
Organ Donation: Increasing Donations While Honoring Our Longstanding Values

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I. INTRODUCTION

According to The Organ Procurement and Transplant Network (OPTN) more than 89,082 individuals are waiting for an organ transplant in the United States.¹ Approximately 10,000 Americans received organs from only 5,000 donors during the first five months of 2005.² One cadaveric³ donor can save as many as eight lives.⁴ Approximately 11,523 Americans received organs from only 5,932 donors

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¹ Organ Procurement and Transplant network, OPTN National Statistical Data, <http://www.optn.org> (last visited Aug. 24, 2005).

² *Id.*

³ TOM KOCH, SCARCE GOODS: JUSTICE, FAIRNESS AND ORGAN TRANSPLANTATION 50-71 (Praeger/Greenwood, ed., 2002). There are two types of organ donors, living and cadaveric. A living donor is one who donates their “extra” kidney for someone else’s benefit, but continues to live. A cadaveric donor is one whose organs are harvested from their deceased body. The cadaveric donor, or one authorized to give donative consent, can donate a single organ or their entire body.

⁴ *Assessing Initiatives to Increase Organ Donations: Hearing Before the Subcomm. on Oversight and Investigation of the H. Comm. on Energy and Commerce*, 108th Cong. 4 (2003) (opening statement of James C. Greenwood, Chairman of Comm. Energy and Commerce) [hereinafter *Hearing*].

during the first six months of 2004.⁵ The shortage of organs is a national problem that contributes to the premature deaths of thousands of individuals annually.⁶ Unfortunately, in 2002 “only [forty] percent of individuals who died and had organs eligible for donation actually became donors.”⁷

Now, and for the last several decades, there has been a growing disparity between the number of individuals needing organ transplants to survive and those willing to donate their organs. This disparity will continue to grow even as the success rate of organ transfers increases, more transplant centers open, new transplant surgeons are trained and begin practicing, and Medicare and private insurance companies increase their coverage of organ transplant procedures.⁸ The disparity has not been attributed to one particular characteristic of the organ transfer, but several factors including: (1) the difficulty of organ matching; (2) inefficient distribution of organs from a geographic and socioeconomic perspective; and (3) a severely deficient organ supply.⁹ Should the altruistic system of organ donation go unchanged, more and more individuals in the transplant community will face circumstances known for centuries in other contexts.¹⁰ When a resource is scarce “some must die or do without for the common good of society,” and in the case of transplantation it is the sick in need of an organ who must die or do without for the good of society.¹¹

The need to increase the number of organ donors is real. The legislature has proposed increases in education for the public and funding for organizations responsible for the procurement of organs.¹² But is there another way to get life saving organs for those in need? Can donor incentives increase the propensity to donate, thereby decreasing the organ shortage? The federal government’s prohibition on the exchange of organs for “valuable consideration,” as expressed in the National Organ Transplant Act,¹³ has created a broad deterrent to innovative legislation that could balance the repugnant nature of an absolute market based system for the sale of organs against the severe shortage of organs that results in unnecessary deaths. The exchange of valuable consideration, considered under the common law to be anything other than incidental expenses, for human organs from live or cadaveric donors is strictly prohibited.¹⁴ Valuable consideration is defined as “an equivalent or

⁵ *Id.*

⁶ *Id.*

⁷ *See Id.* (indicating that in the year 2000 alone, 40,000 names were added to the transplant waiting list, which then totaled 81,752 names).

⁸ Richard J. Howard, *Organ Donation: Social Policy, Ethical, and Legislative Issues*, in BIOPSYCHOSOCIAL PERSPECTIVES ON TRANSPLANTATION 39 (James R. Rodrigue ed., 2001).

⁹ KOCH, *supra* note 2, at 53-55.

¹⁰ *Id.* at 56. The author uses the analogy of the incidents that occurred on a lifeboat following the sinking of the *William Brown* in 1841. After the *William Brown* collided with two icebergs, approximately 30-33 passengers, including the Captain and his staff, boarded two life boats which were ill equipped to navigate the waters of the open ocean. The morning following the sinking, the larger of the two boats was likely to sink itself. In order to avoid this fate, the mate of the boat ordered that sixteen passengers of the boat be jettisoned (thrown overboard). The sacrifice of fourteen men and two women was made in order to lighten the weight of the vessel and save the lives of the other passengers.

¹¹ *Id.* at 54-58.

¹² Public Health Service Act, 42 U.S.C. §§201, 274f (2000) (*amended by* Organ Donation and Recovery Improvement Act, Pub. L. NO. 108-216, 118 Stat. 584 (2004)).

¹³ National Organ Transplant Act, 42 U.S.C.S. § e274 (1994).

¹⁴ *Id.* § 274(e).

compensation having value that is given for something acquired or promised (as money or marriage) and that may consist either in a benefit accruing to one party or a loss falling upon another.”¹⁵ More specifically, the Advisory Committee on Organ Transplantation (ACOT)¹⁶ and the common law define valuable consideration as “anything having worth, whether monetary or intrinsic, which induces or motivates an agreement or a contract.”¹⁷

The extent that legislation can go in encouraging the development of incentive systems for organ donors will be limited by the extent that the law recognizes possessory right in organs. Those possessory rights include the possessory rights of organs during life and disposition of organs after death. The right to possess is a property concept.¹⁸ Many fear the recognition of an absolute, or even a possessory property right in the human body is a commodification of the human body.¹⁹ Commodification of the body, or a perception of the body as property, compromises the altruistic nature of all organ transfers. The purpose of this comment is to propose that the legislature develop ways to incentivize organ donors by allowing them to exercise their possessory right in their body after death to a degree that continues to honor the altruistic nature of the current organ donor system. This can only be accomplished by balancing the extent of that possessory right with the altruistic nature of donor practices.

Recently, the legislature has attempted to narrow the interpretation of valuable consideration, but the issue remains as to whether this is enough to encourage federal and state legislatures to reintroduce legislation that has been discarded or toned down because of the questions surrounding valuable consideration.²⁰ The altruistic donative model of organ transfer relies upon a moral framework where the donor is incentivized to donate their organ(s) based on the moral and ethical duty to respect members of our “moral community.”²¹ This Comment proposes that the legislature take two significant steps to increase the propensity of individuals to donate their organs. First, the legislature should narrowly define valuable consideration, thereby providing guidance to state and federal organ donation organizations so that they can develop pilot programs and legislation. Second, the states should develop pilot programs that provide quasi-incentives, incentives that would induce more individuals to consider organ donation, but incentives that would not be a material element of the ultimate decision to donate organs, thereby honoring the altruistic nature of the donation.

This Comment focuses on the severely deficient organ supply and the increasing need to adapt to current restrictive and prohibitive organ transplantation legislation. Part II of this Comment describes the history of organ transplantation with a critical

¹⁵ WEBSTER’S COLLEGIATE DICTIONARY 1382 (11th ed. 2003).

¹⁶ See *infra* p. 15.

¹⁷ Dept. of Health and Human Res., Advisory Committee on Organ Transplantation, *Semi-Annual Meeting Notes*, available at <http://www.organdonor.gov/acotres2.html>

¹⁸ JOSEPH WILLIAM SINGER, PROPERTY LAW: RULE, POLICIES, AND PRACTICES xlv-xlvi (Aspen 3d ed., 2002).

¹⁹ BETHANY SPEILMAN, ORGAN AND TISSUE DONATION: ETHICAL, LEGAL, AND POLICY ISSUES 133-146 (Southern Ill. Univ. Press) (1996).

²⁰ Organ Donation and Recovery Improvement Act § 377.

²¹ ROBERT M. VEATCH, TRANSPLANT ETHICS, 143-75 (2000).

analysis of the ethical issues underlying the regulatory scheme that prohibits the sale of organs. Part III of this Comment describes the development of federal and state laws regulating the prohibition of the sale of organs. Part IV describes the case law in America and its handling of property issues as they relate to the body and its separate parts. Part V compares the moral and ethical justifications for the prohibition of prostitution to those that have been expressed in the legislation and case law prohibiting the sale of organs. This comparison provides insight into the significant influence of ethics and morals underlying the prohibition of the sale of organs and must be honored in order for an incentive program to be successful. Finally, Part VI synthesizes the moral, ethical and legal issues by proposing a quasi-incentive model that ceases to deny the possessory right each individual maintains in their organs while respecting the altruistic nature of the transfer by limiting the parameters of exchange.

With respect to a quasi-market based system the relevant question is whether an exchange under the guise of “valuable consideration,” narrowly defined, is feasible as a logical step in the development of programs to increase the propensity to donate. A pure market based system does not honor that ethical and moral foundation of America’s donative system of organ transfer. Not only does this Comment propose a quasi-incentive program that honors the values inherent in current organ transplant theory and practice, but it proposes a program that also limits adverse impact upon the poor and impoverished to stimulate a new generation of organ donors. The ultimate goal is to strike a balance between the public policy foundations of our altruistic donor model and the need to save the lives of needy recipients.

II. WHAT LIES BENEATH – THE MORAL AND ETHICAL ISSUES UNDERLYING THE LEGISLATIVE APPROACH

A compelling philosophical moral and ethical framework influences the current body of organ transplantation law in the majority of countries fortunate enough to have the technology to facilitate organ harvesting and transfer.²² The foundation of the current systems for regulating the procurement and distribution of organs in the United States is an altruistic model.²³ Some scholars believe underlying this model is our value principle of autonomy, specifically, the living have a duty to respect the treatment of the dead, similar to their duty to respect the wishes of the living.²⁴ The foundation of this model is described as deontological. It proposes the notion that there are certain duties we owe one another regardless of the consequences. In other words, we honor the wish not to donate regardless of resulting death of the potential recipients.²⁵

Others view donation of an organ through the lens of “gift” theory.²⁶ Notwithstanding the principles of altruism common among all models of transplantation, under the gift theory, the family of a deceased who faces the

²² *Id.*

²³ KOCH, *supra* note 3, at 74.

²⁴ *Id.*

²⁵ *Id.*

²⁶ RENEE C. FOX & JUDITH P. SWAZEY WITH ASSISTANCE OF JUDITH C. WATKINS, SPARE PARTS: ORGAN REPLACEMENT IN AMERICAN SOCIETY, 31-72 (1992).

decision whether to donate their deceased loved one's organs is subject to inner and outer pressures to make sense of the unexpected and unexplainable catastrophe.²⁷ This is especially the case in instances where the deceased is a relatively young, healthy individual, suffering an unexpected tragic death.²⁸ Psychologically, a healing process takes place whereby the donating family associates the morally and ethically positive attributes of donating to the admirable characteristics of the deceased that would have been fulfilled had he or she survived.²⁹ A person will be classified as an altruist if "all they obtain from doing something for others is the pleasure of making those others happy."³⁰ If donor families experience satisfaction from donating their loved one's organ(s) that is not purely derived from the pleasure gained from making others happy, then there is some aspect of their donation that is not "truly" altruistic.

Compare the actions of the family of X and family of Y. X, a 65 year old male has lived a rewarding life, with a family that anticipated his death as result of health complications that did not affect the ability of surgeons to harvest and transplant his organs. Y, a 16 year old honor student with hopes of going to college and becoming a social worker, dies tragically in a freak car accident on the way to school. The injuries are such that Y's vital organs were all able to be harvested and transplanted. Prior to their deaths, neither X or Y expressed to their respective families their wishes regarding the disposition of their organs after death. After consideration both families donate X and Y's organs. There is an altruistic aspect to both decisions. However, under gift theory the family of Y associates the morally and ethically positive attributes of donating Y's organs to the admirable characteristics that would have been achieved had Y survived. The positive attributes Y's family would have experienced by celebrating Y going to college and achieving the dream of becoming social worker are substituted with the positive attributes of donating Y's organs. The decision to donate made by the family of X is more likely influenced by inner and societal outer gift giving pressures including the obligation to give a gift of life, as well as emotional and spiritual constraints to donate.³¹

The moral and ethical principles underlying the altruistic organ transplant donation model include respect for others, beneficence, non-maleficence, and justice.³² Each of these aspects is generally considered in relation to the greater community of individuals. For example, from the beginning, legislation promulgated to regulate organ donation has held that "donated organs belong to the community"³³ The development of legislation regulating organ transfers has developed based on

²⁷ *Id.* at 33-34.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Alessandro Cigno & Furio Rosati, *Mutual Interest, Self-enforcing Constitutions and Apparent Generosity*, in *THE ECONOMICS OF RECIPROCITY, GIVING AND ALTRUISM* 226 (Michael Kaser ed., 2000).

³¹ FOX, *supra* note 26, at 34-35.

³² James E. Childress, *Ethical Criteria for Procuring and Distributing Organs for Transplant*, in *ORGAN TRANSPLANTATION POLICY, ISSUES AND PROSPECTS* 87, 88 (James F. Blumstein & Frank A. Sloan ed., 1989).

³³ Executive Summary of the Report of the National Task (1986), *reprinted in* DALE H. COWAN, JO ANN KANTOROWITZ, JAY MOSKOWITZ & PETER H. RHEINSTEN, *HUMAN ORGAN TRANSPLANTATION* app. A, at 389 (Dale H. Cowan, Jo Ann Kantorowitz, Jay Moskowitz & Peter H. Rheinstein ed., 1987).

theses moral and ethical principles. However, with the evolution of science and technology current, legislation has not supported the increase demand for organ donors.

III. THE LEGISLATIVE HISTORY OF ORGAN TRANSPLANTATION REGULATIONS

The first successful organ transplant occurred during 1954 in a Boston hospital.³⁴ Subsequent advancements in technology have resulted in the successful transplantation of the human liver, kidney, pancreas, intestines, lungs, tissue, heart, and corneas.³⁵ Early on the system of matching donors and donees was informally based upon familial and personal relationships, the small network of professionals qualified to perform surgeries, and the limited number of hospitals equipped to perform the procedures.³⁶ As the procedures to harvest and transfer organs were refined and the frequency of procedures increased, the medical community, which up until the late 1960's was operating without legal and administrative guidance, faced several efficiency and distributive fairness challenges.³⁷ These challenges included: (1) the increasing number of patients with degenerative diseases for whom transplantation might be the only option of survival; (2) the difficulties medical teams faced in matching antigens between donor and donee; and (3) the daunting task of determining who should receive organs when the demand exponentially exceeded the supply. These problems cumulatively contributed to the dire need to introduce a formal organ transplant administrative framework.³⁸ The primary goal of the framework would be to resolve these problems from both a legal and ethical perspective.³⁹ Later on, the need for public education, criminal penalties for the sale of organs and equal treatment of recipients would move to the forefront of organ transplant legislation as the scarcity of organs as a resource increased.⁴⁰

Today, organ transplantation is governed by federal and state law, and the institutions with administrative responsibilities include the: 1) Department of Health and Human Services (DHHS); 2) the United Network of Organ Sharing; 3) Organ Procurement Organizations; 4) Organ Procurement and Transplant Network; and 4) state governments.⁴¹

A. The Federal Government

The first version of the Uniform Anatomical Gift Act (UAGA) was passed by the National Conference of Commissioners in 1968.⁴² UAGA provided the states with a model law detailing who may execute anatomical gifts,⁴³ the rights and duties of the

³⁴ Alan Reed et. al., *Solid Organ Transplantation*, in *BIOPSYCHOSOCIAL PERSPECTIVES ON TRANSPLANTATION* 1-18 (James R. Rodrigue ed., 2001).

³⁵ *Id.*

³⁶ KOCH, *supra* note 3, at 50-71.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ SPIELMAN, *supra* note 19, at 3-8.

⁴² UNIF. ANATOMICAL GIFT ACT §1 (amended 1987), 8A U.L.A. 70 (1968).

⁴³ *Id.* § 3. In order of priority, the classes of individuals that may authorize the gift of all or part of the human body after death for specified purposes are 1) spouse, 2) an adult son or daughter, 3) either parent,

donee and the physician and those acting in good faith under the model law at the time of the donor's death,⁴⁴ and who can become a donee under the act.⁴⁵ Provisions regarding the sale of organs were absent from the originally adopted version of UAGA, although commentators interpreted the UAGA to implicitly prohibit the sale of organs.⁴⁶ Recognizing the evolution of the altruistic model of organ donation the commentators noted that "until the matter of payment becomes a problem of some dimensions, the matter should be left to the decency of intelligent human beings."⁴⁷ Some variation of the 1968 UAGA was adopted in all 50 states and the District of Columbia.⁴⁸ A project by the Hastings center after the adoption of the 1968 UAGA throughout the country noted that UAGA "is not producing a sufficient supply of organs to meet the current or projected demand for them."⁴⁹

The UAGA was amended in 1987 to include a provision forbidding a person from "knowingly, for valuable consideration, purchase[ing] or sell[ing] a part for transplantation or therapy, if removal of the part is intended to occur after death of decedent."⁵⁰ The Commissioners did not define valuable consideration in the act, and the latter portion of the section appears to be limiting sales only when death will subsequently occur after donation, therefore leaving open the question as to whether or not living donors are subject to the UAGA if adopted without alterations.⁵¹ Generally, all 50 states and the District of Columbia adopted a variation of the 1968 or 1987 model law, some with more variations of the law than others.⁵²

In 1984 Congress passed the National Organ Transplant Act⁵³ (NOTA) to, among other things, regulate organ transfer consistently between and among the states by making it "unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce."⁵⁴ One commentator attributes Congress' promulgation of NOTA as a response to H. Barry Jacob's, physician and entrepreneur, attempt to induce hospitals across the country to participate in his international human kidney brokerage firm.⁵⁵ The premise behind the brokerage was to "commission kidneys from persons living in Third World countries or in

4) an adult brother or sister, 5) guardian of the person of the decedent at the time of his death, 6) any other person authorized or under obligation to dispose of the body.

⁴⁴ *Id.* § 8.

⁴⁵ *Id.* § 6.

⁴⁶ Laurel R. Siegel, *Re-Engineering the Laws of Organ Transplantation*, 49 EMORY L.J. 917, 932 (2000). (discussing organ transplantation statutory law).

⁴⁷ Shelby E. Robinson, *Organs for Sale*, 70 U. COLO. L. REV. 1019, 1019 n. 57 (1999). (interpreting notes of commentators of the model acts).

⁴⁸ UNIF. ANATOMICAL GIFT ACT, 8A U.L.A., Prefatory Note (2003).

⁴⁹ HASTINGS CTR., *Ethical, Legal and Policy Issues Pertaining to Solid Organ Procurement* (1985).

⁵⁰ UNIF. ANATOMICAL GIFT ACT §10.

⁵¹ No state defined valuable consideration in their adoption of the Unif. Anatomical Gift Act. However, several states broadened the scope of second part of the provision. Nevada, New Hampshire, New Mexico omitted "if removal of the part is intended to occur after death of the decedent. See UNIF. ANATOMICAL GIFT ACT, 8A U.L.A., introductory cmt. (2003).

⁵² Advisory Committee on Organ Transplantation, Appendix 6: Donor Designation: State Law and OPO Practice, available at <http://www.organdonor.gov/acotres2.html>.

⁵³ 42 U.S.C.S. §274 (1984).

⁵⁴ § 274(e).

⁵⁵ SPIELMAN, *supra* note 19, at 144-146.

disadvantaged circumstances in the United States for whatever price would induce them to sell their organs.”⁵⁶

The states, and not the federal government, maintained the authority to regulate who could make organ donations as well as, when and how they could be made based on the model text of the UAGA. The federal government feared that because state legislatures maintained the ability to vary the terms of the UAGA if they adopted it, state legislatures would make variations to the prohibition of sales amendment, and other various sections, included in the 1987 version of UAGA.⁵⁷ One possibility under this scenario would be for state A to omit the organ sale prohibition clause from their legislation which would allow for the sales of organs to go unregulated within that particular state. Neighboring state B, which adopted the sale prohibition clause under the UAGA would potentially be disadvantaged in the procurement of organs as donors may be inclined to travel to state A in order to receive something in exchange for their organ. A goal of NOTA was to instill equality between the states within the national transplantation institution, and by invoking its power under the Commerce Clause⁵⁸ Congress standardized the criminal imposition of a severe fine and/or potential imprisonment for the sale of organs.⁵⁹

NOTA lacks the clarity and guidance that was missing from the UAGA in terms of directing those relying upon the Act as to what valuable consideration would mean. The severe shortage of donors was growing while NOTA’s goal to increase the propensity of donation within the U.S. was unrealized. Specifically, NOTA does not define valuable consideration, although it does provide statutory exclusions by explaining that valuable consideration does not include “reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ or the expenses of travel, housing, and lost wages incurred by the donor of a human organ in connection with the donation of the organ.”⁶⁰ Penalties for violation of the Act include a maximum fine of \$50,000 and /or imprisonment for up to five years.⁶¹

NOTA grants the Secretary of the Department of Health and Human Services (DHHS) the authority to create and grant funds to Organ Procurement Organizations (OPO)⁶² and to establish the Organ Procurement and Transplantation Network (OPTN).⁶³ An OPO is a private, non-profit entity responsible for identifying potential donors, and then acquiring, preserving, testing and allocating donated organs, and finally assisting hospitals in developing organ donation inquiry protocols.⁶⁴ The OPOs were established as administrative agencies to supervise organ procurement and allocation within geographic regions.⁶⁵ Each OPO is required to participate in the OPTN, a private network responsible for: the national

⁵⁶ *Id.* at 145.

⁵⁷ *Id.* at 22-25.

⁵⁸ U.S. CONST. art. I, § 8, cl. 3.

⁵⁹ KOCH, *supra* note 3, at 50-71.

⁶⁰ National Organ Transplant Act, 42 U.S.C.S. § 274(e)(c)(2) (2000).

⁶¹ § 274(e)(b).

⁶² 42 U.S.C.S. § 273 (1984).

⁶³ § 273.

⁶⁴ § 273 (b)(2)(B)(3)(A-K).

⁶⁵ *Id.*

list of individuals in need of organs; identification of criteria and processes for equitable allocation; public education; and ongoing analysis and evaluation of national organ transplantation procedures.⁶⁶ Additionally, NOTA granted the Secretary of DHHS the authority to create the Task Force on Organ Procurement and Transplantation (Task Force) to examine the “medical, legal, ethical, economic, and social issues presented by human organ procurement and transplantation.”⁶⁷ The Task Force was originally instructed to examine, among other things, “factors that diminish the number of organs available for transplantation,” however, the Secretary issued neither an explicit directive for the Task Force to investigate topics related to the sale of human organs, nor initiatives that provided alternatives to the altruistic model of organ donation.⁶⁸

One year after the promulgation of NOTA the Task Force provided the Secretary with a report that explicitly rejected living donor transplantation for anything other than altruistic factors and recommended that “states prohibit the sale of organs from cadavers and living donors within their boundaries.”⁶⁹ The recommendations set forth by the Task Force, and the OPTN and OPO collaboration under NOTA failed to solve the organ donor shortage dilemma under the Congressionally adopted scheme.

The shortage of organs was not the only challenge faced by individuals involved in procuring, allocating, and transplanting organs. Concerned by the medical community’s fear of governmental interference in organ transplant allocation and the federal government’s increasing financial burden in regulating and informally distributing organs, the Task Force struggled to create an efficient and fair network for organ allocation.⁷⁰ The United Network for Organ Sharing (UNOS) an independent, non-profit organization, was created from a mandate by NOTA with goals to implement the recommendations for fair and equal distribution proposed by the Task Force.⁷¹ Under UNOS guidance, with oversight from the DHHS, the country was divided into eleven geographic regions, and UNOS was charged with “establishing and enforcing . . . uniform standards of organ allocation that should be followed by all procurement agencies and transplant centers.”⁷²

With the responsibility to allocate organs upon inception UNOS formulated, and now constantly updates, a list of all potential organ recipients.⁷³ A list of potential donors was not compiled by UNOS.⁷⁴ Advocates of a donor list suggested that UNOS declination to compile the list based on the Task Force’s report was an

⁶⁶ § 273 (a)(2), (b)(1)(A-O).

⁶⁷ *Id.*

⁶⁸ COWAN, *supra* note 33, at 389.

⁶⁹ *Id.* at 399.

⁷⁰ KOCH, *supra* note 3, at 58-61.

⁷¹ *Id.*

⁷² James F. Blumstein, *Government’s Role in Organ Transplantation Policy*, in *ORGAN TRANSPLANTATION POLICY: ISSUES AND PROSPECTS* 5-39, 23 (James F. Blumstein & Frank A. Sloan ed., 1989) (quoting Pub. L. No. 98-507 (1984)).

⁷³ *Id.* at 27.

⁷⁴ *Id.* in Pub. L. No. 98-507, §101 (b)(3)(J) (1984) Congress proposed that the Task Force consider creating a list of potential organ donors, however the Task Force returned a report claiming the list would not be useful.

example of “policy-inhibiting aspects of a set of hard ideological rules.”⁷⁵ However, opponents of the list suggested that it could incite the legalization of incentives to encourage individuals to sign up on the list and shift the emphasis away from the “next of kin consent” by depriving the family of its opportunity to “promote a sense of community through acts of generosity.”⁷⁶

The Task Force has provided annual reports to the Secretary since the passing of NOTA in 1984. Until the late 1990’s, the central reoccurring recommendations by the Task Force in these reports to increase the propensity of donation and the availability of organs to recipients have been focused on redefining the terms to determine if a donee is a medically urgent patient, determining viability of organs to improve movement between geographic areas, broader geographic sharing of organs, rewards for high performing OPO’s, and addressing socioeconomic barriers to the extent that donation is hindered by accessibility to health insurance or financing for operations for hospitals.⁷⁷

In an exercise of powers granted to him under NOTA in 2000, the Secretary of DHHS created the Advisory Committee on Organ Transplantation (ACOT).⁷⁸ The ACOT is tasked with advising the DHHS on ways to enhance organ donation, ensure that the organ donation system is grounded in medical science, ensure the public that the system is equitable, and that the public has confidence in the integrity and effectiveness of the transplant system.⁷⁹ The ACOT has considered many of the reoccurring issues related to increasing organ donation that were historically identified by the Task Force, however, the committee also actively investigates ways to increase donation under the limitations of NOTA’s prohibition of organ purchases.⁸⁰

In April 2004, President Bush signed into law The Organ Donation and Recovery and Improvement Act (ODRIA)⁸¹ which significantly increases the Secretary’s authority to improve the organ donation and transplant system.⁸² ODRIA expands allowable reimbursements for living organ donors by authorizing \$5 million per year for 2005-2008 to be paid for allowable expenses to organ donors.⁸³ The Act also allows for the reimbursement of expenses for relatives of donors so that they can accompany and assist donors through the donation process.⁸⁴ It is unclear how the ODRIA provisions for reimbursement will affect NOTA’s valuable consideration

⁷⁵ Blumstein, *supra* note 73, at 28.

⁷⁶ *Id.*

⁷⁷ Organ Procurement and Transplantation Network, 64 Fed. Reg. 56,650 (Oct. 20, 1999) (to be codified at 42 C.F.R. Pt. 121).

⁷⁸ 42 U.S.C. §§ 217(a), 300(a) (2000); Public Health Services Act, 42 C.F.R § 121.12 (2000).

⁷⁹ Advisory Committee on Organ Transplantation, <http://www.organdonor.gov/acot.html> (last visited October 26, 2005).

⁸⁰ 42 U.S.C. § 274(e) (1984).

⁸¹ Organ Donation and Recovery Improvement Act, 42 U.S.C. § 573 (2004).

⁸² Advisory Committee on Organ Transplantation, *Semi-Annual Meeting Notes*, available at <http://www.organdonor.gov/acot5-04.htm>

⁸³ 42 U.S.C. § 377. (allowable expenses include the expenses of having relatives or other individuals, not to exceed 2, accompany or assist the donating individual; reimbursement of travel and subsistence expenses incurred by the individuals toward making living donations of their organs; and the reimbursement of incidental nonmedical expenses that are incurred).

⁸⁴ *Id.* §377(c)(2).

statutory exclusions which include “expenses of travel, housing, and lost wages incurred by the donor of human organ in connection with the donation of the organ.”⁸⁵ NOTA implicitly precludes payments made to anyone other than the donor.⁸⁶ Notably, language struck from the original proposed version of ODRIA called for the appropriation of funds towards demonstration projects to test incentives that otherwise might be barred as valuable consideration.⁸⁷ Congress strongly opposed the idea of living donors receiving money for their organs, and since the language in the act did not limit the demonstration programs to cadaveric donor programs, there was a chance that a slippery slope would lead to payments to the living.⁸⁸

B. The Failure of State Law Attempts – A Focus on PA Law

In 1996, Pennsylvania was the first state to propose the creation of a pilot program that recognized the severe need for an increase in organ donation by providing for financial assistance for donors.⁸⁹ To meet the demand, the state, under Governor Robert P. Casey Memorial Organ and Tissue Donation Awareness Trust Fund, established the following:

Ten percent of the total fund may be expended annually by the Department of Health for reasonable hospital and other medical expenses, funeral expenses and incidental expenses incurred by the donor or donor’s family in connection with making a vital organ donation. Such expenditures shall not exceed \$3,000 per donor and shall only be made directly to the funeral home, hospital or other service provider related to the donation. No part of the fund shall be transferred directly to the donor’s family, next of kin or estate. The advisory committee shall develop procedures, including the development of a pilot program, necessary for effectuating the purposes of this paragraph.⁹⁰

The Act continues to face fierce scrutiny throughout the legal community, particularly because legal scholars oppose payment, subsidy, or reimbursement for anything other than incidental expenses.⁹¹ Pennsylvania has even run up against road blocks in an effort to reimburse donors for incidental expenses because of issues identified by the legal community supporting the states efforts related to administrative feasibility.⁹² No pilot program under the Fund has been implemented.⁹³ Case law has not developed that provides an interpretation of valuable consideration; however many of the property issues related to donation have evolved through the common law.

⁸⁵ 42 U.S.C.S. § 274(e)(c)(2).

⁸⁶ *Id.*

⁸⁷ Advisory Committee on Organ Transplantation, *supra* not 83.

⁸⁸ *Id.*

⁸⁹ The Governor Robert P. Casey Memorial Organ and Tissue Donation Awareness Trust Fund, PA. CONS. STAT. ANN. tit. 20 §8622(b)(1) (West 1996).

⁹⁰ *Id.*

⁹¹ PENNSYLVANIA DEPARTMENT OF HEALTH, ORGAN DONATION ADVISORY COMM., ANNUAL REPORT TO THE GENERAL ASSEMBLY 1 (2000).

⁹² *Id.*

⁹³ *Id.*

IV. THE PROPERTY ISSUES RELATED TO THE LEGISLATIVE SCHEME – CASE LAW

In 1999 a Florida man placed a single human kidney for sale on the internet auction site Ebay.⁹⁴ Before the site pulled the item from the auction, a high bid of \$5.7 million dollars was offered for the organ.⁹⁵ The auction raised the issue of organ sales within the media and the organ transplant community to a national level.⁹⁶ The predominant property issues related to the organ transplantation were at the center of the controversy, and have been issues at the center of the national debate underlying the right to sell organs: (1) Does an individual have a property right to their body? If yes, can the altruistic model underlying organ transplantation survive? If not, does another entity have a property right to an individual's body?; (2) Does the exchange for valuable consideration rely upon recognizing an expanded property right in the body? The answers to these questions may not be clear, as discussed below both the common-law and federal and state legislation lead to the conclusion that: (1) yes, an individual does have a property right in their body (2) yes, the altruistic model underlying organ transplantation can survive because this right is not absolute; and (3) yes, the exchange for valuable consideration would rely upon a significant expansion of the scope of property rights now recognized by the law.

The early development of American common law defining property rights in the human body evolved from the English common law which held that there was no property right in a dead body.⁹⁷ Although early American courts applied English common law, today courts do recognize a next of kin's property right in a corpse and this property right developed with regard to the burial or alternative forms of disposition responsibilities of the deceased's family.⁹⁸ A majority of courts commonly refer to this right as a "quasi-property right"⁹⁹ and the courts have struggled with determining the boundaries of the quasi-property right.¹⁰⁰

The New Jersey Supreme Court held that the parents of a suicide victim had a property right in their son's body where a hospital failed to honor their wishes to turn off life support.¹⁰¹ However, the court discounted the use of the term "quasi-property right" as nothing more than a fictional term used to protect "personal feelings of the survivors."¹⁰² The 6th Circuit determined that the quasi-property right is restricted to one of preventing mutilation or damage to the body and allowing

⁹⁴ Amy Harmon, *Auction for a Kidney Pops up on Ebay's Site*, N.Y. TIMES, Sept. 3, 1999, at 13.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See *Brotherton v. Cleveland*, 923 F.2d 477,481 (6th Cir. 1991) (citing to *Williams v. Williams*, 20 Ch. D. 659, 665) (following the development of property rights in dead bodies but ultimately not reaching a determination on the issue).

⁹⁸ *Id.* at 481 (citing *Spiegel v. Evergreen Cemetery Co.*, 117 N.J.L. 90,93, 186A. 585,586 (1936)) ("it is not the prevailing rule in England as well as in this country, that the right to bury the dead and preserve the remains is a quasi-right in property").

⁹⁹ *Id.*

¹⁰⁰ See *e.g. Lascrain v. Newark*, 793 A.2d 731 (N.J. Super. 2002) (holding daughter's interest in father's body was limited to ensuring the integrity of his corpse in preparation for his burial and authorized disposition of his remains).

¹⁰¹ *Strachan v. John F. Kennedy Mem. Hosp.*, 538 A.2d. 346 (N.J. Super 1988).

¹⁰² *Id.* at 350 (referring to the quasi-property right as a legal fiction).

possession of the body for the purpose of burial or other lawful disposition.¹⁰³ Whether the quasi-property right is a legal fiction or an existing right of the next of kin to determine burial or disposition of a corpse, these courts did not recognize the quasi-property rights of the living or their next of kin in any context outside of imminent death or subsequent to death.¹⁰⁴ Modern transplantation practices allow for the harvesting of organs from the recently deceased and the current laws appear to expand the quasi-property right from one of a right to burial to disposition to one that includes the entitlement to donate anatomy.¹⁰⁵

As for the rights of the individual to their own bodies, the courts do not recognize an absolute property right to the body prior to, or following, death.¹⁰⁶ Generally, property is referred to as a legal bundle of rights and is commonly recognized to include a combination of the rights to possess, exclude, use, dispose, enjoy fruits or profits, destroy as well as the right to sell.¹⁰⁷ The law has recognized that property rights are not absolute and various bundles attach themselves to various forms of property, limited to the extent that they may not be exercised to interfere with another's property rights.¹⁰⁸ A bundle of these property rights in the living body has been recognized by common and statutory laws.¹⁰⁹

There are a limited set of exceptions to the general rule that the tangible substance of the human body cannot be legally exchanged for valuable consideration, and a limited number of the sticks in the bundle attach themselves to these exceptions.¹¹⁰ These exceptions include blood, hair, and sperm.¹¹¹ The term tangible is used because the human body as an entity is used to provide services in exchange for property.¹¹² The sale of the intangible services related to the human body is a separate issue that will not be explored here further than the pointing out, for introductory purposes, that slavery ended in 1865 with the ratification of the Thirteenth Amendment.¹¹³ The law does permit the sale of fluids¹¹⁴ and other body

¹⁰³ Whaley v. County of Tuscola, 58 F.3d. 1111, 1114 (6th Cir. 1995).

¹⁰⁴ See Strachan, 538 A.2d at 350 (recognizing a property right in the body in a situation of imminent death); Whaley, 58 F.3d. at 1114 (recognizing a property right limited to disposition of the body after death).

¹⁰⁵ UNIF. ANATOMICAL GIFT ACT §10.

¹⁰⁶ See Erik Jaffe, *She's Got Bette Davis's Eyes: Assessing the Nonconsensual Removal of Cadaver Organs Under the Takings and Due Process Clause*, 90 COLUM. L. REV. 528, 543 (1990) (discussing substantive rights existing relative to the body).

¹⁰⁷ Danielle Wagner, *Property Right in the Human Body: The Commercialization of Organ Transplantation and Biotechnology*, 33 DUQ. L. REV. 931, 933 (1995).

¹⁰⁸ *Id.*

¹⁰⁹ Jaffe, *supra* note 107, at 543. "The right to possess one's own body can be seen in the prohibition of slavery and involuntary servitude, and in the civil and criminal penalties for false imprisonment. The right to use one's body is evident in the simple employment contract and in the reluctance to require specific performance when such contracts are breached. Finally, the civil and criminal penalties for battery provide evidence of the right to exclude others." *Id.* at 545-46 (footnotes omitted). Additionally, the right to dispose of the body whether through burial or some other form of disposition has been recognized as a quasi-property right first and foremost for the individual to determine prior to death. *Id.* at 543 n66.

¹¹⁰ See *Id.* at 544 n.76. (cataloging substantive common law and statutory rights attached to cadavers and the individual parts of the body including blood, sperm and hair).

¹¹¹ *Id.*

¹¹² *Id.* at 546 (noting that the body is an entity that provides labor services).

¹¹³ The Thirteenth amendment states: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any

parts that “can be replenished and do not harm the health of the vendor,” hair and blood being the two most obvious examples.¹¹⁵

In *Moore v. Regents of the University of California*¹¹⁶ the notion of replenishment and failure to harm the health of the vendor are not bright line rules followed by the courts in granting authority for the sale of parts of the human body. When faced with a claim of conversion for bodily matter (unique cancerous cells), the California Supreme Court rejected the plaintiff’s plea that it recognize an absolute right in the human body.¹¹⁷ Instead, the court, facing an issue of first impression in the jurisdiction, refused to expand the claim of conversion to a scope encompassing bodily matter.¹¹⁸ In *Moore*, the California Supreme Court recognized a patient’s claim for lack of informed consent and breach of fiduciary duty where a physician, in collaboration with a biotech company, knowingly conducted research on the plaintiff’s unique cells from which they were able to secure a patent.¹¹⁹ The secured patent had a potential value in excess of three billion dollars, and the owners would be afforded with all royalties and profits arising out of the patent.¹²⁰

Moore brought a claim of conversion¹²¹ that was rejected by the California Supreme Court because: (1) the court balanced the public policy considerations in favor of refusing to extend conversion to cell lines; (2) the court determined decisions pertaining to assigning property rights to cell lines is a matter for the legislature; and (3) conversion was not a necessary claim in order to protect Moore’s rights.¹²² In treating hairy-cell leukemia, doctors removed Moore’s spleen and without his knowledge, or consent, used portions of the removed organ for lucrative scientific research.¹²³ Subsequently, doctors continued to remove blood, blood serum, skin, bone marrow aspirate and sperm from Moore.¹²⁴ Moore was told that these extraction procedures were necessary for his treatment, however, Moore was never informed of the additional use of his cells.¹²⁵ The court determined that the patient’s right to make an “autonomous medical decision”¹²⁶ afforded Moore a

place subject to their jurisdiction.” U.S. CONST. amend. XIII §1.

¹¹⁴ See, e.g. Va. Code Ann. § 32.1-289.1 (2005) (making it a felony to sell, offer to sell, buy, offer to buy, or procure through purchase any natural body part with the exception of hair, ova, blood and other self-replicating fluids).

¹¹⁵ J. GORDON HYLTON ET AL., PROPERTY LAW AND THE PUBLIC INTEREST: CASES & MATERIALS 30 (2nd ed. 2003).

¹¹⁶ 793 P.2d 479 (Cal. 1990).

¹¹⁷ *Id.* at 490-92

¹¹⁸ *Id.* at 493

¹¹⁹ *Id.* at 481-82, 497.

¹²⁰ *Id.* at 482.

¹²¹ In addition to the conversion claim, Moore brought claims of lack of informed consent, breach of fiduciary duty, fraud and deceit, unjust enrichment, quasi-contract, bad faith breach of implied covenant of good faith and fair dealing, intentional infliction of emotional distress, negligent misrepresentation, intentional interference with prospective advantageous relationships, slander of title, accounting, and declaratory relief. *Moore*, 793 P. 2d at 482 n.4. The superior court only recognized the claim for conversion, sustaining demurrers to the remaining causes of action. *Id.* at 482.

¹²² *Moore*, 793 P.2d at 493 (Cal. 1990).

¹²³ *Id.* at 481.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 493.

method of recovery that did not “threaten with civil liability innocent parties who are engaged in socially useful activities, such as researchers.”¹²⁷

The majority decision failed to consider the persuasiveness of UAGA¹²⁸ upon Moore’s claim. As Justice Broussard poignantly argues in his concurring and dissenting opinion, “the majority fails to recognize that the Uniform Anatomical Gift Act, as we have seen, expressly confirms a patient’s right to designate, prior to removal, the use to which a body part will be put.”¹²⁹ Justice Broussard suggests that the majority in *Moore* identified the wrong issue.¹³⁰ Instead of determining whether or not a patient has a general property interest in a body part after removal, Broussard identified the issues as whether or not the patient has a right to determine, before a body part is removed, the use to which the part will be put after removal.¹³¹ Notably, Broussard describes the patient’s right to control the future of his organ, thereby suggesting that the organ is protected by the law of conversion.¹³²

According to Restatement Second of Torts § 227, “one who uses a chattel in a manner which is a serious violation of the right of another to control its use is subject to liability to the other for conversion.”¹³³ Under Broussard’s analysis, a claim for conversion of bodily matter is only afforded to an individual after three conditions have been satisfied: (1) the individual to whom the matter belongs has consented to the uses of the matter after it has been extracted or excised or they have failed to consent to any use at all; (2) the bodily matter has been extracted or excised from the individual; and (3) one has “seriously violated” or interfered with the consented use of the chattel.¹³⁴ This interpretation is consistent with comment (b) of *Restatement* which notes that a just claim of conversion is only so if it is “just to require the actor to pay its full value.”¹³⁵ Once all three conditions are fulfilled, it is reasonable to conclude that under the law, an individual guilty of conversion will be required to pay for the full value of the organ, and at that time the value of the organ must be assessed. There is no right to sell that emerges, but the individual is compensated for their loss of decision making consent over the body parts disposition or use.

In *Hecht v. Superior Court*, the Los Angeles Superior Court held that a sperm donor has “an interest, in the nature of ownership, to the extent that he ha[s] decision making authority as to the use of his sperm for reproduction.”¹³⁶ By analogy, the court found persuasive the Tennessee Supreme Court’s analysis and the holding in

¹²⁷ *Id.*

¹²⁸ UNIF. ANATOMICAL GIFT ACT § 2.

¹²⁹ *Moore*, 793 P.2d at 502-03 (Broussard, J., concurring in part and dissenting in part).

¹³⁰ *Id.*

¹³¹ *Id.* at 501.

¹³² *Id.* at 501-02.

¹³³ RESTATEMENT (SECOND) OF TORTS § 227 (1965).

¹³⁴ *Moore*, 793 P.2d at 502 (Broussard, J., concurring and dissenting).

¹³⁵ RESTATEMENT (SECOND) OF TORTS § 227 cmt. b

¹³⁶ *Hecht v. Super. Ct.* 16 Cal. App. 4th 836 (Cal. Ct. App. 2d, Div. 7 1993). The sperm donor, William E. Kane, deposited 15 vials of sperm into a California sperm bank in October 1991 and executed an authorization for the sperm to be released to his live-in girlfriend, Hecht. Kane took his own life on October 30, 1991 and there was a dispute between Hecht and Kane’s two children from a previous marriage over Kane’s estate. The parties reached a resolution as to the estate issue, and six months later Hecht attempted to claim her rights to the sperm but was refused by the sperm bank.

Davis v. Davis,¹³⁷ where the court concluded that frozen pre-embryos “occupy an interim [property] category that entitles them to special respect because of their potential for human life.”¹³⁸ The *Davis* court relied upon the notion that a property right to a decision as to the disposition of the pre-embryos defined the boundaries of the property rights in the bodily matter.¹³⁹ The *Hecht* court determined that the fact that the egg had not yet joined with the sperm would not factor into the court’s holding, but that the determinative aspect of the court’s analysis was that “the value of the sperm lies in its potential to create a child after fertilization, growth, and birth.”¹⁴⁰ The *Hecht* court distinguished *Moore* factually in two ways. In *Hecht*, Kane consented to the disposition of his sperm prior to its use, and procedurally, *Hecht* was a will contest.¹⁴¹ If the *Hecht* court did not distinguish *Moore*, which was binding precedent, the court would have been precluded from finding an interim property right in the sperm.¹⁴²

Donated organs possess an analogous potential. Although they do not create a new life, they do prolong the life of an already living being that continues to grow (metaphorically) and in many instances, birth of new life is only possible because one is alive to procreate as a result of an organ transplant. Under *Moore*, property rights emerge after a violation of a donor’s consent, but under *Hecht*, the interim classification of body parts as property affords legislators guidance as to when the decision making process about organ donation must be made, and the extent that that decision must be respected. This interim class provides limitations as to the sale of body parts that are an additional barrier to a market based system. The other barrier is the valuable consideration issue. Even if individuals were allowed to exchange valuable consideration for organs, the common law does not attach the right to sell stick of the property right bundle to organs. The determinative aspect of the exchange is the decision with respect to disposition, because that is the nature of the ownership interest.

V. MORAL AND ETHICAL “OBSTACLES” UNDERLYING THE PROPERTY ISSUE

The recognition of a quasi-property right in the body does not dispose of the challenge to design balanced legislation to incentivize organ donors. The challenge is not only legal, it is one that is influenced by longstanding ethical and moral public policy issues. The ethical and moral influences on the prohibition of the sale of organs are quite similar to the ethical and moral influences on the prohibition of the institution of prostitution.

Prostitution is an ambiguous term because the definition depends upon the social context of the situation in which one is searching for a definition and whether one is viewing the institution from a moral, legal or social basis.¹⁴³ In order to facilitate an

¹³⁷ 842 S.W. 2d 588 (Tenn. 1992).

¹³⁸ *Hecht*, 16 Cal. App. 4th 836, 849 (quoting *Davis*, 842 S.W. 2d 588, 597).

¹³⁹ *Davis*, 842 S.W. 2d at 597.

¹⁴⁰ *Hecht*, 16 Cal. App. 4th at 850. (Concluding that Kane had “an interest in the nature of ownership, to the extent that he had decision making authority as to the use of his sperm for reproduction.)

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ LENORE KUO, PROSTITUTION POLICY: REVOLUTIONIZING PRACTICE THROUGH A GENDERED PERSPECTIVE 41 (Despina Papazou Gimbel ed., 2002).

analysis from a legal perspective by considering the property aspects of the practice, prostitution can be defined as the “practice of selling, explicitly and contractually, the private performance of specified acts of a sexual nature.”¹⁴⁴ By describing the practice as a sale of a performance, this definition does not explicate the notion that prostitution is “equivalent to the sale of either the person or her [sexual organ].”¹⁴⁵ This perspective distinguishes prostitution from the donation or sale of a body part because, in the end, the vendee does not convert a physical object to his possession. However, implicitly the definition can be interpreted to denote a situation where one uses the human body, or a specific organ, and surrenders that organ to another for their benefit.

The controversy surrounding the legalization of prostitution is not significantly different from the controversy surrounding the legalization of the sale of organs. As Joel Finberg points out, there are four common justifications used by the political and legal community to justify the prohibition of prostitution:

1. The Harm Principle – to prevent harm to person other than the actor (or to society’s institutions).
2. The Offense Principle – to prevent hurt or offense (as opposed to injury or harm) to others.
3. Legal paternalism – to prevent harm to the very person it prohibits from acting, as opposed to others.
4. Legal moralism – to prevent inherently immoral conduct whether or not such conduct is harmful or offensive to anyone.¹⁴⁶

Two are readily accepted within the political and legal community, The Harm Principle and The Offense Principle, while the legal paternalism and legal moralism are much more controversial.¹⁴⁷ Analysis of the prohibition against the sale of organs in relation to the harm principle exposes the moral and ethical principles underlying the courts and legislatures treatment of the issue. A successfully designed quasi-market system should consider this principle with a design that negates harm to the actor, those other than the actor, and the greater community as justifications to the continued broad prohibition of organ sales.

The Harm Principle – Putting aside the type of harm sought to be avoided by prohibiting prostitution, consider the type of harm sought to be prevented by prohibiting the sale of body parts. Determinative to the California Supreme Court’s rejection of expanding the scope of conversion to a cell line was its goal to avoid the negative impact of civil liability brought against innocent parties which would hinder medical and biotechnological research by “restricting access to the necessary raw materials.”¹⁴⁸

Secondly, there has been a longstanding argument within the organ transplant community that the sale of organs is repugnant to public policy because it would

¹⁴⁴ *Id.* at 42.

¹⁴⁵ *Id.* at 41.

¹⁴⁶ *Id.* at 120 (quoting JOEL FEINBERG, HARM TO SELF X (Oxford Univ. Press ed., 1986))

¹⁴⁷ *Id.*

¹⁴⁸ *Moore*, 51 Cal. 3d at 144. The court does go on to say that “This exchange of scientific materials, which still is relatively free and efficient, will surely be compromised if each cell sample becomes the potential subject matter of a lawsuit.”

“unduly put pressure on low-income individuals” to donate their organs for the monetary incentives.¹⁴⁹ Minorities, specifically African-Americans, are considered a target group for financial compensation schemes proposed to legalize the sale of organs because they are severely underrepresented as donors in relation to their make-up of the general population.¹⁵⁰ These schemes include direct payment to the donor, or indirect payment in the form of medical expense or funeral cost payment.¹⁵¹ Because African-Americans may fall into the low income classification, those that oppose the sale of organs for these reasons suggest that compensation for organs presents the low-income African American with a conflict.¹⁵² Because it is likely that they cannot gain ready access to health and welfare services, by providing them with a means to have their healthcare expenses paid for, or their funeral costs covered in exchange for their bodies, these individuals are presented with a “conflict of interest.”¹⁵³ A quasi-market based system that focuses on motivational behavior and not financial incentives can be developed that is not harmful to the parties involved and the greater community.

VI. A SOLUTION HONORING VALUES TO INCREASE ORGAN DONATIONS

A quasi-market based system that balances the longstanding altruistic nature of donor practices with the current need to increase the propensity to donate via indirect incentives is a system that can work. The success of a pure market based system aimed at increasing the propensity of individuals to donate organs is unlikely in America. Since the early 1980’s scholars, legislators, physicians, and those in need of an organ transplant have proposed, in one form or another, the creation of a market based system to increase the likelihood that individuals will donate their organs.¹⁵⁴ Recently, ACOT suggested a revision of the “valuable consideration” prohibition¹⁵⁵ in the National Organ Transplant Act to allow exchanges between the donee and either a transplant organization¹⁵⁶ or a private recipient.¹⁵⁷ However, I propose that a necessary shift in the law is a focus on the human spirit and the motivating behaviors underlying altruism, not an exchange that values organs. A quasi-market based system would honor altruism and promote the exchange of indirect compensation treating both as consistent aspects of the gift donor transfer.

The altruistic underpinning of the organ donation system emerged when transplantation was in its infancy stage. The moral, ethical, psychological and legal

¹⁴⁹ *Hearings, supra* note 4, at 6 (testimony of Rep. Diana DeGette).

¹⁵⁰ A. L. Caplan et. al., *Financial Compensation for Cadaver Organ Donation: Good Idea or Anathema?*, in *THE ETHICS OF ORGAN TRANSPLANTS: THE CURRENT DEBATE* 219-23 (Arthur L. Caplan & Daniel H. Coelho ed., 1998).

¹⁵¹ *Id. See supra* discussion *infra* The Failure of State Law Attempts – A Focus on PA Law.

¹⁵² *Id. Caplan, supra* note 151, at 219-23.

¹⁵³ *Id.* at 220.

¹⁵⁴ FOX & SWAZEY, *supra* note 26, at 65-72.

¹⁵⁵ 42 U.S.C.S. §§ 273 – 274 (1994).

¹⁵⁶ Howard, *supra* note 8, at 50-53. The exchange for valuable consideration can be between an administrative party such as an OPO, the OPTN or UNOS and the donee.

¹⁵⁷ *Id.* A market based system could also be facilitated between private entities, for example private organizations to administer the transaction between individuals may surface as a result of the change in legislation.

aspects of organ donation cannot be separated from the scientific aspects of the practice. But this does not mean that thousands of Americans must continue to die each year for the sake of preserving an altruistic model that has not evolved with science. The model can evolve to support the current organ demand, while it continues to respect gift theory. What this means is that with a better understanding of the motivating factors embedded in the moral and ethical grain of the individuals that have, and will, donate their organs, we can develop legislation and programs that will increase organ donation. And this can be accomplished without abrogating the traditional values and morals that have made the American system of organ donation one that has not had to compromise the sanctity of the human body.

In general, the majority of individuals are not outright opposed to organ donation.¹⁵⁸ Mild doubts about preferences for disposition of the body, a slight distaste for considering the subject of harvesting, the inconvenience of carrying a donor card, or myths about medical teams limiting their efforts to save the lives of organ donors in emergency situations in order harvest organs have all been identified as reasons individuals fail to donate their organs.¹⁵⁹ The reasons potential donors hesitate or fail to donate are not related to a desire on their behalf to receive compensation. In a normative sense, these reasons are related to motivational behavior. For example, individuals with doubts about the appropriate way to dispose of their, or their loved one's, body may only be motivated to donate by education about the benefits of donation, or by talking to a transplant surgeon about the effects of the harvesting on the deceased. Or we may not yet understand what exactly would motivate individuals to donate. Whether it be to meet a family that has benefited from organ donation, or an experience with a group of individuals that have donated, there is more to motivating an individual to donate than financial incentives.

A quasi-market based system would entice the potential donor to more deeply and seriously consider the option to donate. By targeting the behaviors that motivate people to donate, a system can be developed that incentivizes individuals to consider the option, and instead of compensation for their organ directly, they receive a form of compensation for their consideration. This system would differ from the proposed system identified as "reward gifting" which combines a financial incentive with an altruistic donation.¹⁶⁰ The financial incentive need not necessarily be tied to the ultimate decision to donate. By designing a program that targets the decision making factors related to altruism, even individuals who determine that donation is not an option for them should receive consideration in exchange for participation in the program. And an understanding of the types of programs to develop and the forms of incentives to offer begins with research into the behaviors that have motivated current potential donors. The problem is serious enough for the government to take the risk.

The second step in this process is for the legislature to narrow the definition of "valuable consideration" in § 274(e) of NOTA.¹⁶¹ Neither Congress nor the

¹⁵⁸ Henry Hansmann, *The Economics and Ethics of Markets for Human Organs*, 14 J. Health Pol., Pol'y & L. 57-58 (1989).

¹⁵⁹ *Id.*

¹⁶⁰ Howard, *supra* note 8, at 51.

¹⁶¹ 42 U.S.C.S. § 274(e) (1994). "It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the

judiciary has been challenged to define NOTA's "valuable consideration" prohibition. ACOT has suggested three ways that a definition can be reached: 1) through a lawsuit; 2) a request for regulatory authority to be given to the Department of Health and Human Services to define the concept; 3) amend NOTA.¹⁶² Faced with a claim by either a state or an individual that NOTA has been violated, a court would likely have to determine if there has been a violation of the exchange for valuable consideration, and a judicially active court in its discretion could interpret the law to reach a definition of the law. Typically, an issue of statutory interpretation of this nature comes up through the courts.¹⁶³ A court that faces the issue in defining the term will need to balance the creation of a meaningful definition that can empower states to create programs with the risk of creating an incentive that would entice individuals to take a risk that they would otherwise not take or exploit the disadvantaged who would pursue incentives for the wrong reasons.

Case law supports the notion that the altruistic model of organ transplantation can survive despite the limited property rights recognized in the body by the Brotherton, Strachan, and Whaley courts. A quasi market system can allow either the individual or next of kin to receive valuable consideration in exchange for their participation in pilot programs targeting motivational behavior. Treatment of this nature is consistent with the current system's primary focus on the individual decision and the secondary focus on the next of kin. The property right is not absolute, so this construct works in a quasi-market system because the only stick of the property right bundle affected is the right to decide disposition. In a pure market based system, the right to sell stick of the bundle would be affected. By targeting motivational behavior, and not the actual organ transfer, the net effect is a very limited set of situations where valuable consideration will be exchanged.

Finally, with an understanding of what promotes altruistic behaviors and a narrowed definition of valuable consideration, states should be empowered to create long-term pilot programs. Initially, these should be focused on non-living donations. And to limit the slippery slope fears that have hindered Pennsylvania's efforts, the legislature can include language in the programs that are developed that define the types of transfers that fall under the programs pur view.

The development of legislation and the common law regulating organ donation is built upon a strong cultural foundation that honors the ethical and moral values of gift theory. Scientific advances have rendered the legislation incapable of supporting the dire need for additional organ donations. Limitations at the federal level impact the states' capability to increase organ donations in new ways. The obstacles to developing pilot programs include federal, state and moral issues that can all be overcome by honoring the values of gift theory. Instead of discarding the values of gift theory, honoring the model and adapting legislation to respect altruistic behavior can ultimately save lives.

transfer affects interstate commerce."

¹⁶² Advisory Committee on Organ Transplantation, Appendix 6: Donor Designation: State Law and OPO Practice, available at <http://www.organdonor.gov/acotapp6.html>.

¹⁶³ *Id.*