have no incentive to even consider donation.

Many policies have been proposed and implemented in the United States and abroad in an effort to increase the organ supply. However, no

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1. U.S. Transplant Waiting List Passes 100,000, http://www.unos.org/news/newsDetail.asp?id=1165 (last visited June 12, 2010).

2. Donate Life America, Understanding Donation: Statistics, http://www.donatelife.net/UnderstandingDonation/Statistics.php (last visited June 12, 2010).

3. *See infra* notes 194-96 and accompanying text.

4. Russell Korobkin, *Buying and Selling Human Tissues for Stem Cell Research*, 49 ARIZ. L. REV. 45, 49 (2007).

country has yet offered financial incentives as a means to boost donation rates.[5] In this Note I will argue for the legalization of financial incentives for organ donations in order to increase the organ supply through both living and cadaveric donations. While there are valid arguments against the implementation of an incentive-based system of organ donation, many of these concerns can be accommodated through regulation rather than prohibition.

Part II of this Note details the law governing organ donations in the United States and abroad; namely the Uniform Anatomical Gift Act ("UAGA" or "the Act")[6] and the National Organ Transplant Act ("NOTA"),[7] both of which stand in the way of providing financial incentives for organ donation in the United States. Part III discusses the current scarcity of transplantable organs from both cadaveric and live organ donors. Part IV rebuts common arguments in opposition to the legalization of an incentive-based system of organ donation, such as the paternalistic belief that compensation for organ donations would exploit the poor, creating a disparity in organ donation and allocation among different socioeconomic groups.

Part V discusses egg donation, more specifically, current legislation regarding the sale of ovum, as well as why compensation for egg donations is permitted in the United States. Part VI will analyze the arguments in favor of allowing financial incentives for organ donations. Lastly, in Part VII, I propose an incentive-based solution to the organ shortage. Under my proposed model, a procurement agency, regulated by the government, would be the sole entity permitted to purchase organs from live or cadaveric donors and would allocate those organs to transplant centers in the same manner that they are allocated today. This system would provide financial incentives for donations, while avoiding many of the concerns associated with a market for organs.

II. THE PROBLEM: SCARCITY OF ORGANS FOR TRANSPLANTATION

Each day only eighty people receive an organ for transplantation while 150 people are added to the waitlist.[8] This gap continues to widen

5. T. Randolph Beard & David L. Kaserman, *On the Ethics of Paying Organ Donors: An Economic Perspective*, 55 DEPAUL L. REV. 827, 828 (2006).

6. REVISED UNIF. ANATOMICAL GIFT ACT (amended 2006), 8A U.L.A. 52 (Supp. 2009).

7. National Organ Transplant Act of 1984, Pub. L. No. 98-507, 98 Stat. 2339 (codified as amended at 42 U.S.C. §§ 273-74 (2006)).

8. The International Association for Organ Donation, Understanding: Statistics/Facts, http://iaod.org/understanding-organ-donation.htm (last visited June 12, 2010).

as the organ donation rate has remained constant since 2005.[9] The shortage is not due to an inadequate amount of transplantable organs, as there is an estimate of 12,000 to 15,000 eligible cadaveric donors per year.[10] A 100% recovery rate from 15,000 donors would result in a procurement of over 50,000 organs, a momentous leap towards eventually meeting our organ demand.[11] Unfortunately, merely half of all eligible donors consent—proof that the current altruistic method of organ procurement is ineffective.[12] Likewise, the shortage is not due to a lack of support for organ donation. According to a 2005 Gallup poll, 95.4% of Americans reported that they "support" or "strongly support" organ donation, yet only 53.2% granted permission on their driver's license, carry a donor card or joined a registry.[13]

Consequences of the organ shortage are not limited to loss of life; the government and American citizens bear substantial economic burdens. Patients waiting for an organ transplant incur costly medical bills for long-term disease management treatments. According to one expert, "for every new transplanted kidney . . . Medicare would avoid direct dialysis costs of approximately $55,000 per year for each patient transplanted . . . ."[14] Thus, Medicare saves roughly $220,000 over four years for every kidney donation.[15]

There has been a shortage of organs for transplantation for as long as the technology for organ transplants has existed.[16] The medical

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9. The Organ Procurement and Transplantation Network, Donors Recovered in the U.S., http://optn.transplant.hrsa.gov/SharedContentDocuments/Fall_2008_Regional_Meeting_Data_Slides.pdf.

10. OFFICE OF INSPECTOR GEN., DEP'T OF HEALTH AND HUMAN SERV., VARIATION IN ORGAN DONATION AMONG TRANSPLANT CENTERS 1 (2003), *available at* http://www.oig.hhs.gov/oei/reports/oei-01-02-00210.pdf. Due to the need for healthy, fully functioning organs there is a natural ceiling on cadaveric donors. *See infra* notes 23-25 and accompanying text.

11. M. Lane Molen, Comment, *Recognizing the Larger Sacrifice: Easing the Burden Borne by Living Organ Donors Through Federal Tax Deductions*, 21 BYU J. PUB. L. 459, 467 (2007).

12. Joseph B. Clamon, *Tax Policy as a Lifeline: Encouraging Blood and Organ Donation Through Tax Credits*, 17 ANNALS HEALTH L. 67, 68 (2008).

13. THE GALLUP ORG., 2005 NAT'L SURVEY OF ORGAN AND TISSUE DONATION ATTITUDES AND BEHAVIORS 5, 9 (2005), *available at* ftp://ftp.hrsa.gov/organdonor/survey2005.pdf. The survey shows that 40.5% of Americans "strongly support" organ donation, 54.9% "support" organ donation, and only 4.6% "oppose" or "strongly oppose" organ donation for transplants. *Id.* at 5.

14. Ginny Bumgardner and Trent Tipple, Testimony before Subcommittee on Labor, Health and Human Services, Education and Related Agencies 3 (Apr. 15, 2005), *available at* http://www.a-s-t.org/files/pdf/public_policy/pub_pol_library/TransRoundtable41505.pdf.

15. *Id.*

16. Sean Arthurs, Comment, *No More Circumventing the Dead: The Least-Cost Model Congress Should Adopt to Address the Abject Failure of Our National Organ Donation Regime*, 73 U. CIN. L. REV. 1101, 1112 (2005); S. Gregory Boyd, Comment, *Considering a Market in Human Organs*, 4 N.C. J.L. & TECH. 417, 420 (2003). Skin grafts became routine in the 1920s and cornea transplants were perfected by the 1940s. Kelly Ann Keller, Comment, *The Bed of Life: A Discussion*

community has employed organ substitutes such as artificial organs[17] and xenotransplantation in an attempt to circumvent the organ shortage.[18] These alternatives have seen some degree of success, however human organ transplants from cadaveric or live donors remain the most practical and successful method of treating advanced organ failure.[19]

A. Shortage of Cadaveric Donors

Cadaveric donation, the donation of one's organs upon death, is the most widely accepted source of organs for donation.[20] Cadaveric donations are preferred over live donations because they pose no health risk to the donor and produce a greater quantity of organs and tissues.[21] From a single cadaveric donor at least twenty-five different body parts and fluids may be donated for procedures ranging from heart-lung transplants to facial reconstruction.[22]

Nevertheless, there are constraints on the supply of cadaveric donors which exacerbate the organ shortage. For organs to be viable for

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of Organ Donation, Its Legal and Scientific History, and a Recommended "Opt-Out" Solution to Organ Scarcity, 32 STETSON L. REV. 855, 865-66 & n.63 (2003). The first successful kidney transplant took place in 1954. *Id.* Successful heart, lung, and pancreas transplantations followed shortly after. *Id.*

17. Artificial organs can substitute for human organs for only a limited length of time. The Left Ventricular Assist Device ("LVAD") is a heart-related artificial device which assists the left ventricle in pumping oxygenated blood to the body. LVADs, like all other artificial organs, are not meant to be a permanent replacement for a human organ. They are instead used to bide time while a patient waits for a transplantable organ. Boyd, *supra* note 16, at 430.

18. Fritz H. Bach et al., *Ethical and Legal Issues in Technology: Xenotransplantation*, 27 AM. J.L. & MED. 283, 284-85 (2001). Xenotransplantation is the transplantation of animal organs, tissues, and cells into humans. *Id.* Proponents of xenotransplantation believe that with further research of immunosuppressant drugs and genetic engineering of animals, one day xenotransplantation can offer an unlimited supply of organs for transplantation. *Id.* Nevertheless, graft rejection, cross-species disease transfer, and moral objections by some groups, such as animal-rights activists, are all problems that must be remedied before xenotrasnplantation can become an accepted alternative to human organ transplants. Boyd, *supra* note 16, at 428-29 & n.95.

19. Boyd, *supra* note 16, at 420.

20. Vanessa Chandis, Comment, *Addressing a Dire Situation: A Multi-Faceted Approach to the Kidney Shortage*, 27 U. PA. J. INT'L ECON. L. 205, 210 (2006).

21. Molen, *supra* note 11, at 466.

22. Gregory S. Crespi, *Overcoming the Legal Obstacles to the Creation of a Futures Market in Bodily Organs*, 55 OHIO ST. L.J. 1, 8-9 (1994). From a single cadaveric donor the following organs and tissue may be donated: brain tissue, 1 jaw bone, bone marrow, 1 heart, 4 separate valves, 2 lungs, 1 liver, 2 kidneys, small and large intestines, 206 separate bones, 27 ligaments and cartilage, 2 corneas to restore sight, 2 of each inner ear, 1 heart pericardium which is used to cover the brain after surgery, 1 stomach, 1 pancreas, 2 hip joints, over 600,000 miles of blood vessels, and approximately 20 square feet of skin. Christy M. Watkins, *A Deadly Dilemma: The Failure of Nations' Organ Procurement Systems and Potential Reform Alternatives*, 5 CHI.-KENT J. INT'L & COMP. L. 1, 5 (2005).

donation, the donor must have died in a way that left their organs fully functioning and free from disease.[23] This limitation creates a natural ceiling on the number of eligible cadaveric donors.[24] Estimates show that only 2% of potential donors meet the medical requirements.[25]

Consent is another constraint which impedes the use of all potential cadaveric donors.[26] Although the UAGA regards donor cards or official records of an individual's desire to make an anatomical gift as legally sufficient to allow for the harvesting of a deceased's organs,[27] most states require consent from the next of kin first.[28] A 2001-2002 study by the Department of Health and Human Services found a national average consent rate of 51%.[29] This is unexpectedly low considering approximately 95% of Americans support the idea of cadaveric organ donations.[30] While the need for fully functioning organs will always limit the donor pool, financial incentives have the capability to drastically increase consent rates.

B. Shortage of Live Donors

A living donation involves the donation of a nonvital organ while alive.[31] A single kidney, liver, lung, intestine, pancreas, and even a heart can all be donated from a live donor.[32] Live donations from related

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23. Molen, *supra* note 11, at 467.

24. *Id.*

25. Clamon, *supra* note 12, at 68.

26. *See* Molen, *supra* note 11, at 467-68.

27. REVISED UNIF. ANATOMICAL GIFT ACT § 14(a) (amended 2006), 8A U.L.A. 93 (Supp. 2009). The UAGA requires a reasonable search for records to determine whether the deceased desired to donate, as well as a reasonable search for family members authorized to donate on their behalf. *Id.* at § 14(a), (g).

28. Molen, *supra* note 11, at 468-69.

29. *Id.* at 467-68; OFFICE OF INSPECTOR GEN., *supra* note 10, at 3.

30. *See supra* note 13 and accompanying text.

31. *See* United Network of Organ Sharing, Transplant Living, http://www.transplantliving.org/livingdonation/facts/organs.aspx (last visited June 11, 2010).

32. *Id.*

- [K]idney - This is the most frequent type of living organ donation. [For the donor, there is little risk in living with one kidney because the remaining kidney compensates to do the work of both kidneys.]
- [L]iver - Individuals can donate a segment of the liver, which has the ability to regenerate and regain full function.
- [L]ung - Although lung lobes do not regenerate, individuals can donate a lobe of one lung.
- [I]ntestine - Although very rare, it is possible to donate a portion of your intestine.
- [P]ancreas - Individuals can also donate a portion of the pancreas. [Like the lung, the pancreas does not regenerate, but donors usually have no problems with reduced function.]

donors are universally accepted provided that they are free from coercion and meet informed consent requirements.[33] Likewise, live donations from unrelated donors, while more controversial, are not prohibited by any laws in the United States.[34]

Society has shown a positive attitude towards live donations. A 2005 Gallup poll showed that 91% of Americans were "very likely" or "somewhat likely" to provide a live donation to a family member,[35] 75% were "very likely" or "somewhat likely" to donate to a close friend, and 38% were "very likely" or "somewhat likely" to donate to a stranger.[36] Even if recovery rates of cadaveric donors were improved, due to natural constraints on cadaveric donors,[37] live donations would still be necessary.[38] Currently, donations "by altruistic strangers makes up less than 1 percent of live kidney donations in the United States."[39] Providing compensation for live donations is a simple, yet effective, means of enlarging the group of individuals willing to donate.

III. LEGISLATIVE HISTORY OF ORGAN DONATION

The organ donation system in the United States is based on altruistic principles. The system is detailed in two acts, the UAGA[40] and

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- [H]eart - A domino transplant makes some heart-lung recipients living heart donors. When a patient receives a heart-lung "bloc" from a deceased donor, his or her healthy heart may be given to an individual waiting for a heart transplant. Extremely rare, this procedure is used when physicians determine that the deceased donor lungs will function best if they are used in conjunction with the deceased donor heart.

Id.

33. Kelly Lobas, Note, *Living Organ Donations: How Can Society Ethically Increase the Supply of Organs?* 30 SETON HALL LEGIS. J. 475, 486-87 (2006).

34. *Id.* at 487. One reason for the controversy surrounding living donations is because doctors take the Hippocratic Oath, swearing that they will act within the best interest of the patient. When a doctor removes a healthy organ from a healthy individual the doctor is putting that individual's health at risk, violating the "principle of non-malfeasance, 'above all, do no harm.'" Keller, *supra* note 16, at 870-71 (quoting R.W. Strong & S.V. Lynch, *Ethical Issues in Living Related Donor Liver Transplantation*, *reprinted in* THE ETHICS OF ORGAN TRANSPLANTS: THE CURRENT DEBATE 41, 42 (Arthur L. Caplan & Daniel H. Coelho eds., 1998)).

35. THE GALLUP ORG., *supra* note 13, at 19-20. Only 4.4% of Americans reported that they were "not at all likely" to donate while living to a family member. *Id*. at 19.

36. *Id.* at 19-20.

37. *See supra* notes 23-29 and accompanying text.

38. Molen, *supra* note 11, at 473.

39. David Steinberg, *Kidneys and the Kindness of Strangers*, HEALTH AFFAIRS, July-Aug. 2003, at 184, 185.

40. REVISED UNIF. ANATOMICAL GIFT ACT (amended 2006), 8A U.L.A. 52 (Supp. 2009).

the NOTA.[41] These statutes set forth laws regarding the procurement and allocation of organs for transplantation.

A. Uniform Anatomical Gift Act

First Drafted in 1968, the UAGA was enacted the same year as the first successful heart and liver transplants.[42] The National Conference of Commissioners on Uniform State Laws ("NCCUSL") drafted the Act with the purpose of outlining uniform legal and ethical guidelines for cadaveric organ procurement, allocation and transplantation in the hopes of increasing the organ supply.[43] The Act, among other things, provided that an individual can either pre-designate his organs to be donated upon death, or, at death, the decedent's next of kin can consent to donation.[44] Although the Act did not explicitly forbid compensation for organ donations, the Act did use the term "gift" which was interpreted to prohibit the sale or purchase of organs.[45]

Despite its adoption in all fifty states and the District of Columbia,[46] the 1968 UAGA failed to increase the organ supply.[47] In fact, the demand for transplantable organs at this time increased due to the development of Cyclosporine, an immunosuppressant that increases compatibility between the donor organ and the recipient.[48] Additionally, the organs' imminent expiration further impeded their procurement.[49] Organs must be harvested shortly after death in order to be viable for transplantation, but often by the time a will was located and read it was

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41. National Organ Transplant Act of 1984, Pub. L. No. 98-507, 98 Stat. 2339 (codified as amended at 42 U.S.C. §§ 273-74 (2006)).

42. Michele Goodwin, *The Body Market: Race Politics & Private Ordering*, 49 ARIZ. L. REV. 599, 618 (2007).

43. Sarah Elizabeth Statz, Note, *Finding the Winning Combination: How Blending Organ Procurement Systems Used Internationally Can Reduce the Organ Shortage*, 39 VAND. J. TRANSNAT'L L. 1677, 1683 (2006).

44. UNIF ANATOMICAL GIFT ACT § 2(a)-(b) (1968), 8A U.L.A. 116 (2004).

45. Statz, *supra* note 43, at 1683-84. The UAGA does not address live donations. Goodwin, *supra* note 42, at 620.

46. Steve P. Calandrillo, *Cash for Kidneys? Utilizing Incentives to End America's Organ Shortage*, 13 GEO. MASON L. REV. 69, 78 (2004); Jo-Anne Yau, *Stealing What's Free: Exploring Compensation to Body Parts Sources for Their Contribution to Profitable Biomedical Research*, 5 PIERCE L. REV. 91, 99 (2006).

47. MICHELE GOODWIN, BLACK MARKETS: THE SUPPLY AND DEMAND OF BODY PARTS 113 (2006).

48. *Id.* at 112-13. Immunosuppressants are used to suppress the immune systems of organ transplant recipients. When a person receives an organ transplant their white blood cells will try to reject the transplanted organ. Immunosuppressants prevent the white blood cells from doing this. *See, e.g.*, MayoClinic.com, Cyclosporine, http://www.mayoclinic.com/health/drug-information/DR601591 (last visited June 12, 2010).

49. GOODWIN, BLACK MARKETS, *supra* note 47, at 113.

too late to begin the harvesting process.[50] For the same reason, donor cards were ineffective since often the deceased was not carrying his card when brought to the hospital in an emergency.[51] Lastly, the Act did not require hospitals or doctors to request donations from patients or the family of the deceased, leaving many viable organs unused.[52]

In 1987, the NCCUSL amended the UAGA[53] placing added emphasis on the need for organs for transplantation rather than research or education.[54] The main goal of the amended Act was to increase the organ supply by simplifying the donation process and encouraging altruism.[55] Now, an anatomical gift made by the deceased before death is irrevocable.[56] The Act gives the donor's requests priority over family objections[57] to insure that the intent of the donor is carried out and not subsequently vetoed by his next of kin.[58] For the same reason, if a donor wishes to limit his anatomical gift to a particular organ or for a specific purpose, e.g., transplantation rather than medical research, his request must be clearly stated.[59] Additionally, hospitals are now required to discuss the option of donation with terminally ill patients and the families of the recently deceased.[60] Despite this legal obligation, one study found that 30% of families of potential donors were not approached about consenting to organ donation.[61] And, even when approached, about half the time families decline to donate.[62]

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50. *Id.* at 113.

51. *Id*. at 114.

52. *Id.* at 115.

53. The UAGA of 1987 was only adopted by about half of the states and was amended once again in 2006 to clarify ambiguities that arose since the 1987 amendments. Richard J. Bonnie et al., *Legal Authority to Preserve Organs in Cases of Uncontrolled Cardiac Death: Preserving Family Choice*, 36 J.L. MED. & ETHICS 741, 742 (2008).

54. Statz, *supra* note 43, at 1684. For example, let say a donor executes a will leaving his entire body to a medical school for research or education. If the donor later signs a document donating a kidney for transplantation, the donor's kidney, if medically suitable, would go to a procurement organization and the donor's body without the kidney would go to the specified medical school. REVISED UNIF. ANATOMICAL GIFT ACT § 6 cmt. (amended 2006), 8A U.L.A. 70 (Supp. 2009).

55. *See* Statz, *supra* note 43, at 1684.

56. UNIF. ANATOMICAL GIFT ACT § 2(h) (amended 1987), 8A U.L.A. 25 (2004) ("An anatomical gift that is not revoked by the donor before death is irrevocable and does not require the consent or concurrence of any person after the donor's death.").

57. *Id.* § 3(a), 33-34.

58. *Id.* § 2 cmt., 26-27; Bonnie et al., *supra* note 53, at 743.

59. *Id.* § 2 cmt., 25.

60. *Id.* § 5, 44.

61. Fred H. Cate, *Human Organ Transplantation: The Role of Law,* 20 J. CORP. L. 69, 82 (1994). One reason for this may be that it is difficult for healthcare professionals to have this sensitive discussion while families are in intense grief. Statz, *supra* note 43, at 1685.

62. *See supra* notes 28-29 and accompanying text.

Most notably, the 1987 amendment explicitly prohibited the sale and purchase of organs[63] and imposed a penalty for violations which includes a felony conviction, potential imprisonment for a maximum of five years, and up to a $50,000 fine.[64]

B. National Organ Transplant Act

NOTA was enacted to encourage live organ donation, clarify acceptable organ procurement practices, and improve the efficiency of the organ donation and allocation process.[65] Legislative history suggests that the primary concern that led to the enactment of NOTA was the fear that a market in organs would result in commodification of the human body and exploitation of the poor.[66]

NOTA was promulgated primarily in response to a scheme by Dr. H. Barry Jacobs to broker human kidneys.[67] Jacobs established a company, called The International Kidney Exchange, Ltd., to "commission kidneys from persons living in Third World countries or in disadvantaged circumstances in the United States for whatever price would induce them to sell their organs."[68] He planned to resell the organs he procured at an agreed-upon price plus an additional $2,000 to $5,000 for his services.[69] To prevent similar "profit-motivated commerce in living donor organs," Title three of NOTA explicitly prohibits the sale or purchase of organs,[70] as the Act states, "[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 . . . ."[71]

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63. UNIF. ANATOMICAL GIFT ACT § 10(a), 8A U.L.A. 62 ("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.").

64. *Id.* § 10(c), 62. This prohibition on valuable consideration does not apply to the "removal, processing, disposal, preservation, quality control, storage, transportation, or implantation" of the organ. *Id* § 10(b).

65. Calandrillo, *supra* note 46, at 79.

66. H.R. REP. NO. 98-575, at 8, 22-23 (1983).

67. Calandrillo, *supra* note 46, at 79-80.

68. Alicia M. Markmann, Comment, *Organ Donation: Increasing Donations While Honoring Our Longstanding Values*, 24 TEMP. J. SCI. TECH. & ENVTL. L. 499, 505-06 (2005) (quoting BETHANY SPEILMAN, ORGAN AND TISSUE DONATION: ETHICAL, LEGAL, AND POLICY ISSUES 145 (1996)).

69. Patrick D. Carlson, Comment, *The 2004 Organ Donation Recovery and Improvement Act: How Congress Missed an Opportunity to Say "Yes" to Financial Incentives for Organ Donation*, 23 J. CONTEMP. HEALTH L. & POL'Y 136, 158 (2006).

70. *Id.* at 159.

71. National Organ Transplant Act of 1984, 42 U.S.C. § 274e(a) (2009). This provision was proposed by then-Senator Albert Gore. Carlson, *supra* note 69, at 158-59.

The organ sale ban does not apply to all bodily products nor does it prohibit all compensation.[72] The Senate Committee on Labor and Human Resources noted that the prohibition does not apply to body products that "can be replenished and whose donation does not compromise the health of the donor."[73] Likewise, the term "valuable consideration," as in the UAGA, "does not include the 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."[74] Thus, although the organs themselves are not for sale, all other products and services associated with organ procurement, allocation and transplant are.[75] This exception allows all parties, except the source of the organ, to receive compensation for their role in the transplant.[76] Denial of source compensation is a serious flaw in the current organ procurement system which will be discussed in greater detail later in this Note.[77]

In order to encourage organ donation, NOTA created the National Organ Procurement and Transplantation Network ("OPTN"), a not-for-profit private organization charged with promoting organ donation, establishing organ procurement protocols and ensuring that organs are allocated appropriately.[78] The United Network for Organ Sharing ("UNOS") was created by the OPTN to carry out these objectives.[79] UNOS's mission is "to advance organ availability and transplantation by uniting and supporting . . . communities for the benefit of patients through education, technology and policy development."[80] To accomplish its goals, UNOS maintains the transplant waitlist, coordinates matches of donors and candidates,[81] reports transplantation data,[82] increases public awareness, provides assistance to patients in

72. S. REP. NO. 98-382, at 16-17 (1984) *reprinted in* 1984 U.S.C.C.A.N. 3975, 3982.

73. *Id.*

74. § 274e(c)(2).

75. *See* Calandrillo, *supra* note 46, at 81; Yau, *supra* note 46, at 98.

76. *See* Yau, *supra* note 46, at 98.

77. *See infra* notes 232-40 and accompanying text.

78. *See* § 274; *see also* Calandrillo, *supra* note 46, at 81.

79. United Network for Organ Sharing, Who We Are, http://www.unos.org/whoweare/ (last visited June 12, 2010).

80. *Id.*

81. UNOS maintains a twenty-four hour hotline to aid organ procurement organizations in the matching process. United Network for Organ Sharing, What We Do, Organ Sharing, http://www.unos.org/whatWeDo/organCenter.asp (last visited June 12, 2010).

82. UNOS has collected, maintained, and analyzed data from nearly every organ transplant since 1986. United Network for Organ Sharing, What We Do, Research, http://www.unos.org/whatWeDo/research.asp (last visited June 12, 2010).

making informed decisions, sets standards for patient care, and offers educational programs for professionals.[83]

Despite the UAGA and NOTA, the severe shortage of transplantable organs in the United States persists.[84] In fact, the UAGA and NOTA have hindered rather than helped to increase the organ supply because prohibiting compensation leaves altruism as the only quasi-incentive to donate—an incentive that has proven to be ineffective.[85]

C. Legislation Abroad

The scarcity of organs for transplantation is not confined to the United States—it is a global problem.[86] Internationally, the two main methods of organ procurement are presumed consent and express consent; both unfortunately have failed to procure enough organs to meet the demand.[87] In a presumed consent system, as utilized by France, Belgium, Austria, Spain, Switzerland, Greece, Italy, and Singapore,[88] it is implicit that all citizens will donate their organs upon death unless they dissent to donation while living.[89] France and Belgium have a soft presumed consent system,[90] which forbids removal of organs if the deceased's family objects and that objection is made known.[91] In France and Belgium doctors are encouraged to seek family consent and inform them of their right to decline to donate.[92] Although seeking family

83. United Network for Organ Sharing, What We Do, http://www.unos.org/whatwedo/ (last visited June 12, 2010).

84. As of April 6, 2010, 106,773 people are waiting for a potentially life saving organ transplant. Organ Procurement and Transplantation Network, http://optn.transplant.hrsa.gov/ (last visited June 12, 2010).

85. This is evident from poor donation rates under the current system. *See supra* notes 10-12 and accompanying text.

86. *See* Chandis, *supra* note 20, at 217-18.

87. *See* Magda Slabbert & Hennie Oosthuizen, *Commercialization of Human Organs for Transplantation: A View From South Africa*, 24 MED. & L. 191, 192 (2005).

88. Troy R. Jensen, Comment, *Organ Procurement: Various Legal Systems and Their Effectiveness*, 22 HOUS. J. INT'L L. 555, 564-65 (2000).

89. Slabbert & Oosthuizen, *supra* note 87, at 193. Most countries which employ a presumed consent system of organ procurement have a national database listing all individuals who have chosen not to be organ donors. *Id.*

90. Statz, *supra* note 43, at 1693.

91. *See* Emily Denham Morris, Note, *The Organ Trail: Express Versus Presumed Consent as Paths to Blaze in Solving a Critical Shortage*, 90 KY. L.J. 1125, 1136 (2002).

92. Statz, *supra* note 43, at 1692-93.

consent is not required, in France and Belgium many doctors continue to act in accordance with the wishes of the deceased's family.[93]

Austria has a strict presumed consent system under which a deceased's organs may be harvested, regardless of the wishes of the next of kin,[94] unless the deceased had chosen not to be an organ donor and that request is presented in writing.[95] Doctors in Austria have no legal obligation to seek consent from the deceased's family or search for documents of the deceased's wishes.[96] If there is doubt as to the deceased's intentions, the organs may still be harvested.[97] As a result, in most emergency situations, if the deceased's organs are viable, they will be harvested since the deceased often will not have a written document stating his desire not to donate when he arrives at the hospital.[98]

Austria has seen an increase in its organ supply since the implementation of its presumed consent legislation.[99] The average number of donors per million per year rose from 4.6 before the 1982 legislations, which established the presumed consent system, to an average 27.2 donors per million per year between 1986 and 1990.[100] To deter its citizens from opting out, if an individual registers his dissent to donate and is later in need of an organ transplant that individual is placed at the bottom of the transplant wait list.[101] This penalty is likely the leading cause of Austria's steep donation rate increase.[102]

Singapore offers more tangible incentives to deter its citizens from opting out. In Singapore, those registered as organ donors have priority on the wait list and the "immediate family members of an organ donor receive a 50% subsidy in medical expenses for the five years following the donation."[103] Such legislation would likely face First Amendment

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93. Curtis E. Harris & Stephen P. Alcorn, *To Solve a Deadly Shortage: Economic Incentives for Human Organ Donation*, 16 ISSUES L. & MED. 213, 224 (2001). In France, doctors seek family consent more than 90% of the time. *Id.*

94. *Id.* at 225; Abena Richards, Comment, *Don't Take Your Organs to Heaven . . . Heaven Knows We Need Them Here: Another Look at the Required Response System*, 26 N. ILL. U. L. REV. 365, 389 (2006).

95. Richards, *supra* note 94, at 389.

96. *Id.*; Statz, *supra* note 43, at 1694.

97. Statz, *supra* note 43, at 1694.

98. Richards, *supra* note 94, at 389. This system of procurement is also called conscription, or "routine salvaging." *Id.* at 379. Conscription is the strongest form of presumed consent since consent before donation is not required from anyone, including the donor. *Id.*

99. Statz, *supra* note 43, at 1694-95.

100. *Id*.

101. *See id.* at 1694.

102. *Cf. id*. at 1695 (noting that car accidents may be the true reason for the steep donation rate increase experienced in Austria).

103. *Id.* at 1696.

constitutional challenges in the United States as many religions proscribe cadaveric organ donations.[104]

Brazil did not experience a similar growth in donation rates under a presumed consent system. In 1996, only 2.7% of people in need of an organ transplant received one.[105] Therefore, in order to increase their organ supply, Brazil passed the Presumed Organ Donor Law establishing a presumed consent system of organ procurement.[106] Due to widespread public disapproval and a resulting decline in organ donations, Brazil reverted back to an express consent system of organ donation[107] similar to the model the United States and South Africa currently employ. Under an express consent system an individual must voluntarily choose to be an organ donor and take affirmative steps to demonstrate that intent, such as stating so in a will or signing a donor card.[108] In Brazil, unless his desire to donate is made known, upon death his organs may not be harvested for transplantation.[109]

Despite limited success in Austria, both the presumed consent and express consent models of organ procurement have failed to bridge the gap between the supply and demand for transplantable organs.[110] An alternative to these models is imperative to save thousands of lives in the United States and around the world. An organ procurement system that offers financial incentives for living and cadaveric organ donation has the potential to cure the organ shortage by appealing to those individuals who would not otherwise consider donation.

IV. REBUTTAL OF COMMON ARGUMENTS AGAINST THE LEGALIZATION OF FINANCIAL INCENTIVES FOR ORGAN DONATION

This section rebuts the most commonly raised arguments against legalizing financial incentives for both living and cadaveric organ donation. While there are legitimate counterarguments against

104. Richards, *supra* note 94, at 393.

105. Jensen, *supra* note 88, at 558. The low transplant rate may be attributed to cultural and geographic factors. In Brazil, rural towns lack modern healthcare facilities capable of conducting organ transplants. Further, because of the distance between towns and the rugged terrain only 10% of organs arriving at the hospital are transplantable. Another reason for the low transplant rate in Brazil is that many believe that harvesting organs would desecrate the human body. *Id*. at 558-59.

106. Everton Bailey, Comment, *Should the State Have Rights to Your Organs? Dissecting Brazil's Mandatory Organ Donation Law*, 30 U. MIAMI INTER-AM. L. REV. 707, 708 (1999). "Unless manifestation of will to the contrary . . . it is presumed that authorization is given for the donation of tissues, organs and human body parts, for the purpose of transplantation or treatment of diseases." *Id.* (citations omitted).

107. Morris, *supra* note 91, at 1138.

108. *See* Keller, *supra* note 16, at 860.

109. Slabbert & Oosthuizen, *supra* note 87, at 193.

110. *Id.*

authorizing the sale of organs, strict regulation and oversight will assuage many of these concerns.

A. The Poor Will Not Be Coerced Into Selling Their Organs

The picture that opponents of financial incentives paint in the mind of society is one of an impoverished mother selling her kidney to a multi-millionaire in order to feed her three young children.[111] Opponents of a market in organs believe that financial incentives compromise the voluntary nature of the decision to donate and can therefore be coercive, particularly to poor and minority communities.[112]

This argument contains several weaknesses. First, it is paternalistic and blatantly insults the poor, as it implies that the poor are not competent people capable of making rational decisions that best serve their interests. The prohibition against financial incentives for organ donation is inconsistent with other potentially dangerous activities engaged in daily by those looking for an economic advantage.[113] The government, without societal objection, permits the poor to engage in all sorts of risky activities, such as working on construction sites and in mines in order to subsist.[114] Just as society deems all competent individuals capable of assigning a reasonable risk-to-pay association before entering a profession, society should permit these same individuals autonomy to assign value to the risks attending organ donation.[115]

> In a capitalist society with an unequal distribution of resources, it is inevitable that the inducement of compensation will affect some peoples more than others, and that people of lesser means will be more likely to donate at any given payment level than people of greater means. The well-to-do rarely accept dangerous, dirty, or unpleasant jobs, whereas the near-destitute often do.[116]

The use of a financial incentive to induce one to engage in a risky activity is not inherently coercive, nor is payment for such activities

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111. Calandrillo, *supra* note 46, at 93-94.

112. *Id.*; Korobkin, *supra* note 4, at 51; Slabbert & Oosthuizen, *supra* note 87, at 197-98; Chandis, *supra* note 20, at 229.

113. *See* Shaun D. Pattinson, *Organ Trading, Tourism, and Trafficking Within Europe*, 27 MED. & L. 191, 199 (2008); *see also* Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813, 1842-43 (2007).

114. *See* Volokh, *supra* note 113, at 1842-43; *see also* Pattinson, *supra* note 113, at 199.

115. *See* Pattinson, *supra* note 113, at 199; *see also* Volokh, *supra* note 113, at 1842-43.

116. Korobkin, *supra* note 4, at 54.

impermissible.[117] As long as informed consent is obtained, organ donations in exchange for financial incentives, like all other transactions in today's market economy, are completely voluntary.[118]

Anticipation of an economic gain often provides motivation for individuals to act.[119] These payments, in all other circumstances, are viewed as a reward or an exchange for time and effort, not coercion.[120] Coerce means "to force or compel, as by threats, to do something" and "to bring about by using force . . . ."[121] If financial compensation were permitted, the purchasing agency would not threaten or pressure the perspective donor. The agency would simply offer potential donors compensation in exchange for a voluntary donation; there would be no coercion.[122] The free market system for female eggs for use in assisted reproduction illustrates that economic coercion of the poor should not be a concern impeding the legalization of financial incentives for organ donation. Ova are freely sold, yet the majority of egg donors are not poor or minority women.[123] This suggests that if organs were to be sold in the same method as eggs, no economic coercion would result.

Moreover, the selling price of an organ will not be high enough that the poor will be compelled to donate by the possibility of becoming rich overnight.[124] Mechanisms of supply and demand will determine the price of organs.[125] Offering financial incentives will increase the number of available organs resulting in a decrease of organ prices.[126] It is therefore unlikely that the price would be the sole factor in one's decision to donate; altruism would still play a substantial role.[127] For those who are still distrustful and feel the need to protect the poor, in order to eliminate the fear of coercively high prices, the government can set a maximum price on organs so the poor will not have the opportunity to bargain for high consideration.

Additionally, for those who believe banning organ sales is necessary to protect vulnerable groups, let's consider a policy that

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117. *See id.* at 51, 53. For instance, coal mining is a dangerous career, yet we would not require one who works as a miner to do so without compensation. *Id.* at 54.

118. *See id.* at 51.

119. Beard & Kaserman, *supra* note 5, at 832.

120. *Id.*

121. WEBSTER'S NEW WORLD COLLEGE DICTIONARY 283 (4th ed. 2002).

122. Beard & Kaserman, *supra* note 5, at 832.

123. Margaret R. Sobota, Note, *The Price of Life: $50,000 for an Egg, Why Not $1,500 for a Kidney? An Argument to Establish a Market for Organ Procurement Similar to the Current Market for Human Egg Procurement*, 82 WASH. U. L.Q. 1225, 1245-46 (2004).

124. Yau, *supra* note 46, at 106.

125. *Id.* at 105.

126. *Id.* at 105-06.

127. *See* Beard & Kaserman, *supra* note 5, at 834.

allows only adults over a certain income level to receive financial compensation for living or cadaveric organ donations. The poor would still be encouraged to donate, however would not be compensated for their donation.[128] Faced with such a proposal, it seems evident that any person in the excluded income bracket would rather have the option to donate for compensation. Society, under the façade of protecting the poor, is actually denying the poor "the use of one of the few assets they have, their bodies and, by extension, their personal autonomy."[129]

B. The Rich Will Not Monopolize Available Organs

A fear in permitting the sale of organs is that the poor will be persuaded to sell their organs which only the rich could afford to purchase, creating a disproportionate allocation of organs among socioeconomic groups.[130] The main weakness of this argument is that it assumes the recipient is the party paying for the organs.[131] If this were the case, the rich would monopolize all available organs by outbidding the poor.[132] Such a system would also lead to chaos, bribery, and absurdly high prices for organs.[133] A foretaste of this occurred in 1999 when a Florida resident attempted to auction his functioning kidney on eBay.[134] By the time eBay discovered and removed this offer, the bidding had reached over $5.7 million.[135] However, if procurement agencies were to purchase organs from donors and then allocate the organs to recipients in the same manner allocated today, no such bidding wars would occur and the poor would have equal access to organs.

It is a reality that wealth influences all sorts of daily health care decisions. About 46.3 million Americans, or 15.4% of the population, do not have health insurance.[136] If the government and society truly cared to prevent wealth from influencing health care, the lack of coverage of

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128. *Id.* at 832-33.

129. Boyd, *supra* note 16, at 466.

130. Beard & Kaserman, *supra* note 5, at 831; Calandrillo, *supra* note 46, at 93-94; Slabbert & Oosthuizen, *supra* note 87, at 197; Chandis, *supra* note 20, at 229-30.

131. *See* Beard & Kaserman, *supra* note 5, at 831.

132. Lobas, *supra* note 33, at 503.

133. *See, e.g.*, Amy Harmon, *Auction for a Kidney Pops Up on Ebay's Site*, N.Y. TIMES, Sept. 3, 1999, at A13.

134. *Id.*

135. *Id.* The advertisement read: "Fully functional kidney for sale. You can choose either kidney. Buyer pays all transplant and medical costs. Of course only one for sale, as I need the other one to live. Serious bids only." Erica D. Roberts, Note, *When the Storehouse is Empty, Unconscionable Contracts Abound: Why Transplant Tourism Should Not be Ignored*, 52 HOW. L.J. 747, 748 n.1 (2009).

136. U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2008 20, 22 (2009), http://www.census.gov/prod/2009pubs/p60-236.pdf.

these 46 million Americans would have been remedied through universal health care coverage.[137] Transplants are expensive and thus are generally only available to those with health insurance, government provided healthcare, or personal funds.[138] Personal finance therefore should not be a concern prompting the ban on organ sales because, due to insufficient health care coverage, the poor currently have unequal access to organ transplants.[139]

Without a transplant, health care funders would be paying for other treatment necessitated by the underlying illness, such as dialysis.[140] Long term care in the absence of a transplantable organ is typically more expensive then the transplant itself.[141] For example, medical expenses associated with a kidney transplant, including after-care, are on average $100,000 less than expenses stemming from long term dialysis.[142] It is thus more financially efficient for health care providers to pay up to $100,000 for a kidney than to pay for long term dialysis, no matter the wealth of the patient.[143]

C. The Human Body is Already Commodified

Most Western nations believe that permitting the sale of human body parts is morally and ethically wrong, as it devalues the human body and undermines the sanctity of life.[144] Some who strongly oppose offering financial incentives describe the practice as "trafficking in human flesh,"[145] "strip[ping] the human body of its proper dignity,"[146] and violating "the dignity of man."[147] This argument focuses on the fact that the product being sold is a part of a human being,[148] however in the Unites States, ova banks thrive by buying and selling eggs to women for

137. Calandrillo, *supra* note 46, at 100.

138. Volokh, *supra* note 113, at 1839.

139. Charles C. Dunham IV, *"Body Property": Challenging the Ethical Barriers in Organ Transplantation to Protect Individual Autonomy*, 17 ANNALS HEALTH L. 39, 63 (2008).

140. Volokh, *supra* note 113, at 1839.

141. *Id.*

142. *Id.*

143. *Id.*

144. Lisa Milot, *The Case Against Tax Incentives for Organ Transfers*, 45 WILLAMETTE L. REV. 67, 86 (2008); Sunny Woan, Comment, *Buy Me a Pound of Flesh: China's Sale of Death Row Organs on the Black Market and What Americans Can Learn From It*, 47 SANTA CLARA L. REV. 413, 436-37 (2007).

145. Crespi, *supra* note 22, at 21.

146. Ann Bindu Thomas, Note, *Avoiding EMBRYOS "R" US: Toward a Regulated Fertility Industry*, 27 WASH. U. J.L. & POL'Y 247, 258 (2008).

147. Woan, *supra* note 144, at 437.

148. Calandrillo, *supra* note 46, at 97-98.

use in assisted reproduction.[149] Infertile women have paid thousands of dollars for these eggs and the chance to conceive and deliver a child.[150] Just as society embraces a market for ova, the bodily product that creates life, society should express similar sentiments for a market in organs, the bodily product that sustains life.[151]

Additionally, this contention is irreconcilable with the realities of today's market economy, in which almost every aspect of the human body is commodified in one way or another.[152] Models are paid for their beauty, singers for their voice, athletes for their superior strength and dexterity, and professionals for their knowledge. Additionally, some biological vaccines derived from cells lines of the human body are patented no differently than any other product in today's market.[153] It is fundamentally inconsistent to hold that commodification of life saving organs is so pervasively immoral as to be prohibited, but not these other multi-million dollar industries which are nearly unanimously accepted by society.[154]

Moreover, bartering in organs, also called paired organ exchanges, occurs in the United States under the guise of altruism, however the essence of the transaction is no different than donating an organ in exchange for financial compensation.[155] Consider a hypothetical situation demonstrating a paired organ exchange:[156] Two waitlist patients, Patient A and Patient B, have friends and family who are willing to donate to their respective patient. However, Patient A's willing donors are incompatible with Patient A, but compatible with Patient B. Conversely, Patient B's willing donors are biologically

149. *Id.* at 97.

150. *Id.*

151. *Id.* at 98. Opponents of financial incentives for organ donors argue that since a woman has more eggs than she will ever need they are considered regenerative, like sperm and blood, and therefore do not carry the same concerns as organ donation. *See* Andrew Wancata, *No Value for a Pound of Flesh: Extending Market-Inalienability of the Human Body*, 18 J.L. & HEALTH 199, 223-24 (2003). Due to technological advances this argument no longer has merit as the line between regenerative and non-regenerative body parts has blurred. Today, surgeons can perform split liver transplants which involve a live donor donating part of his liver. *Id.* The half livers within time regenerate into complete, fully functioning livers. *Id.* Additionally, despite ethical issues, with further research physicians may be able to grow new organs from stem cells. *Id.* Therefore ova should not be distinguished from organs on the basis that ova are regenerative and organs are not. *Id.*

152. Kenneth Baum, *Golden Eggs: Towards the Rational Regulation of Oocyte Donation*, 2001 BYU L. REV. 107, 135.

153. *See id.*

154. *Id.* at 135-36.

155. *See* Woan, *supra* note 144, at 440.

156. Michael T. Morley, Note, *Increasing the Supply of Organs for Transplantation Through Paired Organ Exchanges*, 21 YALE L. & POL'Y REV. 221, 224 (2003).

incompatible with Patient B, but are compatible with Patient A. A paired organ exchange occurs when the willing donor of Patient A donates his organ to patient B on the condition that the willing donor of Patient B donates his organ to Patient A.[157]

> There is a legal objection that you're not allowed to trade or sell organs for "valuable considerations," but the folks who run the kidney establishment . . . ha[ve] managed to delude or persuade themselves that these swaps are, in fact, pure altruism . . . . I don't care about the linguistics at this point—I think it's baloney . . . . It's a market for barter.[158]

Commodification of the human body occurs whether the exchange is organ-for-organ or organ-for-money. It is therefore puzzling why donating an organ in exchange for financial compensation is forbidden when, at the same time, donating an organ in exchange for an organ is not only permitted but encouraged.[159] The form of the transactions may be different, but in substance they are indistinguishable.

D. Organ Donation Does Not Impose Unconscionable Health Risks on Live Donors

Those opposed to live organ donations fear that financial incentives would induce all people, not just the poor, to gamble with their health and lives.[160] Organ donation, however, is not nearly as dangerous as the general public may think. The mortality rate after a kidney donation is only about 0.03%,[161] which can be further reduced through careful selection of donors and enhanced prophylactic measures.[162] Additionally, there is less than a 2% risk of complication and no increased risk of kidney disease.[163] To exemplify the low risk associated with live organ donations, fishers and related fishing workers have a

157. *Id.* (calling for an expansion of the existing national organ waitlist to "include information about individuals potentially willing to donate on behalf of each patient, and using [that] data to identify cross-matches").

158. Interview by Russ Roberts with Richard Epstein, Professor of Law, Univ. of Chicago (June 5, 2006), *available at* http://www.econtalk.org/ archives/2006/06/the_economics_o_4.html (the quote can be found approximately six minutes into the interview).

159. Woan, *supra* note 144, at 440.

160. *See* Volokh, *supra* note 113, at 1841.

161. *Id.*; Watkins, *supra* note 22, at 30; Morley, *supra* note 156, at 232.

162. Watkins, *supra* note 22, at 30.

163. Volokh, *supra* note 113, at 1841; Morley, *supra* note 156, at 232.

0.1% risk of death while on the job, structural iron and steel workers have a 0.04% risk of death and roofers have a 0.03% risk.[164]

E. Financial Incentives Would Not Lead to Premature Termination of Care

There is the apprehension that financial incentives for cadaveric donations would lead to premature termination of care for critically injured or terminally ill patients.[165] This argument is flawed for several reasons. First, the financial incentives offered would not be sufficiently lucrative to persuade family members to prematurely "pull the plug" on their loved ones.[166] Second, it is the family of the deceased who would receive the financial benefits for donation, not the physician.[167] Physicians would have nothing to gain by prematurely terminating care;[168] rather they have everything to lose, for example, their medical license, by such practices.[169] Third, many hospitals have protocols prohibiting the discussion of organ donation with the family until the decision to withdraw life support has been made.[170] Thus, family members do not know whether their loved ones organs are of donatable quality until the decision to terminate life support has been made.

F. Altruism Would Still Play a Prominent Role in the Decision to Donate

The United States relies on altruism and volunteerism to procure organs for transplantation.[171] Those opposed to financial incentives for donation fear that permitting the sale of organs would eliminate altruistic tendencies among American citizens.[172] These opponents fail to realize that paid and unpaid organ donations can coexist without reducing altruism.[173] Compensation does not necessarily obliterate the altruistic

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164. BUREAU OF LABOR STATISTICS, NATIONAL CONSENSUS OF FATAL OCCUPATIONAL INJURIES IN 2008 4 (2009), http://www.bls.gov/news.release/pdf/cfoi.pdf; *accord* Volokh, *supra* note 113, at 1842; Watkins, *supra* note 22, at 30.

165. Beard & Kaserman, *supra* note 5, at 833; Chandis, *supra* note 20, at 236.

166. Beard & Kaserman, *supra* note 5, at 833-34.

167. *Id*. at 833.

168. *Id*.

169. Keller, *supra* note 16, at 873 (noting that if a surgeon were to remove a patient's organs before that patient was pronounced dead, the surgeon would be charged with homicide).

170. Carlson, *supra* note 69, at 161.

171. Kimberly J. Cogdell, *Saving the Leftovers: Models for Banking Cord Blood Stem Cell*s, 25 ISSUES L. & MED. 145, 160 (2009).

172. Dunham, *supra* note 139, at 64; Slabbert & Oosthuizen, *supra* note 87, at 198; Boyd, *supra* note 16, at 464.

173. Boyd, *supra* note 16, at 464-65.

nature of an act. For example, enlistees are compensated for their time in the army, yet all would agree that army service is nevertheless still altruistic.[174] Compensation for organ donation is not intended to reimburse the donor for the market value of their organ plus profit; rather it is solely meant to act as a motivator to encourage citizens to consider donation, to complete a donor card or join a donor registry. Organ donation, regardless of compensation, is a selfless act motivated by the desire to help others; altruistic ideals will still play a prominent role in the decision to donate.

V. EGG DONATION

The ability to extract human ova, fertilize it in a Petri dish and then place the resulting embryo into another women's uterus has given many infertile women the chance to conceive and deliver a child.[175] By 1983, in vitro fertilization ("IVF") using a donor egg became a successful option for many infertile women.[176] Not long thereafter, by the early 1990s, a market for egg donors was widespread.[177] Each year thousands of women sell their eggs on the open gamete market.[178] These women are generally recruited by assisted reproductive technology clinics through advertisements on college campuses[179] and the internet.[180] Donor candidates are evaluated based on intellectual, genetic, and

174. *See* Christian M. Williams, Note, *Combatting the Problems of Human Rights Abuses and Inadequate Organ Supply Through Presumed Donative Consent*, 26 CASE W. RES. J. INT'L L. 315, 362 (1994).

175. Most commonly, donor eggs are needed due to premature ovarian failure, poor egg quality, or diminished ovarian reserves most frequently caused by maternal age. Sanford M. Benardo & Katherine Benardo, *Assisted Reproductive Technology: Egg Donation and Surrogacy Arrangements in Law and Practice*, 2 BLOOMBERG CORP. L.J. 406, 407 (2007).

176. *Id.* IVF is the assisted reproductive process in which eggs are extracted from a donor, fertilized exteriorly and then implanted into the uterus of the recipient. *See* THE N.Y. TASK FORCE ON LIFE AND THE LAW, THINKING OF BECOMING AN EGG DONOR? 6, 14-19 (2009), http://www.health.state.ny.us/publications/1127.pdf (discussing the process of egg donations and its attending risks).

177. Benardo & Benardo, *supra* note 175, at 407. In 2000, approximately five thousand egg transfers took place, though not all resulted in a successful pregnancy. Lisa Hird Chung, Note, *Free Trade in Human Reproductive Cells: A Solution to Procreative Tourism and the Unregulated Internet*, 15 MINN. J. INT'L L. 263, 266 (2006).

178. Sarah Terman, *Marketing Motherhood: Rights and Responsibilities of Egg Donors in Assisted Reproductive Technology Agreements*, 3 NW. J.L. & SOC. POL'Y 167, 167 (2008).

179. *Id.* at 167; Sarah B. Angel, Recent Development, *The Value of the Human Egg: An Analysis of Risk and Reward in Stem Cell Research*, 22 BERKELEY J. GENDER L. & JUST. 183, 198 (2007).

180. Terman, *supra* note 178, at 167.

physical traits[181] and are generally chosen by purchasers based on these attributes.[182]

Currently in the United States women are typically paid between $5,000 and $8,000 per ovulation cycle.[183] There have, however, been instances in which women with certain desirable traits, physical characteristics or academic achievements have been paid as high as $50,000 to $100,000 for their eggs.[184] Some evidence suggests that the egg donors are persuaded to donate by the lure of financial compensation.[185]

A. Egg Donation Legislation

Legislation in the United States is virtually silent on gamete donor compensation.[186] While NOTA is the closest federal legislation to prohibiting the market in ova, it does not apply to gametes.[187] Currently, Louisiana is the only state that explicitly prohibits the sale of ova[188] and Virginia is the only state that explicitly authorizes the sale.[189] The silence of the other states can be interpreted as an implied acceptance of the practice.[190]

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181. *Id.*; Angel, *supra* note 179, at 198.

182. Terman, *supra* note 178, at 167. Some agencies allow potential purchasers to meet and interview potential donors. Korobkin, *supra* note 4, at 49.

183. Chung, *supra* note 177, at 279.

184. Korobkin, *supra* note 4, at 49; Chung, *supra* note 177, at 279.

185. Chung, *supra* note 177, at 285-86.

186. Radhika Rao, *Coercion, Commercialization, and Commodification: The Ethics of Compensation for Egg Donors in Stem Cell Research*, 21 BERKELEY TECH. L.J. 1055, 1057 (2006). Even the Fertility Clinic Success Rate and Certification Act, which requires fertility clinics to publish their pregnancy success rates and certify laboratories handling embryos, does not grant any agency authority over clinical practices, such as regulating compensation. Thomas, *supra* note 146, at 252.

187. 42 U.S.C. § 274e(c)(1) (2006) (defining the term "human organ" to mean "the human (including fetal) kidney, liver, heart, lung, pancreas, bone marrow, cornea, eye, bone, and skin or any subpart thereof and any other human organ (or any subpart thereof, including that derived from a fetus)").

188. LA. REV. STAT. ANN. § 9:122 (2008) ("The sale of a human ovum, fertilized human ovum, or human embryo is expressly prohibited."). This law is based on the principle that an "embryo has the same legal status as a person." Lyria Bennett Moses, *Understanding Legal Responses to Technological Change: The Example of In Vitro Fertilization*, 6 MINN. J. L. SCI. & TECH. 505, 536-37 (2005).

189. VA. CODE. ANN. § 32.1-291.16 (2008). The statute states that:

> With the exception of hair, ova, blood, and other self-replicating body fluids, it shall be unlawful for any person to sell, to offer to sell, to buy, to offer to buy, or to procure through purchase any natural body part for any reason including, but not limited to, medical and scientific uses such as transplantation, implantation, infusion, or injection.

Id.

190. While no other state has laws dealing specifically with the sale of gametes, states do have laws dealing with other issues surrounding artificial reproductive technology and IVF. Virginia, for

Several countries regulate financial compensation for egg donations. For instance, the United Kingdom and Canada prohibit compensation in excess of the donor's reasonable expenses.[191] Likewise, although Belgium has no specific assisted reproductive technology regulations, since the Belgium Civil Code, Article 1128, states that body parts may not be sold, most fertility clinics only allow reimbursement for reasonable expenses incurred.[192] In these countries, women in need of an egg donation rely on purely altruistic egg donors and as a result often have to wait years before a donor is found.[193]

B. Arguments in Favor of a Free Market in Ova

1. Without Financial Incentives the Supply Would Not Meet the Demand Leaving Many Infertile Women Unable to Procreate

As with organ donations, altruism alone does not generate adequate egg donations.[194] Without financial incentives for ova donations the supply will fail to meet the demand, leaving many infertile women unable to procreate. In countries such as Israel, England, Germany, and France, where compensation for gamete donations are prohibited, there is a shortage of eggs for use in assisted reproduction.[195] Because of the rarity of the altruistic donor, women frequently must wait as long as five years to receive a donation and typically do not have a choice in the features of the donor.[196] Although it is possible that other variables such as religious beliefs, social norms, and health care systems contribute to the discrepancy in ova donations between the Unites States and countries that do not permit compensation, it is evident that in the United States compensation does have a positive effect on supply.[197] Before one couple listed a $50,000 advertisement seeking an egg donor with certain characteristics, they received few responses, none which matched the

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example, requires HIV tests for gamete donors, New Hampshire has laws regarding how long embryos can be stored in vitro, and Pennsylvania requires that certain IVF statistics be reported. Moses, *supra* note 188, at 537-38.

191. Chung, *supra* note 177, at 271-72. *See also* Human Fertilisation and Embryology Act, 2008, c. 22, § 47 (U.K.); Assisted Human Reproduction Act, 2004 S.C., ch. 2, §§ 5-6 (Can.).

192. Chung, *supra* note 177, at 272.

193. *See infra* notes 194-96 and accompanying text.

194. Baum, *supra* note 152, at 158; John A. Robertson, *Commerce and Regulation in the Assisted Reproduction Industry*, 85 TEX. L. REV. 665, 688 (2007).

195. Baum, *supra* note 152, at 158-59; Robertson, *supra* note 194 at 687-88.

196. Baum, *supra* note 152, at 158-59. This is unlike women in America, who have the privilege of choosing a donor based on physical or intellectual characteristics. Terman, *supra* note 178, at 167.

197. Baum, *supra* note 152, at 159.

profile they desired.[198] However, after increasing the listed compensation to $50,000 they were swamped with hundreds of replies.[199] As it is clear that supply does not meet the demand when donor compensation is prohibited—until a compelling justification to deny infertile women access to donor eggs is identified—a free market for ova should prevail.

2. Procreative Liberty

Procreative liberty is the right to decide whether or not to procreate.[200] It includes the right to reproduce and the right to avoid reproducing.[201] The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution protects certain fundamental rights, such as the right to be free from governmental interference in matters relating to procreation,[202] intimacy,[203] and marriage.[204] There is currently no U.S. Supreme Court case recognizing the right to non-coital reproduction as a fundamental right, however precedent indicates that such a right would be found to exist.[205]

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education. . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.[206]

Additionally, procreative liberty requires access to all reasonable means of executing the choice to, or not to, procreate.[207] The reason for this is because "the decision whether or not to procreate is so

198. *Id.* at 159 n.133.

199. *Id.*

200. John A. Robertson, *Procreative Liberty in the Era of Genomics*, 29 AM. J.L. & MED. 439, 447 (2003).

201. *Id.*

202. *See* Roe v. Wade, 410 U.S. 113, 154 (1973) (freedom to terminate a pregnancy); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (freedom of unmarried individuals to use contraceptive); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (freedom to use contraception in a marital relationship).

203. *See* Lawrence v. Texas, 539 U.S. 558, 574 (2003) (freedom to engage in adult consensual sodomy).

204. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) (freedom to marry a person of another race).

205. *See* Moses, *supra* note 188, at 519-20; John A. Robertson, *Technology and Motherhood: Legal and Ethical Issues in Human Egg Donation*, 39 CASE W. RES. L. REV. 1, 9-11 (1989).

206. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).

207. Baum, *supra* note 152, at 113.

fundamental, so personal, that its denial would be antithetical to the pursuit of life, liberty, and happiness."[208] This sentiment is supported in *Skinner v. Oklahoma*,[209] the Supreme Court case that established the right to procreate as "one of the basic civil rights of man,"[210] a right that is "fundamental to the very existence and survival of the race."[211]

Skinner is the only Supreme Court case to recognize the right to procreate; all other precedent regarding reproduction involves the right to avoid procreation.[212] In *Griswold v. Connecticut*[213] and *Eisenstadt v. Baird*[214] the Court confirmed a woman's right to avoid reproduction through the use of contraception and in *Roe v. Wade*[215] and *Planned Parenthood v. Casey*[216] through abortion.[217] Although no Supreme Court case deals explicitly with the right to be free from restrictions to procreate through the use of assisted reproduction, the above noted precedent protecting privacy in coital reproduction indicates that such a right would be confirmed.[218] Therefore, if the right to non-coital reproduction were found to be fundamental, regulations imposing an undue burden[219] on access to donor eggs, in the absence of an overriding state interest, would be unconstitutional.[220]

3. Sex Equality

Laws restricting a woman's right to procreate have an overwhelming "sex-specific impact" because, although both men and women procreate, only women become pregnant and only women undergo IVF.[221] Society is overly concerned about the ethical

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208. *Id.*

209. 316 U.S. 535, 541 (1942) (striking down a state statute authorizing sterilization of habitual criminals).

210. *Id.*

211. *Id.*

212. Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 18, 51 (2008).

213. 381 U.S. 479, 485 (1965).

214. 405 U.S. 438, 453-55 (1972).

215. 410 U.S. 113, 164-65 (1973).

216. 505 U.S. 833, 869 (1992).

217. This is not an absolute right. *Casey* only recognizes the right to an abortion up until viability. *Id.* at 870.

218. MAURA A. RYAN, ETHICS AND ECONOMICS OF ASSISTED REPRODUCTION: THE COST OF LONGING 94 (2001).

219. In the context of abortion, an undue burden exists if the "purpose or effect [of a government regulation] is to place a substantial obstacle in the path of a women seeking an abortion before the fetus attains viability." *Casey*, 505 U.S. at 878.

220. *See* Daar, *supra* note 212, at 52-53; Moses, *supra* note 188, at 520.

221. *See* Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 980-81 (1984) (noting that the best argument for the plaintiffs in *Roe v. Wade* would have been one based on the principles of sex equality, not due process or privacy).

implications of compensating egg donors, but shows no acknowledgment or unease towards compensating sperm donations. To proscribe compensation for egg donations but not sperm donations is manifestly discriminatory, especially considering women undergo a greater burden while donating.[222]

> Women, like men . . . should now be free to get out of their protected sphere and enter the market on an equal basis. Men in power should not tell them what to sell and what not to sell. Whatever is problematic . . . should be for women to deal with as a matter of their own moral deliberation and choice.[223]

Any law excluding only women from the market subordinates women, denies their equality and facilitates the maintenance of existing gender based inequalities.[224]

VI. ARGUMENTS IN FAVOR OF COMPENSATING ORGAN DONATIONS

There is widespread public support for providing financial incentives for organ donation in the United States. A study done by the UNOS showed that 52% of Americans support compensating organ donations, 5% have reservations, and only 2% consider financial incentives "immoral or unethical."[225] In addition to the pervasive support, the following considerations illustrate why offering financial incentives is an effective way to increase the organ supply.

A. The Policy Concerns Underlying the Organ Sale Ban are Immaterial Considering the Widespread Support for Egg Donations

The policy concerns underlying the ban of financial incentives for organ donations prove to be immaterial when compared to the sale of ova. A major apprehension among those opposed to organ sales is that the poor will be coerced into selling their organs by the prospect of economic gain.[226] The sale of ova has the potential to be far more coercive than the sale of organs because a woman can sell her eggs

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222. John A. Robertson & Susan L. Crockin, *Legal Issues in Egg Donation*, *in* FAMILY BUILDING THROUGH EGG AND SPERM DONATION: MEDICAL, LEGAL, AND ETHICAL ISSUES 144, 151 (1996); Mary Lyndon Shanley, *Collaboration and Commodification in Assisted Procreation: Reflections on an Open Market and Anonymous Donation in Human Sperm and Eggs*, 36 LAW & SOC'Y REV. 257, 277 (2002).

223. Margaret Jane Radin, *Reflections on Objectification*, 65 S. CAL. L. REV. 341, 350-51 (1991).

224. Baum, *supra* note 152, at 161-62; Angel, *supra* note 179, at 215-16.

225. Watkins, *supra* note 22, at 24.

226. *See supra* notes 111-29 and accompanying text.

many times in her lifetime, as opposed to a kidney which, of course, can only be donated once. Moreover, ova have been sold for as high as $50,000—thousands of dollars more than would ever be offered for an organ under a regulated, incentive-based, system of organ donation.[227]

Additionally, manipulative tactics are often used by assisted reproductive agencies in an effort to solicit donors.[228] Hoping to capitalize on students in need of money, these agencies mainly advertise in college newspapers and, more recently, on popular social networking websites.[229] Despite these tactics, the free market system for eggs illustrates that economic coercion is a nonissue. Eggs may be freely sold yet the majority of egg donors are not poor or minority women.[230] This suggests that a financial compensation system for organs, comparable to eggs, would not be coercive.

Lastly, as mentioned earlier, it is inconsistent to believe the sale of some body parts is immoral but not others. If it does not belittle human life to pay for eggs, a bodily product which is the source of life, then it does not belittle human life to pay for a bodily product which prolongs life.[231]

B. The Donor is the Only Party Not Compensated for His Role in the Transplant

The prohibition of financial incentives "does not include the reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage . . . 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."[232] Therefore, although the organs themselves are not for sale, all other products and services in connection to the organ procurement and transplant are.[233] Society does not require suppliers of any other goods or services to act solely out of selfless motives. However, this provision

227. Korobkin, *supra* note 4, at 49.

228. *See, e.g.*, Angel, *supra* note 179, at 198.

229. *See supra* notes 179-82 and accompanying text.

230. Robertson & Crockin, *supra* note 222, at 151; Sobota, *supra* note 123, at 1245.

231. *See supra* notes 148-51 and accompanying text.

232. 42 U.S.C. § 274e(c)(2) (2006).

233. Cate, *supra* note 61, at 85; Yau, *supra* note 46, at 98-99; *see also* Peter S. Young, *Moving to Compensate Families in Human-Organ Market*, N.Y. TIMES, July 8, 1994, at B7 (describing organ transplants as "quite lucrative. . . . It's like a car at a chop shop. Somebody's making a handsome fee off of processing the parts."); *infra* notes 235-37 (multiorgan donors generate considerable revenue for OPOs and hospitals because each recipient is charged separately).

allows all parties except the source of the organ to receive compensation for their services.[234]

Under the current system of organ procurement, Organ Procurement Organizations ("OPO"s) are paid to recover organs from donors.[235] Hospitals, after finding a match, purchase the organs from the OPOs.[236] The patients then pay the hospital for the cost of procuring the organ, the procedure and all other fees associated with the procedure and hospital stay.[237] Money is exchanged at every level except that of the source, the level without which the transplant would not occur.

It has been contended that the patient is paying for the operation, rather than for the actual organ.[238] However, the transplant cannot occur without the organ. This contention is analogous to the claim that in paying for a meal at a restaurant, the patron only pays for the dining service and not the food itself.[239] The medical treatment and the organ "are sold together as an indivisible package,"[240] it would require extreme naïveté for anyone to believe otherwise.

C. Compensating Organ Donations Would Increase the Organ Supply and Consequently Reduce the Price of Organ Transplants

The organ shortage is a textbook example of how a zero-price policy on a commodity eliminates the supplier's incentive to sell, or in this case donate, their product, thereby creating a relentless demand for the commodity.[241] "It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest."[242] For instance, if lawyers were prohibited to charge for their legal services, there would be a dramatic decrease in the number of practicing attorneys. It should therefore be of no surprise that more people are not willing to donate their organs without some form of external motivation. Permitting financial incentives for organ donations will substantially increase the number of willing donors, alleviating the nation's organ shortage.[243] As the demand for transplantable organs

234. Boyd, *supra* note 16, at 463.

235. Julia D. Mahoney, *The Market for Human Tissue*, 86 VA. L. REV. 163, 180 (2000); Boyd, *supra* note 16, at 462.

236. Boyd, *supra* note 16, at 462.

237. *Id*.

238. Mahoney, *supra* note 235, at 182; Boyd, *supra* note 16, at 463.

239. Mahoney, *supra* note 235, at 182; Boyd, *supra* note 16, at 463.

240. Boyd, *supra* note 16, at 463.

241. Crespi, *supra* note 22, at 19.

242. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 18 (General Books LLC 2010) (1776).

243. Yau, *supra* note 46, at 105-06.

subsides, the price of those organs will decline as well, significantly reducing the total price of an organ transplant.[244]

In addition to reduced costs of transplants, with an increase in the number of transplants performed, money will be saved on long term treatment of the underlying illness. One study showed that based on the cost of dialysis for each person on the kidney wait list "society could break even while paying $90,000/kidney vendor."[245] Other studies had a break-even point of $35,000 per organ, a price which still far exceeds any proposed financial incentive.[246] Thus, any donor compensation under $35,000 per organ would result in an economic gain.

D. Constitutional Right to Medical Self-Defense

Professor Eugene Volokh[247] maintains that the organ sale ban imposes an undue burden on an individual's ability to protect himself using medical care, a right which Professor Volokh has termed "medical self defense."[248]

> Where most other constitutional rights are concerned, bans on using money (either from a bank account or an insurance policy) to help exercise a right are obviously substantial burdens on the right. . . . Likewise, courts have repeatedly struck down restrictions on the spending of money to speak, because such restrictions burden speakers' ability to effectively convey their message. . . . [I]f a ban on paying for one scarce good needed to exercise a constitutional right (teachers', lawyers', doctors', or authors' time, or space for a political ad in a newspaper) substantially burdens that right, then a ban on paying for another scarce good (providers' organs) should generally do so as well.[249]

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244. *See id.*

245. Arthurs, *supra* note 16, at 1119 (quoting Arthur J. Matas & Mark Schnitzler, *Paying for Living Donor (Vendor) Kidneys: A Cost-Effective Analysis*, 4 AM. J. TRANSPLANTATION 216, 216 (2004)).

246. *Id.*

247. Eugene Volokh is a Professor of Law at UCLA Law School, where he teaches, among other courses, free speech law, criminal law, religious freedom law, and church-state relations law. Professor Volokh clerked for Justice Sandra Day O'Connor on the U.S. Supreme Court and for Judge Alex Kozinski on the U.S. Court of Appeals for the Ninth Circuit. Eugene Volokh, http://www.law.ucla.edu/volokh/ (last visited June 12, 2010).

248. *See generally* Volokh, s*upra* note 113, at 1815-18 (contending that individuals have a constitutional right to protect themselves using healthcare).

249. *Id.* at 1835-36 (citation omitted); *cf.* Planned Parenthood v. Casey, 505 U.S. 833, 877 (1992) (concluding that in order for a regulation to be unconstitutional, the law must impose, or intend to impose, a "substantial obstacle" on the exercise of a fundamental right).

The ban on compensating donors limits the number of organ donations made each year, leaving many in need without a transplant.[250] According to Volokh, "[as] long as a ban on compensating organ providers keeps many patients from getting the organs they need to live, it constitutes a substantial burden on the right to medical self-defense, and is therefore presumptively unconstitutional."[251]

VII. A PROPOSAL FOR A REGULATED MARKET IN ORGANS

Above I argued why financial incentives for organ donations are the most logical and efficient way to increase the supply of transplantable organs and save thousands of lives each year. In order to accomplish this in a fair and ethical manner safeguarded from abuse, the government must establish an agency, overlooked by the OPTN, to regulate the organ market. This agency will be the sole entity permitted to purchase organs from donors or, in the case of cadaveric donors, their families. The agency would offer the donor a price, determined by market forces, which would fluctuate from time with changes in supply and demand.[252]

Once purchased, the organs will be distributed according to the UNOS guidelines in the same manner that they are allocated today. Those in need of an organ must be registered on UNOS's wait list.[253] To register, candidates must meet medical requirements and prove that they have the means to finance the transplant.[254] Once on the wait list, organs will be allocated based on a standardized formula which awards points based on a variety of factors including biological compatibility, duration on the wait list, distance from the donor, gravity of the candidate's medical condition, and the likelihood of long term success from the transplant.[255] Transplant centers must also consider the cause of the candidate's organ failure and psychosocial factors such as alcoholism, drug abuse and mental retardation.[256]

Starting with the patient with the highest score, organs will first be offered to patients in the same Donation Service Area ("DSA") as the donor (there are fifty-eight DSAs nationwide).[257] If there is no

250. *See* Volokh, *supra* note 113, at 1836-37.

251. *Id.*

252. *See* Crespi, *supra* note 22, at 48; Chandis, *supra* note 20, at 233.

253. Marc S. Nadel & Carolina A. Nadel, *Using Reciprocity to Motivate Organ Donations*, 5 YALE J. HEALTH POL'Y L. & ETHICS, 293, 299 (2005).

254. *Id.* at 299-300. S*ee also* Dunham, *supra* note 139, at 48-49 (contending that the current organ distribution scheme creates inequalities in organ distribution).

255. Dunham, *supra* note 139, at 48; Nadel & Nadel, *supra* note 253, at 300.

256. Lobas, *supra* note 33, at 479.

257. Nadel & Nadel, *supra* note 253, at 300.

compatible recipient, the organ will then be offered to patients in the donor's OPO region (there are eleven OPOs nationwide).[258] In the event that no compatible candidate is found, the organ will be offered nationwide.[259]

Under this proposal the only way to avoid the UNOS wait list is to receive a donation from a compatible friend or family member, no other direct donation will be permitted.[260] If a stranger wishes to donate an organ, he must do so through UNOS.[261] This will prevent potential recipients from bargaining with willing donors, a practice that has the potential to become exploitative.[262] This does not mean that one wishing to donate an organ must accept compensation; rather it means that they must donate their organ through UNOS and according to UNOS's procurement and allocation procedures.

In order to reimburse the procurement agency, the organ transplant center will include the price the agency paid for the organ in the recipient's operation bill.[263] By having a government regulated agency purchase the organs and distribute them according to the UNOS wait list, this will not be a situation akin to people standing on the corner bargaining for organs. No matter the wealth of an individual, organs will be allocated based entirely on the point system.

A. Additional Protective Measures for Direct Financial Incentives

Considering that the main argument against financial compensation for organ donation is the risk of exploitation and coercion of the poor, additional measures, although unnecessary, may be taken to safeguard against these concerns. Irrespective of supply and demand, the government can place a maximum and minimum cap on the selling price for each organ. A maximum price cap would prevent donors or donor families from being able to bargain with the OPO for an excessively high selling price, as well as ensure that the selling price never becomes so lucrative as to compel donation. The minimum price cap will likewise safeguard donors from inequitably low selling prices.

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258. *Id.*
259. *Id.*
260. Watkins, *supra* note 22, at 27-28.
261. *Id.*
262. *See id.* at 28; *supra* notes 67-71 and accompanying text.
263. Watkins, *supra* note 22, at 27.

B. Indirect Financial Incentives

As an alternative to providing direct payments for organ donations, other forms of payment may be offered as incentives to donate. Although these incentives would not place cash directly into the hands of the donor or the donor's estate, they would help ease some other financial burdens associated with organ donation.[264] Indirect incentives distance the economic benefit from the decision to donate, eliminating many of the concerns opponents have with the sale of organs.[265]

1. Reimbursement for the Medical Care and Funeral Expenses of Cadaveric Donors

At the very least, families of cadaveric donors should receive reimbursement for the medical care and/or funeral expenses of the donor. The following true story exemplifies the fundamental unfairness of the current transplant system: The mother of Susan Sutton, a twenty-eight year old female who took her own life, made the decision to donate her daughter's organs.[266] Her heart and liver saved lives, her corneas gave sight, her bones were used for reconstructive surgery, and her skin provided grafts for burn victims.[267] Not only were the recipients of her tissue and organs given a prolonged and improved quality of life, but both the doctors and the hospitals performing the transplants, as well as the organ procurement agency, profited from her donation.[268] Susan, however, was buried in an unmarked grave because her mother was unable to afford a gravestone and the law prohibited her from donating her daughter's organs in exchange for a proper burial.[269]

In 1994, Pennsylvania sought to remedy this inequity by enacting a Death Benefits Program.[270] The Act created the Organ Donation Awareness Fund.[271] The fund, supported by $1 donations from Pennsylvania residents, reimbursed a cadaveric donor's estate up to $3,000 for "reasonable hospital and other medical expenses, funeral expenses, and incidental expenses incurred by the donor or donor's

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264. *See* David I. Flamholz, Note, *A Penny for Your Organs: Revising New York's Policy on Offering Financial Incentives for Organ Donation*, 14 J.L. & POL'Y 329, 355 (2006).

265. *Id.*

266. Young, *supra* note 233, at B7.

267. Cate, *supra* note 61, at 85; Young, *supra* note 233, at B7.

268. Young, *supra* note 233, at B7. "A singe multiorgan donor . . . can generate considerable revenue as each recipient is separately billed for each donor organ." *Id.* In the case of Susan Sutton, at least $22,000 went to the OPO as its acquisition charge alone. *Id. See also* Calandrillo, *supra* note 46, at 115.

269. Calandrillo, *supra* note 46, at 115; Young, *supra* note 233, at B7.

270. Calandrillo, *supra* note 46, at 116.

271. *Id.*; Carlson, *supra* note 69, at 146.

family in connection with making a vital organ donation."[272] In order to ensure that the transfer of money was not made directly to the donor's estate, payments could "only be made directly to the funeral home, hospital or other service provider related to the donation."[273] This system silenced many opponents of an incentive-based system of organ procurement as it prevents individuals and corporations from capitalizing on the sale of organs and preserves the altruistic nature of organ donation.[274]

Unfortunately, in 2002, the Pennsylvania Department of Health held that these benefits came too close to violating NOTA's prohibition against offering valuable consideration for the purchase or sale of organs, and reduced donor reimbursement to $300.[275] The remainder of the fund now goes toward organ donation awareness programs.[276]

Despite critique that $300 creates little incentive to donate, during the first six months of the revised Death Benefits Plan, nineteen donor families applied for the $300 donation benefit.[277] Further, the number of Pennsylvanians carrying an identification card designating them as an organ donor increased by 0.5%, making an additional 83,344 Pennsylvania citizens potential cadaveric organ donors.[278] Thus indirect financial incentives, at least in Pennsylvania, have proven to be a successful method of increasing the potential donor pool.

2. Tax Benefits

Tax benefits for organ donors, living or cadaveric, is another reasonable alternative to direct compensation.[279] Many states, Wisconsin being the first, have adopted legislation granting tax deductions to living organ donors.[280] Wisconsin allows for a maximum deduction of $10,000 from adjusted gross income for costs incurred from donating all or part

272. 20 PA. CONS. STAT. ANN. §§ 8621-22 (West 1995).

273. *Id.* § 8622.

274. *See* Carlson, *supra* note 69, at 149.

275. *Id*. at 146.

276. Calandrillo, *supra* note 46, at 116.

277. Flamholz, *supra* note 264, at 358. Eighteen donor applicants were living donors and one was a cadaveric donor. Boyd, *supra* note 16, at 460.

278. Flamholz, *supra* note 264, at 358. This includes a donor card or a driver's license indicating wiliness to be an organ donor. *Id.*

279. *See* Molen, *supra* note 11, at 461-63 (arguing that federal tax law should be changed to allow living donors to deduct expenses associate with their donation that are not covered by insurance).

280. *Id.* at 481. Other states which provide similar tax deductions include Arkansas, Georgia, Idaho, Iowa, Minnesota, Missouri, New Mexico, New York, North Dakota, and Utah. *Id.*

of a liver, kidney, pancreas, intestine, lung, or bone marrow.[281] This deduction may be claimed for all donation related expenses that are not covered by insurance, such as travel, lodging, and lost wages.[282] Currently, this incentive is only available to living donors.[283] Under my proposal, tax benefits can easily be made available to cadaveric donors by offering a tax credit to the donor's estate.[284]

Other indirect financial incentives to donate can include a life insurance policy for live donations, a gift to the donor's charity of choice,[285] or college tuition credits for the survivors of cadaveric donors.[286] Compensation does not need to be proportional to the estimated monetary value of the donated organ in order to afford adequate incentive to donate. Those already inclined to donate may be encouraged to complete a donor card when given a slight external motivator.[287]

VIII. CONCLUSION

The current organ procurement system in the United States relies solely on altruistic volunteers. As admirable as this system sounds, it has failed to produce enough volunteers to meet our organ transplant needs. The demand for transplantable organs drastically exceeds the supply such that on average eighteen people die each day waiting for an organ.[288] This situation is likely to persist unless law makers open their minds to the possibility of providing some financial incentive to donate.

Despite established laws, financial incentives for organ donations are a plausible solution to the nation's organ shortage. Opponents can cite endless objections to the use of financial incentives for both living and cadaveric donations, most which have proven to be unconvincing, yet they fail to suggest a better alternative. Because of paternalistic fears of abuse and exploitation, it is unlikely that financial incentives will gain full acceptance by society. Nevertheless, through strict government regulations and oversight, these fears can be minimized.

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281. Jo Napolitano, *Wisconsin Senate Approves Tax Deduction for Organ Donors*, N.Y. TIMES, Jan. 23, 2004, at A12.

282. Molen, *supra* note 11, at 481.

283. Chandis, *supra* note 20, at 266.

284. *Id.* at 266-67. A tax credit for the deceased's estate may not be much of an incentive for the poor, however may increase the number of donations by the rich. *Id*. at 267.

285. Arthurs, *supra* note 16, at 1122.

286. John A. Sten, *Rethinking the National Organ Transplant Program: When Push Comes to Shove*, 11 J. CONTEMP. HEALTH L. & POL'Y 197, 214 (1994).

287. Cate, *supra* note 61, at 85-86.

288. *See supra* note 2 and accompanying text.

Throughout the world, no organ procurement system has seen success.[289] It is time to try a new system. It is time to accept the possibility that offering financial incentives has the potential to cure the nation's organ shortage. By continuing to prevent the implementation of an incentive-based system of organ procurement, those opposed to incentives are effectively condemning thousands of people to death each year, and even more to a life of suffering. How quickly will those opposed to financial incentives change their position the moment they are in need of a life saving organ?

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289. Watkins, *supra* note 22, at 2.

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