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# A PENNY FOR YOUR ORGANS: REVISING NEW YORK'S POLICY ON OFFERING FINANCIAL INCENTIVES FOR ORGAN DONATION

David I. Flamholz\*

“The law must be stable and yet it cannot stand still.”<sup>1</sup>

## INTRODUCTION

Across the nation, 89,498 people are currently on a waiting list for suitable organs.<sup>2</sup> In 2003 alone, close to 6,000 people died in the United States while waiting for transplantable organs.<sup>3</sup> That breaks down to approximately sixteen people per day.<sup>4</sup> The bottom line is that demand for suitable transplant organs far exceeds the supply. The state of New York has a major organ shortage crisis of

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<sup>1</sup> ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 1 (1923).

<sup>2</sup> The Organ Procurement and Transplantation Network, Data, <http://www.optn.org/> (last visited Sept. 30, 2005).

<sup>3</sup> Lawrence R. Reed, *Encourage Organ Donors with a Little Quid Pro Quo*, U.S.A. TODAY, July 23, 2003, at 13A (approximating a “daily death toll that adds up to about 6,000 a year.”). Cf. Paul Elias, *Organ Need Spurs Talk of Financial Incentives*, THE DETROIT NEWS, available at <http://www.detroitnews.com/2001/health/0112/05/a04-357685.htm> (Dec. 3, 2001) (citing a figure of 15,000 people dying per year waiting for organ transplants).

<sup>4</sup> Reed, *supra* note 3.

its own. In New York there are currently 8,192 people awaiting an organ donation.<sup>5</sup> In light of these extenuating circumstances, it is time for New York to follow the lead of the federal government and the Pennsylvania state legislature, by reexamining its opposition to the sale of human organs and adopting a policy of offering indirect financial incentives,<sup>6</sup> combined with a strict set of guidelines. Establishing a program that offers indirect monetary rewards to those who consent to volunteer their organs for donation will increase the supply of organs in the state. Further, following many of the guidelines established by the American Medical Association (AMA) will enable New York to stay within the legal and moral boundaries drawn by ethicists and lawmakers over the past fifty years, and ensure that the ethical and health concerns normally associated with compensation programs will be addressed.

As organ replacement has evolved into an increasingly viable option for individuals facing organ failure, both federal and state legislators find themselves confronted with the difficult task of satisfying two competing goals: the preservation of life and the reduction of suffering on the one hand, and the preservation and protection of the highest ethical and moral standards demanded by American society on the other. Legislators realize that a strong desire to take advantage of new technological advances which may benefit the public must be tempered by recognizing that safeguards and guidelines are necessary to ensure that society's treasured and respected convictions—such as integrity of the human body and respecting deceased wishes—are not compromised.<sup>7</sup>

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<sup>5</sup> The Organ Procurement and Transplantation Network, Overall by Organ, <http://www.optn.org/latestData/rptData.asp> (data last updated Sept. 9, 2005).

<sup>6</sup> Indirect financial incentives—as opposed to direct financial incentives—offer compensation or discounts for various steps of the donation process without offering compensation for the organ itself. *See infra* notes 157-159 and accompanying text.

<sup>7</sup> These issues have not been confronted in the United States alone. *See generally* WORLD HEALTH ORGANIZATION, LEGISLATIVE RESPONSE TO ORGAN DONATION (1994) for a comprehensive compilation of government reactions to the growing field of organ donation around the world.

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In consideration of those two competing goals, in 1984 Congress passed the National Organ Transplantation Act (NOTA),<sup>8</sup> which prohibits the transfer of human organs for “valuable consideration” in inter-state commerce.<sup>9</sup> The legislative history of NOTA cites an insistence that human body parts should never be viewed as commodities.<sup>10</sup> Later, in 1987, the National Conference of Commissioners on Uniform State Laws created the Uniform Anatomical Gift Act (UAGA),<sup>11</sup> which encourages states to prohibit the transfer of human organs for valuable consideration within their own borders. New York had already passed its own law to that effect in 1985, prohibiting the sale of human organs.<sup>12</sup> The legislative history of New York’s statute cites a fear of “widespread medical prostitution.”<sup>13</sup>

One unfortunate consequence of these forms of protective legislation has been the elimination of a potentially valuable source of useful organs—people willing to relinquish their organs in return for some consideration. At present, not only does a shortage of organs exist, but Congress has restricted the means of obtaining those organs as well. A reassessment of the categorical ban on any

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<sup>8</sup> 42 U.S.C. § 274e(a) (2001).

<sup>9</sup> *Id.* Under the United States Constitution, Congress’s power to legislate is limited to, among other things, those issues that affect interstate commerce. U.S. CONST. art. I, § 8. Thus, under the National Organ Transplantation Act, Congress was limited to banning the acquisition or receipt of human organs to instances when it affects interstate commerce.

<sup>10</sup> S. REP. NO. 98-382, at 17 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3975, 3982.

<sup>11</sup> UNIF. ANATOMICAL GIFT ACT § 10(a), 8A U.L.A. 62 (2003).

<sup>12</sup> N.Y. PUB. HEALTH LAW § 4307 (McKinney 2002).

<sup>13</sup> 1985 NEW YORK STATE LEGISLATIVE ANNUAL, Memorandum of Assemblyman Dennis T. Gorski 82 [hereinafter Memorandum of Assemblyman Gorski]. Indeed, in the international community, organ trafficking is on the rise, prompting a re-evaluation of international guidelines on the matter. *See, e.g., Organ Trafficking and Transplantation Pose New Challenges*, MEDICAL NEWS TODAY, available at <http://www.medicalnewstoday.com/newssearch.php?newsid=13008> (Sept. 7, 2004) (suggesting that the World Health Organization consider updating the guiding principles in the light of current practices).

type of organ commodification plan may therefore not only be necessary, it may be unavoidable. Over a decade ago, medical experts predicted that “[t]he growing numbers [of individuals] waiting for cadaveric donations and the high costs of technology such as dialysis . . . will force the issue of commercialization into the national political arena in the future.”<sup>14</sup> However, aside from creating a commercial market for organs, other ethically and legally feasible methods are available to increase organ donations. As discussed in this Note, the method of offering modest and indirect financial incentives to prospective donors is one potentially effective way of increasing the supply of organs while still retaining ethical responsibility and moral sensitivity.

Part I of this note discusses the medical history of organ donation in the United States. Part II examines the organ shortage crisis in the United States and the various hurdles facing legislators who seek to remedy it. Part III delves into the various solutions proposed to solve the crisis. Part IV introduces the financial incentives solution to solve the organ donation crisis. Part V discusses the state of New York’s policy on organ donation. Finally, Part VI recommends a new method to procure organs in New York that is based on Pennsylvania’s already successful campaign to increase donor participation and consent. With this new method, this Note hopes to encourage legislative reform to increase the donor pool in New York, thereby alleviating much of the unfortunate deficit for organs in the New York region.

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<sup>14</sup> Alex Guttman & Ronald D. Guttman, *Sale of Kidneys for Transplantation: Attitudes of the Health Care Profession and the Public*, 24 *TRANSPLANTATION PROCEEDINGS* 2108, 2108 (1992), cited in DAVID PRICE, *LEGAL AND ETHICAL ASPECTS OF ORGAN TRANSPLANTATION*, 370-71 (2000). These thoughts have more recently been echoed in an article in the *American Journal of Law and Medicine*. Gloria J. Banks, *Legal & Ethical Safeguards: Protection of Society’s Most Vulnerable Participants in a Commercialized Organ Transplantation System*, 21 *AM. J.L. & MED.* 45, 110 (1995) (“It is only a matter of time before this country will be forced to decide on the type of commercial system which should be adopted in order to meet the demand of transplantable human organs.”).

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## I. MEDICAL HISTORY OF ORGAN TRANSPLANTS AND DONATION

The human species has attempted to replace organs and tissue since ancient times. In fact the very first organ donor was none other than the very first man—when Adam donated his rib to contribute to the creation of Eve.<sup>15</sup> Over the past few decades, the skills and techniques used to perform organ transplants have dramatically improved.<sup>16</sup> This improvement has led to a steady annual rise in the number of transplants performed. For example, the number of kidney transplants has greatly increased over the previous quarter century. In 1982, only 5,358 kidney transplants were performed in the United States, while in 1986, just four years later, the number increased to 8,960.<sup>17</sup> In 2003, 15,134 kidney transplants were performed.<sup>18</sup> The increasing number of kidney transplants reflects the increase in technology and information available regarding the performance of organ transplants to patients facing organ failure.<sup>19</sup> As technology has transformed

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<sup>15</sup> *Genesis* 2:21-22 (“And He took one of his ribs, and closed up the flesh instead, thereof: And from the rib, which the Lord God had taken from man, made He a woman.”).

<sup>16</sup> Laurel R. Siegel, *Re-Engineering the Laws of Organ Transplantation* 49 EMORY L. J. 917, 918 (2000) (asserting that although the skills and techniques have changed over the centuries, the goal of prolonging life in the event of organ failure remains the same).

<sup>17</sup> Robert Pear, *U.S. Will Require Hospitals to Identify Potential Organ Donors*, N.Y. TIMES, Sept. 6, 1987, at 26. The kidney is by far the organ most transplanted. See Organ Procurement and Transplantation Network, Transplants by Donor Type, <http://www.optn.org/latestData/rptData.asp> (data last updated Sept. 9, 2005) (showing that of the 25,466 organ transplants performed in the United States in 2003, 15,134 of those were kidney transplants).

<sup>18</sup> Organ Procurement and Transplant Network, Transplants by Donor Type, *supra* note 17.

<sup>19</sup> See Sean Arthurs, *No More Circumventing the Dead: The Least-Cost Model Congress Should Apply To Address the Abject Failure of Our National Organ Donation Regime*, 73 U. CIN. L. REV. 1101, 1105 (2005) (citing Michael Waldholz, *Change of Heart: Transplant Pioneer Rejects Approach He Helped Create*, WALL ST. J., June 2, 2003 at A1 (stating that the increase in transplants from 12,000 in 1988 to 25,000 in 2002 is attributable to continual improvements in medical and pharmacological technology)).

organ transplantation into a medically feasible option, the need to regulate the procurement and allocation of organs has become more critical.

Although experiments in transplanting organs began as far back as the middle ages,<sup>20</sup> it is only in the past century that the idea of transplanting organs from one human to another went from being science fiction to a medical reality.<sup>21</sup> In 1911, the first human-to-human organ transplant, a testis allograft,<sup>22</sup> was performed in the United States.<sup>23</sup> Unfortunately, it was only mildly successful as the recipient retained testicular function for only three weeks.<sup>24</sup> Since then, numerous advances have been made in the field of organ donation. The first heart transplant in the United States took place in 1967.<sup>25</sup> However, the patient only remained alive for six and one half hours.<sup>26</sup> Then, in the 1970's, the invention of the immunosuppressive drug, cyclosporine, revolutionized the field by alleviating many of the problems caused by transplant rejection.<sup>27</sup> This invention, coupled with various other advances in surgical techniques, led to an explosion in the number of organ transplants in the 1980's and 1990's.<sup>28</sup> Organ transplants throughout the rest of the world are also being

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<sup>20</sup> See Siegel, *supra* note 16, at 919 (discussing such things as tissue replacements for facial defects in Italy and transplanting animal tissue in Britain).

<sup>21</sup> See AUSTEN GARWOOD-GOWERS, *LIVING DONOR ORGAN TRANSPLANTATION: KEY LEGAL AND ETHICAL ISSUES* 17 (1999) (explaining that early in the twentieth century scientists began experiments in taking an organ out of one animal and placing it in another).

<sup>22</sup> "An allograft is a graft (transplant) of material from the body of one person (usually a dead person) to that of another person." The Knee Guru, Dictionary, <http://www.kneeguru.co.uk/html/dictionary/allograft.html> (last visited Sept. 30, 2005).

<sup>23</sup> Siegel, *supra* note 16, at 920.

<sup>24</sup> *Id.* at 920 n.20.

<sup>25</sup> *Id.* at 920.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 921.

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performed in record numbers.<sup>29</sup> These advances in medicine have not, however, completely solved the organ shortage problem.

## II. THE ORGAN SHORTAGE CRISIS

Despite the great advances in transplant technology, the deficit of transplantable organs grows every day. These technological advances have now created a sad and frustrating irony. That is, while the capability to safely transfer organs now exists, there are simply not enough organs available to meet the growing demand. As noted by Dr. Frank Riddick Jr., chairman of the AMA, a “nationwide crisis” in the shortage of available organs for transplants has developed, and a reliance on the low number of altruistic organ donations is not enough to alleviate this crisis.<sup>30</sup> New procurement strategies are needed to fill the gap between the demand for organs and the supply. However, three obstacles have stood in the way of the implementation of organ procurement methods which would elicit a more adequate supply of organs: (1) the inability to provide appropriate motivation to persuade people to consent to donate either their own organs or those of their deceased relatives; (2) ethical barriers which have made legislators throughout the nation reluctant to enact innovative legislation which would increase the number of organs available for transplant; and (3) legislative reform in the past two decades which has made it more difficult, for those in dire need, to obtain organs.

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<sup>29</sup> See *Record Number of Organ Transplants Performed in the UK*, MEDICAL NEWS TODAY, available at <http://www.medicalnewstoday.com/medicalnews.php?newsid=13859> (Sept. 22, 2004) (“A total of 2,863 life-giving transplants were carried out during 2003-2004 – the highest number ever performed.”).

<sup>30</sup> Elias, *supra* note 3. See *infra* Part II.A.1. The recognition of this “crisis” has been the primary motivation for AMA to reconsider its refusal to conduct a trial on financial incentives. Jim Warren, *ASTS Ethics Committee Endorses Pilot Program to Test a Financial Incentive to Increase Organ Donation*, 11 TRANSPLANT NEWS 10 (May 28, 2002). See also *infra* Part IV.A.2.c. (discussing the AMA’s new policy on financial incentives).



*A. Consent to Donate*

One primary obstacle that has stood in the way of obtaining more organs has been unwillingness on the part of healthy people to consent to donate their organs or those of their deceased relatives. One report predicts that relying on the altruism of the American public to come forth and volunteer to donate their own organs to help their fellow citizens in peril should on its own be sufficient to deal with the shortage of organs.<sup>31</sup> However, reliance on altruism alone has thus far been unsuccessful. Less than 30% of people dying with harvestable organs ever consented to donate their organs.<sup>32</sup> While the concept of organ donation has received widespread approval,<sup>33</sup> many people have been unwilling to step forward and consent to donate their own organs.<sup>34</sup> Both

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<sup>31</sup> In promoting the suggested ban on the sale or purchase of human organs, the U.L.A. cites a Hastings Center Report which states:

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

UNIF. ANATOMICAL GIFT ACT, Comment § 10, 8A U.L.A. 62 (2003).

<sup>32</sup> Reed, *supra* note 3.

<sup>33</sup> See Lloyd R. Cohen, *Increasing the Supply of Transplant Organs: The Virtues of a Futures Market*, 58 GEO. WASH. L. REV. 1, 9 (1989) (citing a 1985 Gallup Poll indicating that seventy-five percent of American adults approve of the concept of organ donation).

<sup>34</sup> *Id.* (explaining that only twenty-seven percent were willing to donate their organs upon death). See Siegel, *supra* note 16, at 944-45 (citing a number of reasons why people might be reluctant to consent to donate their own organs). See also Thomas G. Peters, *Life or Death: The Issue of Payment in Cadaveric Organ Donation*, in THE ETHICS OF ORGAN TRANSPLANTS: THE CURRENT DEBATE 199 (Arthur C. Caplan & Daniel H. Coelho eds., 1998) [hereinafter THE ETHICS OF ORGAN TRANSPLANTS] (suggesting that relying on altruism is a form of imposing our own value system on those who may not share the same thoughts or feelings about organ donation). For an analysis of the implications of such a program, see John A. Sten, *Rethinking the National Organ Transplant*

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psychological and religious factors serve as barriers to voluntary consent to organ donation.<sup>35</sup> Such factors include: a religious belief in sanctity of the human body;<sup>36</sup> a desire not to have one's remains treated as mere carrion;<sup>37</sup> and an unwillingness to contemplate one's own mortality.<sup>38</sup>

To further exacerbate the problem, the families of half of the people dying with harvestable organs refuse to consent to donate their deceased relatives' organs, even when that decision goes against the wishes of the deceased.<sup>39</sup> For instance, in 2004 the New York Organ Donor Network received 55,571 hospital referrals for organ donations in the Greater New York Metropolitan Area.<sup>40</sup> However, only 654 of the families of potential organ donors were approached, and only 308 consented to donate their family member's organs upon death.<sup>41</sup> This consent rate of 47% is below the national average of 55%.<sup>42</sup> Every day the unfortunate gap between patients in desperate need of organs and donors consenting to donate their own or their deceased family member's organs widens.

This gap is unfortunate because as many people die awaiting organs, many medically qualified donors die without taking any steps to donate their organs.<sup>43</sup> With the existence of modern

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*Program: When Push Comes to Shove*, 11 J. CONTEMP. HEALTH L. & POL'Y 197, 214-19 (1994). See also Orly Hazony, *Increasing the Supply of Cadaver Organs for Transplantation: Recognizing that the Real Problem is Psychological Not Legal*, 3 HEALTH MATRIX 219 (1993).

<sup>35</sup> Cohen, *supra* note 33, at 8-11.

<sup>36</sup> *Id.* at 9.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 10

<sup>39</sup> *Id.*

<sup>40</sup> New York Organ Donor Network, Organ and Tissue Donation, <http://www.donatelifeny.org/organ/2004.html> (last visited Sept. 15, 2005).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See Alexander Powhida, *Forced Organ Donation: The Presumed Consent to Organ Donation Laws of the Various States and the United States Constitution*, 9 ALB. L.J. SCI. & TECH. 349, 371 n.117 (1999) (citing a statistic which notes that "25,000 Americans suffer brain deaths every year and only

technology and surgical skills, each person who opts to become an organ and tissue donor has the potential of saving and enhancing up to 50 lives, and can take up to eight people off the organ transplant waiting list.<sup>44</sup> Yet, any hope that medical science may provide to those eagerly awaiting recipients is regrettably buried along with the bodies of those possessing transplantable organs that never consented to donate them. When an individual dies without donating his or her organs, his or her potential life-saving organs regrettably go to waste.

The challenge for legislators and policy-makers has therefore been to find alternative methods of encouraging people to donate their organs, rather than relying on their altruistic tendencies, thereby ensuring that suitable organs do not go to waste.

### *B. Ethical Considerations*

Ethical hindrances have created another obstacle in obtaining adequate numbers of organs. Ethical values are a major part of the fabric of our society, and they also play a large role in shaping medical policy and law.<sup>45</sup> Thus, while many innovative methods have been suggested which could potentially solve the organ shortage crisis in United States,<sup>46</sup> many of these methods have been ignored due to ethical considerations.<sup>47</sup> According to one expert in the field of organ donation, technological advances have placed strains on our existing ethical conceptions.<sup>48</sup>

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2,500 become donors”).

<sup>44</sup> John Zen Jackson, *When it Comes to Transplant Organs, Demand Far Exceeds Supply*, 170 N.J. L.J. 910 (Dec. 16, 2002).

<sup>45</sup> See TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 6-10 (4th Ed. 1994) (discussing biomedical ethics' influence on the medical profession and on public policy decision making).

<sup>46</sup> See *infra* Part III (mentioning such possibilities as eliminating groups of people from organ donor wait-lists, adopting a policy of presumed consent, and allowing a free market to exist for organs).

<sup>47</sup> PRICE, *supra* note 14, at 2.

<sup>48</sup> See *id.* (“[T]he ‘technological imperative’ to keep pushing back the barriers can place enormous strains on our legal and ethical institutions and

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Often, many of the pertinent ethical considerations with regard to organ donation depend on when and from whom the organ is being procured. For example, from an ethical point of view, a major difference exists between obtaining organs from living donors (in a procedure referred to as living donor organ transplantation or LDT) and obtaining organs from cadaveric donors (in a procedure referred to as cadaveric donor organ transplantation or CDT).<sup>49</sup> Despite the superior survival rates when living donor organ transplantation is performed,<sup>50</sup> that method carries with it more ethical dilemmas than does cadaveric donor organ transplantation.<sup>51</sup>

*1. Living Donor Organ Transplantation Ethical Considerations*

Procuring an organ from a living donor can carry with it many ethical complexities. One issue is the difficulty in defining “injury” for medical purposes. While some doctors believe that the removal of an organ is justified by its proprietary use in helping another,<sup>52</sup> it is more often recognized that the removal of an organ for transplantation constitutes an “injury” in ethical terms since it involves physical damage and permanent destruction of the human body.<sup>53</sup> Medical doctors are charged with the duty of beneficence and believe strongly in the principle of non-maleficence.<sup>54</sup> Furthermore, all doctors take the Hippocratic Oath, which states

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frameworks of analysis.”).

<sup>49</sup> See generally, GARWOOD-GOWERS, *supra* note 21, at xvii-xxii. Although there is considerable overlap in the issues existing in both LDT and CDT, they will be analyzed separately for the purpose of this Note.

<sup>50</sup> *Id.* at xviii.

<sup>51</sup> See *id.* at xviii-xxiv.

<sup>52</sup> PRICE, *supra* note 14, at 10.

<sup>53</sup> *Id.*

<sup>54</sup> GARWOOD-GOWERS, *supra* note 21, at 2. The principle of beneficence refers to a moral obligation to act for the benefit of others. BEACHUMP, *supra* note 45, at 260. The principle of non-maleficence asserts an obligation not to inflict harm on others. *Id.* at 189.

that they will “help [their patients], or at least do no harm.”<sup>55</sup> Thus, from the doctor’s perspective, some higher justification must exist for harming a living donor to make organ transplantation medically permissible.<sup>56</sup>

A second issue deals with the human conception of “personhood.” With the goal of helping others as a priority, there is the potential that incompetent and insensate individuals, such as anencephalics<sup>57</sup> or infants or patients in a permanent vegetative state,<sup>58</sup> will be taken advantage of by the removal of their organs in the absence of their consent.<sup>59</sup> The fear of procuring organs from non-consenting living individuals then leads to an inevitable dilemma: are all individuals to be treated equally when lives are at stake and the opportunity to save them exists, or do we place greater emphasis on saving the lives of the healthy, even when it is at the expense of losing the lives of those with who are unable to greatly contribute to society?<sup>60</sup>

A third concern which affects many experimental living organ donor procedures is the issue of risk versus benefit.<sup>61</sup> Policy makers must determine to what extent certain experimental procedures will be explored and tested for the sake of helping others, even with the full consent of the patient.<sup>62</sup> According to some, a determined “threshold of benefit” should be required in every procedure—requiring a minimum amount of good to derive

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<sup>55</sup> GARWOOD-GOWERS, *supra* note 21.

<sup>56</sup> *Id.* at 2-3.

<sup>57</sup> A person without a brain. See STEDTMAN’S MEDICAL DICTIONARY 64 (3d ed. 1972).

<sup>58</sup> As opposed to persons who have suffered total brain death, persons in a permanent vegetative state still demonstrate certain normal brain stem functions, such as cycles of sleep and wakefulness, the ability to breathe and maintain blood pressure unassisted, and several reflexes. Roby S. Shapiro, *The Case of L.W.: An Argument for a Permanent Vegetative State Treatment Statute*, 15 OHIO ST. L.J. 439, 441 (1990).

<sup>59</sup> PRICE, *supra* note 14, at 11.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

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from its use—to determine if it is worth attempting.<sup>63</sup> However, ascertaining the appropriate “threshold” can sometimes be very challenging.<sup>64</sup> These concerns and others explain the reluctance in the medical community to incentivize or even encourage the use of living donor organ transplantation.<sup>65</sup>

*2. Cadaveric Donor Organ Transplantation Ethical Considerations*

Due to the plethora of ethical concerns involved with living donor organ transplantation, health professionals instead have turned to cadaveric donor organ transplantation as the preferred method of organ procurement. However, CDT is not without its own ethical issues. The major ethical issues involved in organ transplants include concerns about: (1) preservation of the integrity and dignity of the human body,<sup>66</sup> and (2) determination of when and how to honor the wishes of the deceased.<sup>67</sup> For instance, policy makers must determine whether the next of kin may dictate if and how organs of the deceased should be allocated when a donor has died without expressing consent to donate his organs.<sup>68</sup> Other ethical and administrative issues arise concerning fair allocation

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<sup>63</sup> *Id.* (citing the Nuffeld Working Party which asserted that xenotransplants should only commence when there was a ‘reasonable chance of success’).

<sup>64</sup> *See id.* (explaining that historically, people are unwilling to resist tangible benefit even in the face of unknown risk).

<sup>65</sup> *See, e.g.,* AMA Guidelines *infra* note 191 (proposing use of financial incentives only for non-living donors).

<sup>66</sup> The President’s Council on Bioethics, Staff Background Paper, *Organ Transplantation: Ethical Dilemmas and Policy Choices*, [http://www.bioethics.gov/background/org\\_transplant.html](http://www.bioethics.gov/background/org_transplant.html) (last visited Sept. 14, 2005) [hereinafter The President’s Council on Bioethics]. This is an idea which one researcher labels as “a desacralization of the human body.” John H. Evans, *Commodifying Life? A Pilot Study of Opinions Regarding Financial Incentives for Organ Donation*, 28 J. HEALTH POL. POL’Y & LAW 1003, 1023 (2003) (“The notion that the body is somehow sacred and different from other objects is one of the deepest cultural notions in at least the Western culture tradition.”).

<sup>67</sup> The President’s Council on Bioethics, *supra* note 66, at Part IV.

<sup>68</sup> PRICE, *supra* note 14, at 15.

methods, such as determining which potential donees receive organs when they become available, and how that priority should be determined.<sup>69</sup>

One primary area of ethical concern for both policymakers and lawmakers, even in the field of CDT, is the potential commodification of human organs.<sup>70</sup> Concerns regarding the commodification of organs include the potential coercion and exploitation of those individuals most in need of money,<sup>71</sup> and a general feeling that organ commodification in any form is inconsistent with the “most basic human values.”<sup>72</sup>

The aforementioned issues concerning both living donor organ transplantation and cadaveric donor organ transplantation have the potential to impede any legislative reform undertaken to resolve the current organ deficiency. These ethical barriers must be considered when creating any new organ procurement method aimed at satisfying the growing need for organs.

### *C. Legislative Background*

Aside from the ethical concerns, any new method for procuring organs must also overcome a legal obstacle. Physicians’ increasing ability to successfully transplant organs has precipitated much legislation.<sup>73</sup> Both the federal and state governments have enacted

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<sup>69</sup> *Id.* at 18. This Note will focus primarily on CDT, although much has been written on LTD as a solution as well.

<sup>70</sup> *See id.* at 367-417. According to Dr. Abdallah S. Daar, a Professor at the University of Toronto, “Few questions in biomedical ethics are as challenging at present as the question of paid organ donation for transplantation, raising as it does difficult issues related to the body, the soul, property rights, autonomy, limitations of freedom, cultural/ethical pluralism and professional versus societal perceptions.” *Id.* at 367.

<sup>71</sup> GENERAL MEDICAL COUNCIL, GUIDANCE FOR DOCTORS ON TRANSPLANTATION OF ORGANS FROM LIVE DONORS, point 3 (1992), *reprinted in* GARWOOD-GOWERS, *supra* note 21, at 173.

<sup>72</sup> World Health Organization, Resolution WHA40.13, Development of Guiding Principles for Human Organ Transplants, *reprinted in* LEGISLATIVE RESPONSE TO ORGAN TRANSPLANTATION, *supra* note 7, at 467.

<sup>73</sup> Powhida, *supra* note 43, at 352-53.

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legislation to deal with the relatively new phenomenon of organ transplants.<sup>74</sup> Unfortunately, much of this legislation serves as an impasse to, rather than a route to, potential avenues of organ procurement. Congress and various state legislatures have enacted many laws with the express purpose of addressing the issues related to the rapidly growing field of organ transplant jurisprudence. Specifically, both federal and state legislators have placed various restrictions on organ trafficking and sale over the past two decades.

*1. Federal Legislation*

In 1984, Congress passed the National Organ Transplantation Act<sup>75</sup> in an effort to address the needs of desperate families seeking organs and financial assistance for transplants, while combating the beginnings of a commercial market for organs.<sup>76</sup> One integral aspect of NOTA is the creation of the Organ Procurement and Transplantation Network (OPTN).<sup>77</sup> Among other tasks, the OPTN established a national list of individuals who need organs<sup>78</sup> and a national system to match available organs with those in need.<sup>79</sup>

In addition to the creation of a national list of potential organ donors and receivers, another important aspect of NOTA is a provision which prohibits organ purchases.<sup>80</sup> This provision states, in pertinent part, "It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce."<sup>81</sup> Violation of this provision of NOTA carries with it a fine of up to \$50,000, a prison sentence

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<sup>74</sup> See *infra* Part II.C.1-3.

<sup>75</sup> 42 U.S.C. § 274 (2001).

<sup>76</sup> S. REP. NO. 98-382, at 2-3 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3975, 3976-3977.

<sup>77</sup> 42 U.S.C. § 274(a) (2001).

<sup>78</sup> 42 U.S.C. § 274(b)(2)(A)(i) (2001).

<sup>79</sup> 42 U.S.C. § 274(b)(2)(A)(ii) (2001).

<sup>80</sup> 42 U.S.C. § 274e(a) (2001).

<sup>81</sup> *Id.*



of up to five years, or both.<sup>82</sup>

## 2. State Legislation

Laws concerning medical treatment, consent to procedures, and the definition of death fall under state jurisdiction.<sup>83</sup> The prohibition of organ purchases in NOTA relates solely to interstate commerce.<sup>84</sup> Therefore, the federal ban on purchasing human organs will not be violated unless the purchase occurs across state lines or otherwise impacts interstate commerce. However, a few years after the enactment of NOTA, the National Conference of Commissioners on Uniform State Laws (NCCUSL) created the Uniform Anatomical Gift Act (UAGA), recommending the prohibition of the sale or purchase of human organs for “valuable consideration” within individual states.<sup>85</sup> Close to half of the fifty states have adopted portions of the UAGA.<sup>86</sup>

Over the past decade, some states aspiring to increase the number of viable organs available within the state while still remaining within the guidelines of NOTA have taken modest steps to increase the number of people willing to donate their organs upon death.<sup>87</sup> For example, some states have created trust funds to spur organ donation by increasing public awareness regarding the need for organ and tissue donation.<sup>88</sup> Delaware created the Organ

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<sup>82</sup> 42 U.S.C. § 274e(b) (2001).

<sup>83</sup> 42 U.S.C. § 274e(a).

<sup>84</sup> S. REP. NO. 98-382, at 17 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3975, 3983.

<sup>85</sup> *See* UNIF. ANATOMICAL GIFT ACT § 10(a), 8A U.L.A. 62 (2003).

<sup>86</sup> *See* UNIF. ANATOMICAL GIFT ACT, *Table of Jurisdictions Wherein Act Has Been Adopted*, 8A U.L.A. 3 (2003) (indicating jurisdictions where the UAGA has been adopted and date in which they were effective in those individual jurisdictions). *But see* MISS. CODE ANN. § 41-39-9 (1999) (declaring contracts for donation of organs to be lawful and requiring repayment of any “monetary consideration” received upon revocation).

<sup>87</sup> *See* Siegel, *supra* note 16, at 940-43.

<sup>88</sup> Steven P. Calandrillo, *Cash for Kidneys? Utilizing Incentives to End America's Organ Shortage*, 13 GEO. MASON L. REV. 69, 131 (2004).

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and Tissue Donation Awareness Trust Fund,<sup>89</sup> used to develop promotional campaigns and school programs encouraging donor registration through the state's driver's license program.<sup>90</sup> Ohio created a similar trust fund, called the Second Chance Trust Fund,<sup>91</sup> whose committee is charged with, among other things, the duty of approving "brochures, written materials, and electronic media regarding anatomical gifts and anatomical gift procedures for use in driver training schools."<sup>92</sup> Florida created the Florida Organ and Tissue Donor Education and Procurement Trust Fund, which distributes its funds for "educational purposes aimed at increasing the number of organ and tissue donors."<sup>93</sup>

*3. New York State Legislation*

In 1985, New York adopted its own version of NOTA legislation, stating: "It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer for valuable consideration any human organ for use in human transplantation."<sup>94</sup> In February of 2004, New York's legislature created by statute the "Life – Pass It On" Trust Fund (the Fund).<sup>95</sup> This law stipulates that money in the Fund "shall be expended only for organ transplant research and education projects approved by the commissioner of health, or to provide grants to not-for-profit corporations in this state which are incorporated for the purpose of increasing and promoting organ and tissue donation awareness."<sup>96</sup>

The recent initiatives in New York and other states such as Delaware, Ohio, and Florida do not represent drastic changes in existing law. Rather, they are merely modest attempts at easing the current organ shortage problem without crossing the prohibited

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<sup>89</sup> DEL. CODE ANN. tit. 16, § 2729(a) (2003).

<sup>90</sup> *Id.* at § 2730(b)(1).

<sup>91</sup> OHIO REV. CODE ANN. § 2108.15 (Anderson 2002).

<sup>92</sup> OHIO REV. CODE ANN. § 2108.17(G)(4) (Anderson 2002).

<sup>93</sup> FLA. STAT. ANN. § 765.5216(1) (West 2005).

<sup>94</sup> N.Y. PUB. HEALTH LAW § 4307 (McKinney 2002).

<sup>95</sup> N.Y. STATE FIN. LAW § 95-d (McKinney Supp. 2005).

<sup>96</sup> *Id.* at § 95-d(3).

line of organ selling or buying drawn by NOTA and the UAGA. With the organ shortage reaching crisis status,<sup>97</sup> it is clear that more proactive and radical steps should be taken in order to adequately manage this predicament, keeping in mind the ethical and legal factors which serve as potential obstacles to any legislative reform.

### III. PROPOSED SOLUTIONS

With the deficit between those waiting for organs and those donating them continuing to widen, government officials and academic scholars have found it necessary to consider other viable solutions to encourage organ donation. Two distinct methods for increasing the donor pool have been identified. The first method is to maximize the efficiency of the existing organ procurement system through distribution and allocation improvements.<sup>98</sup> The second method is to increase the supply of organs by expanding into new donor populations by way of education or providing incentives.<sup>99</sup>

#### *A. Increasing the Efficiency of the Procurement System*

One innovative but controversial method aimed at maximizing the efficient use of available organs is to eliminate entire classes of people from recipient lists. Such arguments have been explored with regard to liver transplants for alcoholics<sup>100</sup> and with regard to convicted criminals.<sup>101</sup> Congress has also focused on the efficient allocation of currently available organs through the formation of a

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<sup>97</sup> See *supra* notes 2-5 and accompanying text.

<sup>98</sup> THE ETHICS OF ORGAN TRANSPLANTS, *supra* note 34, at 10.

<sup>99</sup> *Id.*

<sup>100</sup> Alvin H. Moss & Mark Siegler, *Should Alcoholics Compete Equally for Liver Transplantation*, in THE ETHICS OF ORGAN TRANSPLANTS, *supra* note 34, at 275.

<sup>101</sup> Lawrence J. Schneiderman & Nancy S. Jecker, *Should a Criminal Receive a Heart Transplant? Medical Justice v. Societal Justice*, in THE ETHICS OF ORGAN TRANSPLANTS, *supra* note 34, at 294.

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network to assist local agencies in distributing organs and through the creation of a task force on organ donation to monitor the problems and issues related to organ donation and transplantation.<sup>102</sup>

*1. Eliminating Alcoholics*

The primary reason given for possibly barring alcoholics from competing equally with other patients on the liver transplant waiting list is that individuals should bear some responsibility for medical problems, such as cirrhosis,<sup>103</sup> associated with voluntary choices, such as alcohol abuse.<sup>104</sup> According to this proposal, due to dire scarcity of donor livers, it would only be fair that individuals who develop liver disease through no fault of their own—such as those who have a congenital liver disease—should have a higher priority in receiving a liver transplant than those whose liver disease results from failure to obtain treatment for alcoholism.<sup>105</sup>

Those opposed to disqualification of alcoholics from procurement lists argue that it is based on nothing more than an unjust common conviction that alcoholics are morally blameworthy for their own condition and thus should be disqualified from the competition for rare donor livers.<sup>106</sup> Opponents of barring alcoholics from equal access to donor livers insist that qualification for a new organ should not require moral virtue or a cancellation of a moral vice on the part of the would-be recipient.<sup>107</sup> Rather, moral evaluation should be entirely excluded from all deliberations concerning candidacy for liver

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<sup>102</sup> See *infra*. Part III.A.3.

<sup>103</sup> Progressive disease of the liver. STEDTMAN'S MEDICAL DICTIONARY 256 (3d ed. 1972).

<sup>104</sup> Moss & Siegler, *supra* note 100, at 278.

<sup>105</sup> *Id.* at 279.

<sup>106</sup> Carol Cohen et al., *Alcoholics and Liver Transplantation*, in THE ETHICS OF ORGAN TRANSPLANTS, *supra* note 34, at 286.

<sup>107</sup> *Id.* at 287.

transplantation.<sup>108</sup>

## 2. *Eliminating Convicted Criminals*

Some scholars have argued to exclude convicted criminals from procurement lists.<sup>109</sup> However, eliminating convicted criminals from recipient lists, based merely on past behavior, may not be justifiable from a medical justice perspective.<sup>110</sup> There is a general acceptance within the medical profession that physicians owe patients consideration based solely on potential medical benefits, without any regard to non-medical factors.<sup>111</sup> Nonetheless, medical justice is often tainted by societal factors,<sup>112</sup> and in a just society, principles of distributive justice govern the distribution of burdens and benefits.<sup>113</sup> Thus, scholars argue that, in a society where certain life-saving medical treatments are limited, those who have already taken benefits away from those who have attempted to live justly should not be eligible for further benefits, such as those limited treatments.<sup>114</sup>

Methods for alleviating the critical organ shortage by eliminating certain undesirable organ transplant recipients are radical and will require sacrificing sacred notions of justice and valuable oppositions to discrimination in the medical profession.<sup>115</sup> In contrast to the previous two suggestions, Congress has created a

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<sup>108</sup> *Id.*

<sup>109</sup> Schneiderman & Jecker, *supra* note 101.

<sup>110</sup> *Id.* at 298.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 299.

<sup>114</sup> *Id.* at 300. Schneiderman and Jecker therefore propose that convicted criminals should be entitled to only a “rudimentary decent minimum” level of care, which would not include equal access to such treatments as heart transplants. *Id.* at 303.

<sup>115</sup> Gina Kolata, *Inmate Fears Death Because Prison Won't Finance Transplant*, N.Y. TIMES, Feb. 5, 1994, § 1, at 6. According to Arthur Caplan, “It is absolutely wrong to make judgments about past behavior, criminal conduct, moral worth, indictments, charges or conviction” for the purposes of allocating organs.” *Id.*

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less controversial method to increase the efficiency of the current organ procurement system, which is highlighted in the next section.

3. *Organ Procurement and Transplantation Network and the Task Force*

Congress, with the passing of NOTA, created its own system for maintaining an efficient method of allocating organs.<sup>116</sup> The OPTN was developed to help regional organ procurement agencies better distribute organs to a broader area and adopt more uniform and higher quality standards for the procurement and distribution of donated organs.<sup>117</sup> These regional organ procurement organizations are charged with a duty to locate potential organ donors and arrange for the acquisition, preservation, and transportation of the organs to organ centers.<sup>118</sup> In addition, Congress has created a Task Force on Organ Transplantation<sup>119</sup> to examine the problems and issues relating to organ procurement and transplantation.<sup>120</sup>

The success of Congressional methods of increasing the efficiency of organ procurement and allocation is questionable. The shortage of suitable organs continues to grow and the need for transplantable organs is at a record high. For the first time, the number of people waiting for a deceased donor kidney transplant in the United States has recently exceeded 60,000.<sup>121</sup> It seems that

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<sup>116</sup> 42 U.S.C. § 274 (2001).

<sup>117</sup> See James F. Blumstein, *Government's Role in Organ Transplantation Policy*, 14 J. HEALTH POL. POL'Y & L. 5, 13 (1989) ("The role of the OPTN was to establish a registry of patients in need of organs and potential recipient lists on the registry.").

<sup>118</sup> 42 U.S.C. § 273(a-b) (2001).

<sup>119</sup> National Organ Transplantation Act, Title 1-Task Force on Organ Transplantation, 42 U.S.C. § 273 (1994).

<sup>120</sup> Pub. L. No. 98-507, § 101(b)(1)(A), 98 Stat. 2339 (1984).

<sup>121</sup> Organ Procurement and Transplant Network, *Kidney Transplant Need Exceeds 60,000*, <http://www.optn.org/news/newsDetail.asp?id=358> (reported on Oct. 14, 2004).

Congress's focus on the efficient allocation of the *current* supply of organs has not been successful in reversing the organ shortage crisis. The evidence of the steady decline in the supply of available, transplantable organs has encouraged some governmental institutions to shift gears in their approach to the problem and attempt to increase the supply of organs made available by increasing the actual supply of organs rather than efficiently allocating the existing supply.

### *B. Increasing the Supply of Organs*

There are many possible ways to increase the supply of organs.<sup>122</sup> Among them are adopting a system of presumed consent, creating a market for organs, and expanding the criteria for transplantable organs. Many of these suggested methods of increasing the organ supply require the modification of existing law and policy, and reconsideration of entrenched moral and legal frameworks and are still untested and unproven. Nonetheless, some of these newer methods have gained support in academic circles and in other parts of the world.

#### *1. Presumed Consent*

One suggested proposal for increasing organ donation is the creation of "presumed consent" statutes.<sup>123</sup> Under this method, unless a person affirmatively "opts out" during his lifetime, his organs will *automatically* be donated at death.<sup>124</sup> Many European

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<sup>122</sup> Some of these methods will be explained below.

<sup>123</sup> For a full discussion promoting this solution, see Kelly Ann Keller, *The Bed of Life: A Discussion of Organ Donation, its Legal and Scientific History, and a Recommended "Opt-Out" Solution to Organ Scarcity*, 32 STETSON L. REV. 855 (2003). Cf. Powhida, *supra* note 43 (questioning the constitutional validity of presumed consent statutes).

<sup>124</sup> See Shelby E. Robinson, Comment, *Organs for Sale? An Analysis of Proposed Systems for Compensating Organ Providers*, 70 U. COLO. L. REV. 1019, 1031 (1999) (referring alternatively to presumed consent as "routine salvage").

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countries have adopted this method.<sup>125</sup> Despite being suggested by the UAGA,<sup>126</sup> only a minority of states in this country enacted presumed consent statutes when they adopted other parts of the UAGA.<sup>127</sup> Even in those states which have adopted presumed consent statutes,<sup>128</sup> the statute's application is limited to bodies under the authority of the coroner or medical examiner,<sup>129</sup> and is generally only applicable to the removal of corneas and pituitary glands.<sup>130</sup> In most states, failure to "opt out" is not akin to consent.<sup>131</sup> Rather "reasonable efforts" are required to obtain consent from the next of kin before organs can be harvested.<sup>132</sup> Some opponents of the presumed consent method question the very presumption upon which the laws are based, which is that individuals actually would consent to the donation of their organs if they had been presented the with the option while alive.<sup>133</sup> Other opponents to the presumed consent method see it as failing on ethical grounds, believing the concept of "silence as consent" to be antithetical to American culture.<sup>134</sup>

*2. Creating a Market for Organs*

An alternative solution is opening a futures market for

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<sup>125</sup> Radhika Rao, *Property, Privacy and the Human Body*, 80 B. U. L. REV. 359, 381 n.77 (2000).

<sup>126</sup> UNIF. ANATOMICAL GIFT ACT, *supra* note 85, at 43.

<sup>127</sup> Rao, *supra* note 125, at 380.

<sup>128</sup> *See id.* at 380 n.76.

<sup>129</sup> *Id.* at 381 n.77.

<sup>130</sup> *Id.* at 380.

<sup>131</sup> *Id.* at 381.

<sup>132</sup> *Id.* In practice, however, the difference between laws requiring reasonable efforts and those presuming consent may only be one of semantics. *Id.* at 382.

<sup>133</sup> R. M. Veatch & J.B. Pitt, *The Myth of Presumed Consent: Ethical Problems in New Organ Procurement Strategies*, in THE ETHICS OF ORGAN TRANSPLANTS, *supra* note 34, at 176.

<sup>134</sup> Robinson, *supra* note 124, at 1032.



organs.<sup>135</sup> A so-called “organ market” would allow individuals before death, or surviving family members after death, to sell their own or their loved ones’ organs in a private contract.<sup>136</sup> Thus far this proposal has been met with widespread resistance because it entails the full-scale transformation of the body into property and might lead to unequal allocation of organs.<sup>137</sup> The fear is that the wealthiest individuals will have the greatest access to organs by virtue of their wealth.<sup>138</sup> Despite these drawbacks, this suggested solution has gained mild acceptance in academic circles.<sup>139</sup>

### 3. Transplanting “Marginal” or “Extended Criteria” Organs

American society has witnessed a “shift in the donor pool.”<sup>140</sup> Several conditions, including increased seat-belt use, have deprived transplantation of its most reliable sources of pristine organs.<sup>141</sup> This scarcity in organs has led transplant specialists to relax the standards of who can donate.<sup>142</sup> The result is a considerable increase in the transplanting of “marginal” or “extended criteria” organs in the last several years.<sup>143</sup> Criteria such as age, health, and lifestyle of donors have all but evaporated.<sup>144</sup>

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<sup>135</sup> See Henry Hansmann, *The Economics and Ethics of Markets for Human Organs*, 14 J. HEALTH & HUM. POL. 57 (1989) (discussing the possibility of regulating a market for human organs). See also S. Gregory Boyd M.D., *Considering a Market in Human Organs*, 4 N.C. J. L. & TECH., 417, 468-472 (2003) (proposing different organ market possibilities).

<sup>136</sup> President’s Council on Bioethics, *supra* note 66, at Part III.4.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> See Calandrillo, *supra* note 88, at 108-111 (calling future markets a “solid step in the right direction, and certainly a substantial improvement over current supply incentives”).

<sup>140</sup> Gretchen Reynolds, *Will Any Organ Do?*, N.Y. TIMES MAGAZINE, July 10, 2005, at 37.

<sup>141</sup> *Id.* at 38.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 38-39 (referencing one case in which N.Y.U. transplanted a liver from a deceased 80-year-old and commenting on the recent phenomenon of

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With the demand for transplant organs still growing, despite these lower standards, some academics have suggested using other even more controversial and untested approaches to fill the donor pool.<sup>145</sup>

Any method adopted for increasing the supply of organs must seek to strike a balance between potential success and ethical and legal concerns. Therefore, a method which could potentially increase the supply of organs, but suffers from being ethically questionable and legally unsound, will be met with opposition from any number of ethicists, scholars or legislators. One solution which seems to strike the balance of these factors may be to offer moderate financial incentives to donors or their families in exchange for their organs upon death.

## IV. PROVIDING FINANCIAL INCENTIVES

One solution at the forefront of legal and policy discussions<sup>146</sup> is to allow for a financial compensation to potential donors or their

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transplanting livers infected with Hepatitis C into healthy patients).

<sup>145</sup> Those include: (1) harvesting the organs of executed prisoners, *see* LOUIS J. PALMER, JR., ORGAN TRANSPLANTS FROM EXECUTED PRISONERS: AN ARGUMENT FOR THE CREATION OF DEATH SENTENCE ORGAN REMOVAL STATUTES (1999). *But see* Whitney Hinkle, *Giving Until it Hurts: Prisoners are not the Answer to the National Organ Shortage*, 35 IND. L. REV. 593 (2002) (arguing against the proposal that organs be obtained from executed prisoners); (2) a communitarian approach in which people's preferences are changed through moral persuasion, *see* Amitai Etzioni, *Organ Donation: A Communitarian Approach*, 13 KENNEDY INST. ETHICS J. 1, 5 (2003); and (3) a system of mutuality where only those consenting to donate their own organs would receive priority for a needed transplant, *see* Richard Schwindt & Aidan Vining, *Proposal for a Mutual Insurance Pool for Transplant Organs*, 23 J. HEALTH, POL., POL'Y, & L., 725, 727 (1998). *See also* Rupert Jarvis, *Join the Club: A Modest Proposal to Increase Availability of Donor Organs*, in THE ETHICS OF ORGAN TRANSPLANTS, *supra* note 34, at 190-91 (extolling the virtues of this system for potentially reducing donor demand while at the same time increasing the supply).

<sup>146</sup> *See* Ovetta Wiggins, *Pa. Organ Donors Get \$300 Boost*, PHILADELPHIA INQUIRER, May 27, 2002, available at <http://www.philly.com/mld/inquirer/3346239.htm?1c>.

families in exchange for their consent to donate their organs or their deceased family member's organs upon death.<sup>147</sup> The theory is that compensation in some form would provide adequate incentives for organ donation which do not exist under the current altruistic-reliant system, and that increasing incentives to donate would thereby lead to an increased number of organ donations.<sup>148</sup>

*A. Types of Financial Incentives*

There are three types of incentives: non-financial or "moral" incentives, direct economic payment, and indirect financial incentives.<sup>149</sup> Because it would most adequately address the above mentioned hurdles facing any organ donation reform, a program of indirect financial incentives would be the most effective. There are many hurdles, however, in enacting a program that involves the offering of financial incentives in exchange for organs, including: a practical hurdle in obtaining donor consent, an ethical hurdle in accepting the moral consequences of such a program, and a legal hurdle in fitting the program into existing legislation.

The first type of incentive is non-financial, referred to as "moral" incentives.<sup>150</sup> These moral incentives to donate organs might include commemorative certificates, plaques, or medals of honor to be given to donors or their families in order to express appreciation for their life-saving gifts.<sup>151</sup> Although this moral incentive model may avoid many of the ethical pitfalls that are normally associated with real monetary incentives, it is potentially ineffective as it is an insufficient incentive to produce the number of organs needed.<sup>152</sup> Another type of incentive is direct economic

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<sup>147</sup> See Sten, *supra* note 34, at 214-19 (advocating a "death penalty pilot program" whereby a \$1,000 dollar payment is made to families of organ donors).

<sup>148</sup> Boyd, *supra* note 135, at 472.

<sup>149</sup> Robert V. Veatch, *Why Liberals Should Accept Financial Incentives for Organ Procurement*, 13 KENNEDY INST. ETHICS J. 19, 21-24 (2003).

<sup>150</sup> *Id.* at 20-21.

<sup>151</sup> *Id.* at 21.

<sup>152</sup> *Id.* at 21.

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payment.<sup>153</sup> This approach may be the most effective in eliciting the largest number of organ donations, but it carries with it many of the traditional concerns that exist with organ commodification and organ markets, such as discrimination against the poor,<sup>154</sup> the potential for coercion of those desperate for food and money,<sup>155</sup> and the concern about unethical offers.<sup>156</sup> A third type of incentive takes the form of indirect financial incentives.<sup>157</sup> This includes payments which serve as compensation for costs incurred in the donation process,<sup>158</sup> such as the funeral expenses of the donor or the expenses incurred by family members in attending to the death of the donor.<sup>159</sup> One advantage to this system is that it creates some distance between the decision to provide organs and the economic benefit of doing so.<sup>160</sup> However, the effectiveness and integrity of this approach has encountered some criticism, as one scholar explained that it is “immorally deceptive since [organs] would be given under the pretense that there is no payment of cash to the decision maker when, in effect, there is.”<sup>161</sup> Regardless, this solution is the most attractive because, unlike other proposed solutions, it would address all three hurdles normally associated with organ procurement reform.

*1. Practical Hurdle—Obtaining Donor Consent*

The indirect incentive plan has the potential of being an effective form of motivation to encourage people to consent to

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<sup>153</sup> *Id.* at 26. Dr. Veatch himself endorses this approach, *see id.* at 31-33 (calling for a reassessment of old traditional liberal values in response to the organ shortage crisis). *See also* Peters, *supra* note 34 (endorsing a plan where donors are awarded a \$1,000 gift for the donation of their organs).

<sup>154</sup> Veatch, *supra* note 149, at 26.

<sup>155</sup> *Id.* at 27.

<sup>156</sup> *Id.* at 28-31.

<sup>157</sup> *Id.* at 21-24.

<sup>158</sup> *See id.* at 23-24.

<sup>159</sup> *Id.* at 23.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 22-24.

donate their organs upon death. Not only do preliminary studies in this country indicate approval for such a plan, but financial incentives programs have already been successful internationally.

In the United States, studies on the matter show a general approval for incentives for organ donation in general, and a preference towards indirect financial incentives. In 1992, it was reported that nearly half of Americans support some kind of financial incentive for donation.<sup>162</sup>

In 2003, a pilot study was performed to determine the public's attitude toward families ending the life support of their loved ones in order to harvest his or her organs when various incentive programs are in place.<sup>163</sup> The 2003 study found that the amount of money received from organ donation is a consideration in a family's decision to discontinue life support.<sup>164</sup> Specifically, the study indicated a preference for indirect commodification of organs (such as paying for the expenses related to the donation procedure) over a system where direct cash payments are made.<sup>165</sup>

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<sup>162</sup> See Warren, *supra* note 30 (citing a 1992 study that found that nearly half of Americans support some kind of incentive for organ donation).

<sup>163</sup> See Evans, *supra* note 66, at 1003.

<sup>164</sup> *Id.* Admittedly, this study goes beyond the scope of this note in that it seeks to prove that commodification of organs of some sort would lead to people allowing the person with the organs die when they otherwise would not. *Id.* at 1008. However, if under these conditions financial incentives prove to be sufficient motivation for organ donation, then *a fortiori*, when the patient is already dead.

<sup>165</sup> Evans, *supra* note 66, at 1020. According to the author, one possible explanation for this is that people tend to consider dollars that circulate within the same institutional sphere to have the same moral status. Therefore, using the money from an organ donation would be acceptable to pay for the medical cost of removing the organ but it would be unacceptable to use the money to buy a car. *Id.* at 1022. Other studies did not produce as favorable results. Professors Thomas J. Cossé and Terry M. Weisenberger of Robins School of Business in Richmond, Virginia published their results on this subject in 1999. Thomas J. Cossé & Terry M. Weisenberger, *Encouraging Human Organ Donation: Altruism Versus Financial Incentives*, 6 J. NONPROFIT PUB. SECTOR MKTG. 77 (1999). In four separate surveys conducted over the course of four years in Richmond, Virginia, participants were asked to respond to two questions: 1) Should financial incentives be offered to encourage families to donate? and 2)

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Internationally, financial incentives for living kidney providers have increased the supply of kidneys, and small payments for burial expenses to the families of cadaveric donors have increased the supply of organs in European countries.<sup>166</sup>

More important than the results from studies and surveys is the actual success of this type of model in one state. Pennsylvania's attempt to use indirect financial incentives as a means of encouraging more organ donations has been successful in convincing many of its citizens to consent to donate their organs upon death.

In 1994, Pennsylvania established the Organ Donation Awareness Trust Fund.<sup>167</sup> The program encouraged citizens to register to donate organs and also sought contributions to the trust fund.<sup>168</sup> Initially, part of the money from the trust fund was to be allocated to the compensation of donors for "reasonable hospital and medical expenses, funeral expenses, and incidental expenses incurred by the donor or donor's family in connection with making a vital organ donation," totaling as much as \$3,000 per organ donor.<sup>169</sup> By limiting expenditures to \$3,000 per donor and requiring payment be made directly to the funeral home or hospital as opposed to the donor's family, next of kin, or estate, Pennsylvania legislators hoped that the compensation paid would

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Describe your level of comfort, presenting donor option currently versus that of financial incentives. *Id.* at 87. They concluded from the results that there is only *limited* public support to use financial incentives to encourage organ donation. *Id.* at 91. However, even Professors Cosse and Weisenberger concede that the findings of the study should be limited to the southeastern metro area in which the participants resided. *Id.*

<sup>166</sup> Jackson, *supra* note 44.

<sup>167</sup> 20 PA. CONS. STAT. § 8621 (West Supp. 2005). The fund is now named The Governor Robert P. Casey Memorial Organ and Donation Awareness Trust Fund, named after the former Pennsylvania governor who was a multiple organ transplant recipient. The fund was created by State Representative Bill Robinson after he learned that the mother of a boy, whose heart and liver were donated to Casey, had no life insurance benefits and had to raise money to be able to bury her son. Wiggins, *supra* note 146.

<sup>168</sup> Jackson, *supra* note 44.

<sup>169</sup> *Id.*

not be deemed “valuable consideration” to “acquire, receive or otherwise transfer” the organ, thereby avoiding the prohibitions on the sale of organs in NOTA.<sup>170</sup> Pennsylvania state health officials subsequently lowered the incentive to \$300 per organ donor.<sup>171</sup> The revised plan finally went into effect in January 2002.<sup>172</sup>

Despite speculation that the modified amount offered to donors or their families would do little to ameliorate their hardships and would be deemed as merely incidental,<sup>173</sup> the plan seemed to have an immediate effect. Between January and May of 2002, 19 donors or donor families applied for the \$300 benefit.<sup>174</sup> Contributions collected from motor vehicle registration and driver’s license and identification card renewals combined to add over \$600,000 to the fund from July 1, 2003 to June 30, 2004.<sup>175</sup> Furthermore, 41.83% of Pennsylvanians (or 3,803,915 Pennsylvanians) carrying a driver’s license, permit, or identification card now display the “Organ Donor” designation.<sup>176</sup> This represents a .5% increase over the year before, or an additional 83,344 citizens of the state of Pennsylvania, consenting to donate their organs upon death. Thus, at least in Pennsylvania, indirect financial incentives have proven to be a successful means of increasing organ donations.

## 2. Ethical Hurdle

The greatest objection to a compensation policy regarding

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<sup>170</sup> *Id.*

<sup>171</sup> Boyd, *supra* note 135, at 460.

<sup>172</sup> *Id.* at 459.

<sup>173</sup> See Jackson, *supra* note 44 (“The amounts being considered as financial incentives in Pennsylvania and under the AMA’s proposal seem trivial, and are unlikely to ameliorate the hardship that a family may experience following death.”).

<sup>174</sup> Wiggins, *supra* note 146.

<sup>175</sup> PENNSYLVANIA DEPARTMENT OF HEALTH, ORGAN DONATION ADVISORY COMMITTEE, 2004 ANNUAL REPORT TO THE GENERAL ASSEMBLY 2, available at <http://www.dsf.health.state.pa.us/health/lib/health/OrganDonationAnnualReport4pdf2004.pdf> (last visited Sept. 28, 2005).

<sup>176</sup> *Id.*

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organ donation is that it “opens the door” to ethical issues and problems, such as the dangers and fears of the possible ramifications of any commodification of the human body.<sup>177</sup> However, by reframing old values in the context of the current organ deficit crisis and setting up a system where strong guidelines are followed and indirect and modest incentives are offered, these vehement ethical concerns can be assuaged.

*a. Utilitarianism*

From an ethical standpoint, what is considered right and wrong is often dependent on the philosophical perspective through which something is perceived.<sup>178</sup> In philosophical thought, there exist two well-known perspectives which are relevant to a discussion of whether or not the use of commodification-like methods is ethically appropriate: deontology and consequentialism.<sup>179</sup> A deontological perspective determines rightness or wrongness based on an independent system of values and not purely by consequences.<sup>180</sup> By contrast, utilitarianism, a key brand of consequentialistic thought,<sup>181</sup> judges consequences in terms of their use value.<sup>182</sup> Thus, from a utilitarian perspective the rightness or wrongness of an action is determined not by an objective set of values but by whether, on balance, it produces more pleasure than pain.<sup>183</sup>

From a utilitarian standpoint, certain medical interventions which would normally be considered ethically objectionable can be justified if, in the greater sense, they have the prospect of being

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<sup>177</sup> The President’s Council on Bioethics, *supra* note 66, Part III.3.

<sup>178</sup> See GARWOOD-GOWERS, *supra* note 21, at 1 (“As well as forming an ethical guide to medical professionals, philosophical approaches and principles are at the centre of medical law.”).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*



beneficial as opposed to harmful.<sup>184</sup> Following this approach in organ donation policy, financial incentive methods used to increase the supply of organs would then be considered by utilitarians to be ethically meritorious simply because more persons who would otherwise die would be kept alive.<sup>185</sup> Thus, using commodification-like techniques to procure more organs would be morally just to a consequentialist, merely because the consequences of such techniques would save more lives in the long run.

*b. Re-examining Old Values*

The possibility of commodification-like methods brings other ethical concerns such as the integrity and dignity of the human body and general feelings that commodification methods are inconsistent with human values.<sup>186</sup> These concerns, although admirable, are quite limiting in times of crisis. Therefore, it is necessary to re-examine those values in the context of the current organ shortage crisis.

From a legal theory perspective, changing times often call for a change in law. In many instances, proactive legislation is needed to recognize change and adjust the law accordingly. When those situations arise, legislators have a responsibility to act for their citizens and change the law to meet the changes in society. As Oliver Wendell Holmes Jr. once said:

When we find that in large and important branches of the law the various grounds of policy on which the various rules have been justified are later inventions to account for what are in fact survivals from more primitive times, we have a right to reconsider the popular reasons, and, taking a broader view of the field, to decide anew whether those reasons are satisfactory.<sup>187</sup>

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<sup>184</sup> *Id.* at 2-3.

<sup>185</sup> See Evans, *supra* note 66, at 1022.

<sup>186</sup> See *supra* Part II.B.2.

<sup>187</sup> OLIVER WENDELL HOLMES JR., THE COMMON LAW 26 (Barnes and

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Thus, times of crisis and necessity cry out for a need to reassess historical notions of right and wrong. Ideas and suggestions which may have previously offended our sacred notions of morality and ethics and have been the basis for old laws might then need to be reexamined in light of new potential benefits that are being offered to society. Following this concept, legislators must reassess their past apprehension towards financial incentives in light of the current shortage of transplantable organs.<sup>188</sup>

*c. The AMA Guidelines*

In the medical community a financial incentive program for organ donation has begun to gain more support. The American Medical Association (AMA) has adopted guidelines for a pilot program for financial incentives for organ donors.<sup>189</sup> The new policy, entitled “Ethical Aspects of Future Contracts for Cadaveric Donors,” was recently introduced in July of 2004. The policy asserts that financial incentives may be offered to potential organ donors provided that certain guidelines are followed.<sup>190</sup> Some of

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Noble Books 2004) (1881).

<sup>188</sup> See also Boyd, *supra* note 135, at 471 (concluding that there can and should be an effective market option that is ethically palatable, which the author calls a “practical market”).

<sup>189</sup> American Medical Association, H-370.979, Financial Incentives for Organ Procurement, *available at* [http://www.ama-assn.org/apps/pf\\_new/pf\\_online?f\\_n=browse&doc=policyfiles/HnE/H-370.979.HTM](http://www.ama-assn.org/apps/pf_new/pf_online?f_n=browse&doc=policyfiles/HnE/H-370.979.HTM) (last visited Oct. 19, 2004).

<sup>190</sup> The following is the text from the AMA guidelines:

The AMA has adopted the following guidelines for a pilot program of financial incentives for future contracts regarding organ donations: (1) there is enough evidence in favor of employing some form of financial incentive to justify the implementation of a pilot program. This program, as with any policy involving financial incentives to encourage organ donation, should have adequate regulatory safeguards to ensure that the health of donors and recipients is in no way jeopardized, and that the quality of the organ supply is not degraded. This pilot program should operate for a limited time, in a limited geographical region, and have the following safeguards. (2) Incentives should be limited to

the key aspects of these guidelines include prohibiting the use of organs from a living person and limiting the financial incentives to that of "moderate value."

These guidelines, if used as a framework for a new compensation scheme, would advance efforts to alleviate many of the ethical concerns commonly associated with organ commodification schemes. An absence of the ethical concerns should then create a general public attitude which favors the idea of organs donated for financial compensation.

*d. Indirect and Modest Incentives*

Finally, a program which offers modest and indirect incentives

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future contracts offered to prospective donors. By entering into a future contract, an adult would agree while still competent to donate his or her organs after death. In return, the appropriate state agency would agree to give some financial remuneration to the donor's family or estate after the organs have been retrieved and judged medically suitable for transplantation. Under a system of future contracts, several other conditions would apply: (a) No incentives should be allowed for organs procured from living donors. (b) It would be inappropriate to offer financial incentives for organ donation to anyone other than the person who would actually serve as the source of the organs. Only the potential donor, and not the potential donor's family or other third party, may be given the option of accepting financial incentives for the donation of his or her own organs. In addition, the potential donor must be a competent adult when the decision to donate is made, and the donor must not have committed suicide. (c) Any incentive should be of moderate value and should be the lowest amount that can reasonably be expected to encourage organ donation. By designating a state agency to administer the incentive, full control over the level of incentive can be maintained. (d) Payment of any incentive should occur only after the harvested organs have been judged medically suitable for transplantation. Suitability should continue to be determined in accordance with the procedures of the Organ Procurement and Transplantation Network. (e) Incentives should play no part in the allocation of donated organs among potential transplant recipients. The distribution of organs for transplantation should continue to be governed only by ethically appropriate criteria relating to medical need.

*Id.*

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to donors or their families would seem to sidestep many of the ethical issues that other commodification methods may face. For example, one common ethical concern is that commodification could potentially be a source of inappropriate coercion to those in need of money.<sup>191</sup> However, by following a model similar to the one in Pennsylvania, this concern can be alleviated. Modest incentives which are paid to a funeral home, hospital, or service provider would be enough incentive to encourage without coercion. Some might argue that this type of program is “immorally deceptive”<sup>192</sup> since money is actually being transferred to the donor. However, the indirect nature and modest value of the financial incentives, based on Pennsylvania’s successful model and proposed for New York, would certainly mitigate the moral turpitude of this type of incentive program to some degree.

*3. Legal Hurdle*

Even in enacting NOTA Congress asserted that it was not categorically opposed to all forms of financial compensation for donation.<sup>193</sup> The legislative history indicates a desire to grant fair access to transplants to those who are in danger of losing their lives without the transplanted organ.<sup>194</sup> NOTA’s Congressional legislative history highlights a desire on behalf of Congress to encourage the consideration of “alternative reimbursement policies” such as payment for transplantation procedures.<sup>195</sup> Furthermore, the Senate Report on NOTA stipulates that in enacting NOTA, it was not the intent of the committee that reasonable costs incurred in the process of organ donation be considered part of “valuable consideration.”<sup>196</sup> Indeed, NOTA itself emphasizes that the term “valuable consideration” does not

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<sup>191</sup> See *supra* Part II.

<sup>192</sup> See *supra* note 161 and accompanying text.

<sup>193</sup> See S. REP. NO. 98-382, at 15-16 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3975, 3981.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 3982.

include various payments associated with the transplant procedure 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.”<sup>197</sup> Thus, although Congress intended to prevent the commercialization of the human body, such evidence illustrates that Congress intended to permit some organ procurement procedures which employ financial incentives.<sup>198</sup> The creation of an alternative reimbursement policy which involves compensation which is less than “valuable” would not then endanger what Congress was intending to protect under NOTA—fair access to organs to all those in need.

In fact, Congress and some states have already begun to endorse financial incentive programs as a viable way to solve the organ shortage problem. In April 2004, Title 42 of the United States Code was amended to provide for the “reimbursement of travel and subsistence expenses incurred by individuals toward making living donations of their organs.”<sup>199</sup> In addition, federal legislation is pending which would “provide payments for the purchase of life insurance policies or annuities, payable to a donor’s designee”<sup>200</sup>—thereby providing modest compensation to the families or loved ones of those who volunteer their organs upon their own death.

Among the various states, financial incentive-type legislation has also been enacted.<sup>201</sup> Aside from Pennsylvania’s recently enacted program to promote increased organ donation,<sup>202</sup> the state of Georgia enacted legislation to grant a discount on driver’s license issuance or renewal fees for those who indicate a

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<sup>197</sup> 42 U.S.C. § 274e(c)(2) (2001).

<sup>198</sup> Sten, *supra* note 34, at 216.

<sup>199</sup> 42 U.S.C.A. § 274f(a)(1) (Supp. 2005).

<sup>200</sup> H.R. 2856, 108th Cong. (2003). *See also* Alexander S. Curtis, *Congress Considers Incentives for Organ Procurement*, 13 KENNEDY INST. ETHICS J. 51 (2003) (discussing a series of bills, relating to types of incentives to offer would be donors, introduced during the 107th Congress).

<sup>201</sup> *See* Calandrillo, *supra* note 88, at 44-46 (discussing the fairly recent legislation in Wisconsin and Georgia).

<sup>202</sup> *See supra* Part IV.

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willingness to execute an anatomical gift on their application.<sup>203</sup> More recently, the Wisconsin State Senate passed a bill calling for a state income tax deduction of up to \$10,000 to cover expenses for residents who donate their organs.<sup>204</sup> Although critics of the legislation question whether the legislation would violate NOTA, Wisconsin's Governor expressed support of the bill.<sup>205</sup> The law became effective in January 2004.<sup>206</sup> Other states have passed similar legislation and many have already signed their bills into law.<sup>207</sup>

## V. NEW YORK'S POLICY ON ORGAN DONATION

In 1985, out of concern for the undesirable consequences organ commodification could bring to the state, New York added Section 4307 to the Public Health Laws, in effect banning any form of sale or purchase of human organs.<sup>208</sup> The law declares, "It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer for valuable consideration any human organ for use in human transplantation."<sup>209</sup> However, it is clear that an indirect financial incentive program, similar to the one already in place in Pennsylvania, would violate neither the language nor the

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<sup>203</sup> GA. CODE ANN. §40-5-25[d] (2004).

<sup>204</sup> See Jo Napolitano, *Wisconsin Senate Approves Tax Deduction for Organ Donors*, N.Y. TIMES, Jan. 23, 2004, at A12 (reporting on the passing of the bill in the State Senate after the after it had been "overwhelmingly approved" by the State Assembly in November of 2003).

<sup>205</sup> *Id.* (quoting Governor Doyle as saying, "I'm very supportive of it.").

<sup>206</sup> Erin Madigan, *States Offer Tax Breaks to Spur Organ Donation*, Stateline.org, <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=15749> (Aug. 26, 2004).

<sup>207</sup> See Transplant Living, Financial Aspects: State Tax Deductions and Donor Laws, <http://www.transplantliving.org/livingdonation/financialaspects/statetax.aspx> (last visited Oct. 2, 2005) (listing eight other states which have passed similar legislation).

<sup>208</sup> See *supra* Part II.C.3.

<sup>209</sup> N.Y. PUB. HEALTH LAW § 4307 (McKinney 2002).

legislative intent of this law, and would even be consistent with New York's policy on public health and welfare in general.

*A. The Language of Section 4307*

The 1985 New York legislation mirrors the language in NOTA by prohibiting organ transactions for "valuable consideration."<sup>210</sup> Congress indicated the words "valuable consideration" allows for "alternative reimbursement policies,"<sup>211</sup> and the legislative history of NOTA even stipulates that "reasonable costs" incurred in the process of organ donation should not be considered part of "valuable consideration."<sup>212</sup> NOTA itself states that the term "valuable consideration" does *not* include various payments associated with the transplant procedure 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."<sup>213</sup> No doubt, it was this loose language that allowed Congress to enact §274f to allow for the "reimbursement of travel and subsistence expenses incurred by individuals toward making living donations of their organs."<sup>214</sup> Thus, the conspicuous use of the same language, "valuable consideration" in the New York statute, likely prohibits only compensation which is deemed valuable. Minimum reimbursements for various transplant expenditures and other expenses related to the procedure do not fall under the language of the prohibition and would therefore likely be permissible under Section 4307 as they are under NOTA.

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<sup>210</sup> *Id.*

<sup>211</sup> S. REP. NO. 98-382, at 15-16 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3975, 3981.

<sup>212</sup> *Id.* at 3982.

<sup>213</sup> 42 U.S.C. § 274e(c)(2) (2001).

<sup>214</sup> 42 U.S.C. § 274f(a)(1) (Supp. 2005).

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The legislative history of Section 4307 indicates that some system of moderate indirect financial incentives would not violate the intentions of the New York state legislators who created the law.<sup>215</sup> However, the types and amounts of financial incentives these legislators would allow are unclear. The view expressed by one New York legislator was that the sale of human organs should be prohibited for fear only of “widespread medical prostitution.”<sup>216</sup> Minor incentive programs to induce citizens to consider volunteering their organs are not likely to be considered “medical prostitution”<sup>217</sup> since the minimal value of the consideration would hardly induce people to sell their organs simply for the value they would provide in return. Furthermore, in 1989, the New York State Task Force on Life and Law stated that it was following the federal government’s model in recommending against any type of incentive program in New York State.<sup>218</sup> If that is the case, now that the federal government has acted to initiate a program to provide incentives to donors by offering reimbursement to donors for such things as travel and subsistence expenses incurred while making living donations of their organs,<sup>219</sup> New York should follow its lead and enact a similar program.

*C. New York’s Policy on Public Health*

The New York State Constitution contains a provision which charges the state government with the affirmative responsibility to act in areas of policy regarded to be of special importance, such as public health.<sup>220</sup> This provision states:

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<sup>215</sup> See Memorandum of Assemblyman Gorski, *supra* note 13.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> TRANSPLANTATION IN NEW YORK STATE: THE PROCUREMENT AND DISTRIBUTION OF ORGANS AND TISSUES, THE NEW YORK STATE TASK FORCE ON LIFE AND LAW 53 (2d ed. 1989).

<sup>219</sup> 42 U.S.C. § 274f(a)(1) (Supp. 2005).

<sup>220</sup> See THE NEW YORK STATE CONSTITUTION: A BRIEFING BOOK 232



The protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be made by the state and by such of its subdivisions and in such manner, and by such means as the legislature shall from time to time determine.<sup>221</sup>

Added in 1938 to the State Constitution, this section was meant to place responsibility squarely on the state to protect and promote public health.<sup>222</sup> The actual constitutionalization of such a provision is unique and indicates the State of New York's strong desire to ensure that its citizens' needs in the area of health care will be met.<sup>223</sup>

The organ shortage crisis at hand is an area of policy that must be considered "of special importance." The inevitable and unfortunate death of over 8,000 New York citizens is a public health crisis that should fall under the characterization of this provision of New York's constitution. It is therefore incumbent upon the New York State legislature to heed to this provision and to use the means necessary to address the organ shortage crisis affecting New York citizens. Enacting a program of financial incentives would be a desirable and effective way to fulfill the legislature's responsibility to protect the public health of New Yorkers.<sup>224</sup>

Thus far New York has been slow to adopt its own incentive program for organ donations. Although some insurance incentive does exist for organ donors not covered by Medicaid<sup>225</sup> and

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(Gerald Benjamin ed. 1994).

<sup>221</sup> N.Y. CONST. art. XVII, § 3.

<sup>222</sup> Benjamin, *supra* note 220, at 235.

<sup>223</sup> *Id.* at 232.

<sup>224</sup> The Supreme Court has stated that it is the right and even duty of the state to take steps to protect the safety and health of the public. *See, e.g.,* *Nebbia v. New York*, 291 U.S. 502, 510, 523 (1934) (citing Justice Barbour's statement that "it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends").

<sup>225</sup> *See* MED-MANUAL, MEDICAID-NY §2.2.8.5 (reimbursing non-Medicaid

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legislation was recently passed to reward donors and their families with a medal of honor,<sup>226</sup> these represent only modest steps to encourage organ donation. New York has not created any legislation which resembles the more innovative changes made on the federal level and in the state of Pennsylvania to proactively deal with this frightening organ shortage crisis. Given the severity of the crisis, the models established by Congress and some state governments, and the language and intent of the current ban on organ transaction in the state, it is time for New York to become more proactive in stemming the crisis and develop a financial incentive program of its own.

**VI. A SUGGESTED SOLUTION TO NEW YORK'S ORGAN SHORTAGE CRISIS**

Since the organ shortage is primarily due to low consent rates and not to a shortage of people dying with suitable organs,<sup>227</sup> the efficacy of any program to adequately deal with the shortage would revolve primarily around the simple task of getting more people to consent to donate their organs upon their deaths. Studies indicate that Americans generally have a positive attitude toward organ donation and financial incentives.<sup>228</sup> Thus, a program which would increase both the opportunities and the motivation for individuals to donate their organs would represent the best hope of increasing organ donation in New York. Therefore, this Note proposes that New York adopt a set of guidelines, similar to those of the AMA,<sup>229</sup> combined with a model similar to the one created in Pennsylvania, in initiating a new financial incentive program to

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covered donors donating to a Medicaid eligible recipient).

<sup>226</sup> See N.Y. PUB. HEALTH LAW § 4368 (Supp. 2004) (establishing a medal of honor “to be awarded annually to honor the memory of all individual organ donors or the gifts of donor families”).

<sup>227</sup> Reed, *supra* note 3. See also *supra* Part II.A. (citing statistics from the New York Organ Donor Network that New Yorkers fall below the national consent rate).

<sup>228</sup> *Supra* note 162 and accompanying text.

<sup>229</sup> See *supra* Part IV.A.2.c.

encourage organ donation. This type of program would provide New Yorkers with both an increased opportunity and a financial motivation to consent to donate while still keeping within the limit of what is deemed to be ethically responsible and morally tolerable.

*A. Guidelines of the Program*

The guidelines for the proposed program in New York to increase the number of available organs for transplants should be adopted from the AMA's recent proposal regarding future contracts for cadaveric organ donors.<sup>230</sup> These guidelines are inventive yet conservative, allowing for adequate initiative while still being moderate enough to avoid offending the public's ethical and moral sensibilities.

The AMA's proposed pilot program suggests several regulatory safeguards,<sup>231</sup> the purpose of which are to ensure both that "the health of donors and recipients is in no way jeopardized" and that the "quality of the organ supply is not degraded."<sup>232</sup> The AMA further suggests that incentives be offered by way of a "futures contract," whereby a competent adult prospective donor can agree to donate his or her organs after death in exchange for a state agency's agreement to give some financial remuneration to the donor's family or estate after the organs have been retrieved and judged medically suitable for transplantation.<sup>233</sup> The AMA includes other conditions under the "contract," such as limiting the program to cadaveric donor organ transplantation as opposed to living donor organ transplantation,<sup>234</sup> limiting the option to the prospective donor, not to his or her family or a third party,<sup>235</sup> and restricting the application of this program to organ procurement,

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<sup>230</sup> American Medical Association, *supra* note 189.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* It should be noted that the AMA does not specify any preference of type of remuneration—direct or indirect.

<sup>234</sup> *Id.*

<sup>235</sup> American Medical Association, *supra* note 189.

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not to allocation or distribution.<sup>236</sup> Perhaps most importantly, the proposal stipulates that “[A]ny incentive should be of *moderate value* and should be the *lowest amount that can reasonably be expected to encourage organ donation*.”<sup>237</sup> Following this provision of the AMA guidelines would render the \$10,000 tax deduction, adopted in Wisconsin<sup>238</sup> to be too excessive. However, the \$300 offered to Pennsylvanians who consent to donate their organs would be appropriate. The AMA further suggests that a state agency be designated to administer the incentive and exert full control over it to maintain the level of incentive.<sup>239</sup>

*B. Details of the Program*

With regard to the details of this program, this Note suggests that New York follow the example set by Pennsylvania’s program. Through slight modifications of existing state motor vehicle and tax forms, the State will find itself with both the monetary resources it needs to offer compensation to potential donors and the number of organs it needs to adequately address the existing shortage it faces.

*1. Existing and Pending Relevant Legislation*

Much of the legislation needed for this program is already in place or pending. New York driver license applications<sup>240</sup> already contain a section where the applicant may check off a box to authorize the Department of Motor Vehicles (DMV) to send the applicant’s information to the Department of Health for inclusion in the Organ/Tissue Donor Registry.<sup>241</sup> In addition, in February of

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<sup>236</sup> *Id.*

<sup>237</sup> *Id.* (emphasis added).

<sup>238</sup> See *supra* notes 204-206 and accompanying text.

<sup>239</sup> American Medical Association, *supra* note 189.

<sup>240</sup> New York State Dep’t of Motor Vehicles, Application for Drivers License or Non-Driver ID Card 1, available at <http://www.nydmv.state.ny.us/forms/mv44.pdf> (last visited Oct. 2, 2005).

<sup>241</sup> *Id.*

2004, New York created its own trust fund for organ donation.<sup>242</sup> Another recently enacted law directs the DMV commissioner to develop license application and renewal forms that solicit a voluntary one dollar donation from persons applying for or renewing a driver's license at the time of such application or renewal, with the money collected deposited in the "Life – Pass It On" Trust Fund, an organ donation trust fund.<sup>243</sup> Finally, New York State Resident Tax Forms contain a section for "voluntary gift/contributions" where the filer may contribute to such causes as the Breast Cancer Research Fund, Return a Gift to Wildlife, the Alzheimer's Fund, and others.<sup>244</sup> Although the organ donation trust fund is not currently one of the options, a bill exists to include an additional box where a taxpayer may "check off" to make monetary contributions to the organ donation trust fund.<sup>245</sup>

*a. Modifying Existing Forms*

Under the proposed program, four forms will be modified to contain the option for the applicant to be included in the Organ/Tissue Donor Registry, like the one contained on the driver license application, and to make minimal contributions to the organ donation trust fund. The four forms are: 1) The driver license applications; 2) New York's Vehicle Registration Application Form;<sup>246</sup> 3) New York's on-line vehicle registration renewal

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<sup>242</sup> See *supra* notes 95-96 and accompanying text.

<sup>243</sup> N.Y. VEHICLE AND TRAFFIC LAW § 508-5 (Supp. 2004).

<sup>244</sup> New York State Resident Income Tax Return (Form IT-201) 2, section 56.

<sup>245</sup> See New York State Assembly Bill Summary A06692, available at <http://assembly.state.ny.us/leg/?bn=A06692> (last visited Oct. 2, 2005). The bill, titled "An act to amend the tax law, in relation to providing a tax check off box on personal income tax return forms for the life pass it on trust fund" was last delivered to the Senate on June 6, 2005. *Id.*

<sup>246</sup> See NEW YORK STATE DEP'T OF MOTOR VEHICLES, VEHICLE REGISTRATION/TITLE APPLICATION, available at <http://www.nydmv.state.ny.us/forms/mv82.pdf> (last visited Oct. 2, 2005).

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application,<sup>247</sup> and 4) The New York State Resident Tax Forms. By including these options on all four of these forms, New York will guarantee that the options for organ donation will be presented to a large percentage of its citizens on a regular basis. For example, as of the end of 2004, there were 10,449,816 registered vehicles in New York State.<sup>248</sup> The estimated total population of New York State at the end of 2004 was 19,227,088.<sup>249</sup> This means that from the vehicle renewal applications alone, approximately 54% of the population of the state of New York will be presented with the option to donate organs and make contributions to the fund every time they renew their vehicle registration.<sup>250</sup>

*b. Required Response Format*

Finally, the request to donate, which will appear on the official state forms, must be presented as a “yes” or “no” question.<sup>251</sup> Applicants will be presented with the question, “Do you consent to make an anatomical gift to be effective upon your death?” Thus formatted, applicants will be forced to consider the question and answer it. The question cannot be overlooked or ignored when completing the form.<sup>252</sup> This option would further serve as the “futures contract” suggested by the AMA. Furthermore, adding

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<sup>247</sup> The registrations for certain vehicles can currently be renewed on-line at NEW YORK STATE DMV, INTERNAL OFFICE TRANSACTIONS, <http://www.nydmv.state.ny.us/renew/default.html> (last visited Oct. 2, 2005).

<sup>248</sup> NEW YORK STATE DEP'T OF MOTOR VEHICLES, STATISTICS, VEHICLE REGISTRATIONS IN FORCE 2004, *available at* <http://www.nydmv.state.ny.us/Statistics/regin03.htm> (last visited Oct. 2, 2005).

<sup>249</sup> U.S. CENSUS BUREAU, NEW YORK QUICK FACTS, *available at* <http://quickfacts.census.gov/qfd/states/36000.html> (last visited Oct. 2, 2005).

<sup>250</sup> This rough estimate does not take into account the numbers of people who have registered multiple vehicles.

<sup>251</sup> This strategy was suggested by Dr. Veatch in an earlier article he wrote. *See* Robert M. Veatch, *Routine Inquiry About Organ Donation – an Alternative to Presumed Consent*, 325 NEW ENG. J. MED. 17, 1246-49 (1991), *cited in* Veatch, *supra* note 149, at 32.

<sup>252</sup> These types of questions already appear on many computer based interactive forms where certain fields must be filled in to complete the form.

these sections to these forms would raise funds to finance the incentive program and will solicit donations of organs on a regular basis.

## 2. Incentives Offered

In addition, while some percentage of the proceeds from the fund will go towards increasing education and awareness of organ donation, another percentage of the proceeds from the fund in the proposed program will be directed towards a donor incentive program to pay for the expenses of prospective donors. Just as in Pennsylvania,<sup>253</sup> the financial incentives to New Yorkers in exchange for consent to donate organs upon death would be indirect, such as payments for reasonable hospital bills, travel and funeral expenses, and other incidental expenses incurred by and related to the donation itself. These incentives would be the “financial remuneration” suggested by the AMA. The remuneration would be adequate motivation to encourage donation<sup>254</sup> while avoiding the many moral pitfalls associated with direct financial incentives, such as association with commodification of organs.

The amount of incentive would also be modest, so as not to offend any moral sensitivities people might have toward the exchange of money for human organs. As the AMA suggests, only incentives of “moderate value” should be offered.<sup>255</sup> In addition, the legislative history of Section 4307 of New York’s Public Health Law implies that expenses such as travel or accommodations are not to be included in the definition of “valuable consideration.”<sup>256</sup> To determine what the value should be, New York<sup>257</sup> can follow the Pennsylvania model (\$300), or

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<sup>253</sup> See *supra* notes 169-174 and accompanying text.

<sup>254</sup> See Evans, *supra* note 66, at 1025.

<sup>255</sup> *Supra* Part IV.A.2.c.

<sup>256</sup> *Supra* Part V.B. (citing the fear of the New York Legislature of creating “widespread medical prostitution”).

<sup>257</sup> The state agency that should be in charge of this program is the Department of Health, a department experienced in dealing with medical, health,

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calculate its own figure which it deems to be the “lowest amount that can reasonably be expected to encourage organ donation.”<sup>258</sup> Thus, the legislative framework for this proposal is already in place. Slightly amending existing and pending legislation, and modifying existing state forms, should not be a difficult undertaking. These changes, while small in substance, will be a significant step for New York and its citizens to resolve the current transplantable organ deficiency. The proposed program will be the first steps to finally alleviating a crisis that looms large for many citizens of the state and for their families. The new program’s import should not be underestimated and its necessity should not be overlooked.

## VII. CONCLUSION

Each day that goes by, more people are added to an organ waiting list and more people die waiting on that list. Individuals suffering from organ failure and their families must cope with their sickness, knowing that the technology and resources now exist to save them. The one obstacle is connecting the resources to the demand. An effective solution is already in place in Pennsylvania. It is incumbent upon the legislators of New York to create its own solution that would most effectively work towards solving this grave problem. The means exist; it is now up to the legislators to provide a method that could possibly save thousands of lives in their state and put an end to this horrific crisis.

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and safety matters, which would qualify it as the most adept at deciding crucial issues involved in allocating financial incentives for organ donations.

<sup>258</sup> See American Medical Association Guidelines, *supra* note 189, at (2)(c).