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Organ Shortages in the United States: Proposed Solution and Moral Considerations

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INTRODUCTION

The choice of whether or not to donate one's organs at death is a very personal decision that most can agree must be left to individuals. Indeed, protection of a person's rights over his or her own body has long been a priority in American jurisprudence. However, there are times when the common good of society as a whole must be considered before an individual or their surviving relatives' rights over his or her remains. In fact, when moral considerations are taken into account, there is no just explanation for a refusal to donate one's organs upon death. There is a serious organ shortage in the United States, and that shortage must be remedied. While most moral theorists would agree that every person should donate his or her organs upon death, Americans may not support a drastic measure requiring that all people be considered as donors. Instead, the following system is proposed, in order to serve both individual autonomy and to maximize donation rates from those who do wish to donate.

The United States federal government should adopt and implement legislation establishing a combination of a mandated choice system and a default rule under which all Americans are considered organ donors upon death unless they have explicitly directed otherwise, with limited exceptions, because doing so will decrease the deficit of organs available to Americans at no cost to the decedent or his or her family. The proposed system would consist of two parts. First, on applications for all forms of government issued identification, tax returns and voter registration, individuals would be asked the following question and allowed to check a box for "Yes" or "No": "Do you wish to be an organ donor upon death?" The answers given would be logged in a confidential national registry accessible to hospitals and organ registry networks. An individual's response to this question, whether affirmative or negative, would not be overridden for any reason, other than the individual's subsequent revocation, including

opposition of family members. In the event that the person indicated different intentions on different forms, the most recent designation would act as a revocation of all prior declarations.

Second, in the event that a clear intention on the part of the decedent cannot be discerned because the person did not express their choice in the above system, the default rule would be to treat the individual as a donor. This presumption would be overcome in only limited circumstances. The first is in the event that the decedent was a minor, his or her parents would be consulted for their consent or refusal. The other is a limited exception for objections from the family of the deceased person, on the basis of religious or cultural customs. The procedure outlined above will maximize donation rates, while still protecting the autonomy of the deceased person and concerns of family members.

ORGAN DONATION STATISTICS: THE DREADFUL REALITY

In 2009, there were 105,567 people on organ waiting lists in the United States alone. Unfortunately, there were only 14,630 organ donors, leading to a mere 28,463 transplants that year. Every ten minutes, another person is added to the wait list. On average, 18 people in the United States lose their lives each day while waiting for an organ to become available.¹ That means that over 6,500 Americans die every year waiting for a transplant that never comes. Advances in medical technology over the past few decades have made it possible for people to live longer, higher quality lives. However, science has yet to overcome the associated issue of organ shortages. The number of people on the waitlist is greater than seven times what it was in 1988, while the number of organ donors has only grown to about two and half times what it then

¹ Health Resources and Services Administration, U.S. Department of Health and Human Services. The Need Is Real: Data. [Organdonor.gov](http://www.organdonor.gov/about/data.html), <http://www.organdonor.gov/about/data.html> (last visited April 3, 2012).

was.² The United States has an average of approximately 26 donors per million Americans.³ If every person who died each year agreed to donate their organs, conservative estimates reveal that double the amount of usable organs would be harvested each year.⁴

America is among the countries at the top of the list of best rates of organ donation in the world. However, it is surpassed by Spain, Croatia and Portugal, who have attained rates of approximately 32, 31 and 30 donors per million people, respectively.⁵ Even with this comparatively high rate of organ donation, the need for organs continues to exceed available donors by enormous amounts. In 2010, Spain had a population of approximately 47 million people, while the United States had a population of about 317 million people.⁶ This means that there are roughly seven times as many people in the United States than there are in Spain. In 2010, deceased Americans donated only approximately five times as many organs as deceased Spaniards. With a population that is seven times that of Spain, the United States should have seven times as many donors. Even more disturbingly, the number of Americans on organ wait lists was about twenty-one times the number of people in Spain on organ donation wait lists in 2010.^{7 8 9} It is not clear why there is such a vast disparity in the size of organ waitlists, but part of the reason could be Spain's internationally recognized reformed organ donation system.

² Health Resources and Services Administration, U.S. Department of Health and Human Services. The Gap Continues to Widen, Organdonor.gov, <http://www.organdonor.gov/about/graphdescription.html>, (last visited April 3, 2012).

³ Daily News Staff Writer. Organ donation often comes down to religion and culture; Many Hispanics struggle with concept, New York Daily News, (March 28, 2011), http://articles.nydailynews.com/2011-03-28/entertainment/29375826_1_organ-donation-organ-donors-donor-network.

⁴ David Orentlicher, Presumed Consent to Organ Donation: Its Rise and Fall in the United States, 61:2 Rutgers L. Rev., 295-331, 298 (2009).

⁵ Irish Kidney Association, Deceased Donors 2010, Council of Europe Countries, Transplant Statistics 2010, http://ika.ie/pdf/web_stats_2010.pdf, (last visited April 21, 2012).

⁶ Id.

⁷ According to the Council of Europe Countries 2010 Transplant Statistics, 1,502 deceased people in Spain donated their organs and 7,943 Americans donated their organs. There were 5,475 Spaniards and 113,744 Americans on waitlists for organs in 2010. The number of Americans on the waitlist was obtained from the data published by the Organ Procurement and Transplantation Network (OPTN).

⁸ Id. at footnote 5 supra.

The demand for organs would still far exceed the available supply, even if all eligible persons were to consent to donate their organs upon death. Since only 26 people per every million in the United States agree to donate their organs, the current organ shortages are inevitable. The number of actual donors is additionally limited by the system in place in America, because it does not always protect the decedent's wishes and allows their stated preference to be overruled in many circumstances. Thus, action must be taken to reform the United States organ donation process to better reflect the altruistic intentions of the American public.

THE EXISTING SYSTEM

The United States has established an opt-in method which is administered by each state.¹⁰ All states, as well as the District of Columbia, allow for designation as an organ donor on one's driver's license. All of the aforementioned territories and Puerto Rico now have donor registries.¹¹ There are two important acts which regulate organ donation in the United States. First is the National Organ Transplant Act (NOTA) and the second is the Uniform Anatomical Gift Act (UAGA).

⁹ Department of Health and Human Services, Health Resources and Services Administration, Healthcare Systems Bureau, Division of Transplantation, Organ Procurement and Transplantation Network (OPTN) and Scientific Registry of Transplant Recipients (SRTR), OPTN / SRTR 2010 Annual Data Report, (2011).

¹⁰ Id. at footnote 4 *supra*. at 299.

¹¹ U.S. Department of Health and Human Services. Health Resources and Services Administration, State Organ Donation Legislation, (accurate as of January 2011). For more on the differences between the laws of each state along with access to the full text of each state's laws on organ donation, see http://www.organdonor.gov/legislation_micro/. This database allows for comparison of the different forms of the Uniform Anatomical Gift Act adopted by each state, along with the District of Columbia and Puerto Rico. It also details revenue sources, legal consent, donation education and living support provided by each of these territories.

A. The National Organ Transplant Act

NOTA¹² was the first federal law which regulated organ transplants and was enacted in 1984 in response to the concern that a market was developing for the buying and selling of human organs.¹³ NOTA banned the purchase or sale of organs, by making it a crime to provide or receive any human organ in exchange for valuable consideration.¹⁴ The Act also sought to promote donation by establishing the Organ Procurement and Transplantation Network (OPTN) which created and maintains a national donor registry for the purpose of matching organs between donors and recipients.¹⁵ The act mandated that the OPTN be managed by a non-profit organization and not a public institution.¹⁶ Although there were many other areas of concern that needed to be addressed, including the lack of uniformity among state laws, NOTA did not attempt to regulate those issues and they were left to state law.

B. The Uniform Anatomical Gift Act

In 1968 the UAGA was created in order to standardize the widely varying organ donation laws among the states and to help increase the number of organs available for donation by allowing individuals to register as organ donors.¹⁷ All states enacted the UAGA (1968). Congress decided to give more legal weight to the preferences of the decedent in posthumous donation and the UAGA was revised in 1987 for that purpose.¹⁸ The UAGA was again revised in 2006, and has is the law in a majority of states.

¹² 42 U.S.C. § 273.

¹³ Gwen Mayes, JD, MMSc, Buying and Selling Organs for Transplantation in the US: National Organ Transplant Act of 1984 (NOTA) Bans Buying and Selling, Medscape Education, http://www.medscape.org/viewarticle/465200_2, (Dec. 9, 2003).

¹⁴ Id.

¹⁵ OPTN: Organ Procurement and Transplantation Network, Policy Management, National Organ Transplant Act, <http://optn.transplant.hrsa.gov/policiesAndBylaws/nota.asp> (last visited April 21, 2012).

¹⁶ Id.

¹⁷ Association of Organ Procurement Organizations, Legislative, <http://www.aopo.org/legislative-a33>, (last visited April 21, 2012).

¹⁸ Id.

In the 1960s, states began enacting statutes that permitted medical examiners and coroners who had custody over a cadaver to remove certain organs, including corneas and pituitary glands, without obtaining consent from anyone as long as they were unaware of any objections.¹⁹ These statutes were successfully implemented in many states, leading to unprecedented increases in the supply of the organs that coroners and medical examiners were permitted to harvest.²⁰ However, presumed consent statutes allowed for the removal of other organs, that authority was usually not exercised. In fact, many medical examiners and coroners chose not to harvest any organs or tissue under the presumed consent statutes.²¹ Some surviving family members initiated litigation in response to finding out that organs or tissues had been taken from their deceased kin, but courts initially upheld presumed consent.²² One Georgia court went as far as to hold that the presumed consent statutes fulfill the state's primary goal of protecting the health of its citizens, and implied that the common good of the public had to be considered over individual autonomy.²³ Many other courts decided similarly, and when the UAGA was amended in 1987, it endorsed presumed consent.²⁴

The 1987 version of the UAGA provided for presumed consent, but limited it in a very important way. Instead of allowing medical examiners and coroners to treat individuals as donors as long as they did not know of any objections, the 1987 UAGA required that they first make a reasonable effort to contact next of kin to obtain consent.²⁵ The 1987 UAGA was only adopted by twenty-six states, which in combination with developments in technology and

¹⁹ *Id.* at footnote 4 *supra*. at 302.

²⁰ *Id.* at 303

²¹ *Id.*

²² *Id.* at 304

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

changes in state laws, resulted in inconsistencies among the laws of the states.²⁶ Additionally, several subsequent decisions in controversial cases held that family members had limited property rights in cadavers that were violated by the harvesting of tissues and organs without their consent. These courts, however, did not establish exactly what process was due families before presumed consent could be implemented.²⁷ Due to the change in legal treatment of presumed consent statutes, the subsequent revisions of the UAGA removed the provision that was present in the 1987 version which allowed medical examiners and coroners to harvest organs and tissue without obtaining explicit consent.²⁸

The UAGA was most recently revised in 2006 for the purpose of achieving uniformity among the laws of states, as well as to encourage donation. All states have adopted one or more of the three versions of the UAGA. Currently, forty-four states and Puerto Rico have adopted the 2006 version, three states have retained the 1987 Act, and three states along with D.C. have chosen to continue with the 1968 UAGA.^{29 30} Thus, the 2006 version of the UAGA is current law in the vast majority of states.

The 2006 UAGA revision made many changes to prior law in order to facilitate the donation of more organs. Minors are permitted to make anatomical gifts, provided they would be allowed to apply for a driver's license at that age.³¹ Furthering this theme of autonomy, Section 8 of the 2006 UAGA gives greater legal effect to the choice of the decedent as to

²⁶ Uniform Law Commission, National Conference of Commissioners on Uniform State Laws, Anatomical Gift Act (2006) Summary, [http://www.nccusl.org/ActSummary.aspx?title=Anatomical%20Gift%20Act%20\(2006\)](http://www.nccusl.org/ActSummary.aspx?title=Anatomical%20Gift%20Act%20(2006)), (last visited April 25, 2012).

²⁷ *Id.* at footnote 4 *supra*. at 306-7. One of these cases involved a medical examiner who deliberately failed to communicate with families so that no objections could be made. Most disturbingly, he made a profit by selling the corneas he harvested. See Brotherton v. Cleveland, 173 F.3d 552, 556 (6th Cir. 1999).

²⁸ *Id.* at 307.

²⁹ *Supra.* at footnote 11 *supra*.

³⁰ Uniform Law Commission, National Conference of Commissioners on Uniform State Laws, Enactment Status Map, Acts Anatomical Gift Act (2006), <http://www.nccusl.org/Act.aspx?title=Anatomical%20Gift%20Act%20%282006%29> (last visited April 25, 2012).

³¹ Rev. Unif. Anatomical Gift Act § 4(1)(B) (2006)

effort to increase donation rates. Unfortunately, there are limitless potential reasons why an individual may fail to adequately express their intention to donate. The disparity between the number of people who actually register to become organ donors and those who desire to is most often explained by a general unwillingness of individuals to contemplate the end of their lives.³⁹ The prevalent aversion to considering one's own death cannot be remedied by mere adjustments in the law. The impact of this sentiment, however, can be eliminated by requiring individuals to expressly indicate their intentions.

Even where decedents do communicate their wishes clearly, the existing system allows surviving family members to override the choice of the decedent. In some states donor registration still is not considered binding and the surviving family of the decedent is permitted to decide whether or not the donation should occur, regardless of what the decedent wished.⁴⁰ In a system which values the intent of the decedent so highly in matters of inheritance, it counter-intuitively discounts the importance of the decedent's decisions regarding organ donation. Families are often allowed to override the decision of the decedent, and refuse to allow organs to be harvested. Contrary to the 2006 revision of the UAGA, donor cards and other forms of affirmative consent on the part of the would-be donor are given little legal weight in the face of objections by family members in practice. "In Indiana in 2000, family members overrode a decedent's choice to donate in 74 out of 184 cases involving eligible donors who had indicated their wishes on their drivers' licenses."⁴¹ Despite the fact that the 2006 UAGA and most of the states that have adopted it hold that a decedent's expressed intentions must be honored upon death, many doctors are reluctant to proceed with donation in the face of familial opposition.⁴²

³⁹ *Id.*

⁴⁰ *Id.* at footnote 4 *supra.* at 312.

⁴¹ *Id.*

⁴² *Id.* at 313.

Familial objections prevent many viable organs from being utilized, even now. In response to this issue, the National Association of Attorneys General passed a resolution in 2010 expressing its support for an interpretation which limits families' abilities to interfere with an individual's expressed intention to donate.⁴³ However, enforcement of the provision which gives donors' expressed intentions priority over the wishes of family members remains minimal, virtually eliminating its effectiveness in improving donation rates.

Further evaluation of the current system reveals that allowing families to decide whether or not a decedent will become an organ donor also hinders donation rates. Currently, different classes of representatives can make an anatomical gift on the behalf of a deceased person. Many times, the representatives make the decision to dispose of viable organs, rather than allow them to be harvested and transplanted. In fact, on average, families who are asked to consent to the donation of the organs of a deceased relative refuse about half of the time.⁴⁴ Thus, by allowing surviving family members to make the decision, the number of organs donated is cut to half of what it would be.

POTENTIAL SOLUTIONS TO GROWING DEMAND FOR ORGANS

Scholars have discussed numerous ways in which the organ shortages faced by the United States should be remedied. This section discusses some of those proposals and examines their potential successes and shortfalls. Each approach has advantages and disadvantages when all concerns are taken into account. Several of these options would be viable if not for the serious moral and ethical issues that they raise. Other options, including the existing system,

⁴³ National Association of Attorneys General, Resolution In Support Of Respecting And Upholding The Decisions Made By Persons Who Elect To Be Organ, Eye, And Tissue Donors, (June 2010). Available at http://www.naag.org/assets/files/pdf/signons/resolution.201006.Resolution_NAAG_Public_Health_Safety_Committee.pdf.

⁴⁴ Howard M. Nathan, et al., Organ Donation in the United States, 3 Am. J. Transplantation 29–40, 31 (2003).

would not substantially improve the situation because they would not result in enough organs being donated to decrease organ shortages. A combination of both a mandatory choice and a presumed consent system creates a balance that can achieve large increases in donor rates without impairing individual autonomy to an unacceptable extent.

A. Routine Recovery

Perhaps the most effective system, at least from a solely practical standpoint, would be that of routine recovery. Under this system, all viable organs would be harvested regardless of consent, in a routine process at the time of death.⁴⁵ Very few scholars have advocated a switch to this system, most likely because it would be negatively received from the American public who highly value autonomy and rights over their own bodies. However, the researchers who have endorsed this strategy argue that the requirement for consent is the major cause of organ shortages in the United States.⁴⁶ In support of this radical approach, scholars have contended that honoring a decedent's wishes cannot be made a priority over the preventable loss of human life.⁴⁷ Additionally, supporters claim that this system would be commonly accepted, citing other examples of government powers which overrule an individual's choice to promote the common good, including required vaccinations and mandatory autopsies under suspicious circumstances.⁴⁸ This system would avoid many of the problems associated with other programs. Indeed, it would eliminate concerns that poverty stricken people would be exploited under schemes that allow monetary incentives.⁴⁹ Routine recovery would also remove the need for administrative costs of maintaining a registry for organ donors, because all people would be

⁴⁵ Aaron Spital & James Stacey Taylor, Routine Recovery of Cadaveric Organs for Transplantation: Consistent, Fair, and Life-Saving, 2 Clin. J. Am. Soc. Nephrol. 300–303 (2007).

⁴⁶ Id. at 300.

⁴⁷ Id. at 301.

⁴⁸ Id.

⁴⁹ Id.

considered donors.⁵⁰ Supporters also argue that routine recovery would be more equitable than other systems because it would not allow a person to benefit from the generosity of other donors during life, only to fail to become a donor upon death.⁵¹

In response to criticisms that a routine recovery system infringes upon the right of an individual to determine the fate of his or her body after death, scholars have argued that the right to autonomy extinguishes upon death.⁵² Alternatively, they contend that even if the right remains, it cannot be enforced at the expense of lives of other people who are waiting for organ transplants.⁵³ On a similar note, proponents of routine recovery state that fear of offending surviving family members should not be allowed to prevail over the potential to save lives.⁵⁴ This line of reasoning appears sound at first blush, but a closer examination reveals serious flaws.

Although the routine recovery approach would maximize donation rates, it ignores a person's posthumous intent for the disposition of their organs. Not only does it prohibit refusal, but by extinguishing a decedent's right to control over what happens to their body after his or her death, routine recovery directly contradicts the portion of the 2006 UAGA that allows for anatomical gifts to specific persons chosen by the donor. A willing donor should at least be afforded the opportunity to specify a loved one who they would wish to benefit from the selflessness of their actions, as opposed to a complete stranger. Further, the justification relying on the importance of the common good and the unnecessary loss of life discounts important questions of familial rights. According to some religions and cultures, it is unacceptable to

⁵⁰ Id.

⁵¹ Id.

⁵² Id. at 302.

⁵³ Id.

⁵⁴ Id.

perform proper burial rights upon a person whose body is not intact.⁵⁵ Thus, routine recovery would result in significant emotional distress to survivors who have an established custom of refusing to allow the harvesting of organs. Supporters of routine recovery neglect this extremely personal matter, too readily dismissing the emotions of grieving family members. This issue, combined with the staunch commitment of the American people to individual autonomy, makes it clear that even if this system somehow received enough support to be implemented, there would be widespread opposition to routine recovery. Therefore, the routine recovery proposal is ill suited for the United States, and would likely fail to be enacted or enforced.

B. Monetary Incentives

NOTA provides that “[i]t shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce.”⁵⁶ In direct contravention of NOTA, and similar statewide prohibitions on the receipt of compensation in return for organ donation, many have advocated in defense of monetary incentives to increase the number of people willing to posthumously donate their organs. In fact, various states have proposed or enacted legislation that provides payment, in cash or in kind, to surviving family members of organ donors.

The state of Pennsylvania passed a law in 1999 that would allow payment of \$300.00 toward funeral expenses families of organ donors.⁵⁷ The program was never initiated due to NOTA, the federal law which makes such payment illegal.⁵⁸ For a time, Georgia also took

⁵⁵ See detailed discussion of religious preferences at 32-4 *supra*.

⁵⁶ 42 U.S.C. § 274e

⁵⁷ P.A. Clark, Financial Incentives For Cadaveric Organ Donation: An Ethical Analysis, 4 Internet Journal of Law, Healthcare and Ethics 1 (2006).

⁵⁸ *Id.*

initiative by offering a \$7.00 discount on the fees paid to obtain a driver's license.⁵⁹ When this incentive was discontinued in 2005, Georgia had one of the highest donation rates in the country.⁶⁰ It is worth noting, however, that organ procurement organizations were disinclined to rely upon the validity of the Georgia registry while the discount program was in place due to moral and ethical concerns.⁶¹ Other proposals have included direct payment to families or the decedent's estate, tax credits, payments toward education expenses of the children of the deceased and donation to a charity of the decedent's choice on their behalf.⁶²

Some suggested financial incentives garner more public support than others. In a 2007 study of analyzing responses of Pennsylvania residents to monetary incentive schemes, researchers found that 59% of people are in favor of initiatives which provide benefits to families who decide to donate their loved one's organs.⁶³ Participants expressed much higher levels of support when these payments were to be applied to funeral expenses, donated to charities, paid for travel and lodging or covered medical expenses.⁶⁴ Although most people stated that monetary incentives would have no impact upon their choice to donate organs on behalf of themselves or their family members, the majority of those who acknowledged that it would influence their decision replied that it would increase the probability that they would choose to donate.⁶⁵ Despite the seemingly overwhelming support for financial incentive programs, the law as it stands prohibits them on the basis of moral and ethical considerations.

⁵⁹ David H. Howard, Producing Organ Donors, American Economic Association, 21 Journal of Economic Perspectives, 25-36, 30 (2007).

⁶⁰ Id.

⁶¹ Id.

⁶² Id. at footnote 57 supra.

⁶³ C.L. Bryce et al. Do Incentives Matter? Providing Benefits to Families of Organ Donors, 5 Am. J. Transplantation 2999-3008, 3001, (2005).

⁶⁴ 81% of study participants approved of allocations for funeral expenses, 73% for charitable donations, 78% for travel and lodging and 84% for medical expenses. Id.

⁶⁵ Id. at 3001-2.

Opponents of financial incentive systems have explained that to allow any type of payment compromises fundamental principles of organ donation. One issue is that to provide monetary benefits for organ donors increases the chances of donors acting as a result of coercion instead of altruism, as has traditionally been the standard.⁶⁶ These scholars argue that the primary purposes of NOTA were to prevent the treatment of human organs as commodities and to provide equal access to organs across socioeconomic lines.⁶⁷ Many scholars fear that financial benefits to organ donors will prey upon the desperation of the poverty stricken, allowing more affluent Americans to exploit them.⁶⁸ Critics of programs involving payment have also argued that such a system could result in conflicts of interest that cannot exist in harmony with informed consent.⁶⁹ Some opponents claim that incentives would result in the commercialization of organs, compromising human dignity and devaluing human life.⁷⁰ While these are compelling concerns that warrant significant consideration, supporters of a system of payments for organ donors have been quick to dismiss them.

Proponents of monetary benefits for donors emphasize a commitment to saving lives as well as to individual autonomy in making decisions about organ donation. In defense of this system, many supporters compare it to other legal forms of selling portions of one's body, such as blood and reproductive cells.⁷¹ Additionally, these scholars argue that, for the same reasons as women are allowed to receive payment for the surrogate hosting of other people's children and the government is permitted to pay to induce people to join the voluntary army, benefits to organ

⁶⁶ Francis L. Delmonico, M.D., et al. Ethical Incentives – Not Payment – For Organ Donation, 346 New Eng. J. Med. 2002-2005, 2002, (2002).

⁶⁷ Id.

⁶⁸ Gary S. Becker & Julio Jorge Elías, Introducing Incentives in the Market for Live and Cadaveric Organ Donations, at page 26. Available at http://home.uchicago.edu/gbecker/MarketforLiveandCadavericOrganDonations_Becker_Elias.pdf.

⁶⁹ Id. at footnote 57 *supra*.

⁷⁰ Id.

⁷¹ Id.

donors are acceptable.⁷² Proponents contend that the claim that this program would result in the immoral commoditization of organs is refuted by the government's own actions of paying voluntary soldiers to risk their bodies and their lives if sent to war.⁷³ This comparison is used not only to in the context of commercialization of human life, but also in response to concerns about exploitation of the underprivileged. Researchers argue that expectations that a voluntary army would become an army of the poor, motivated by financial needs, did not come about because many low income people could not qualify due to inadequate education, corresponding deficient test scores and other factors.⁷⁴ It follows that many individuals living in poverty would not be able to donate organs as a result of unsatisfactory living conditions that cause many of the poor to suffer from diseases would prevent them from donating organs, as they would pose too high a risk to the organ recipient.⁷⁵ Instead, proponents contend that most organs would come from the middle class.⁷⁶ Some scholars also argue that the individual autonomy of poor people is best served by allowing them to decide whether or not they should donate their organs in exchange for monetary benefit.⁷⁷ Other researchers have stated that exploitation can be minimized through government regulation which would mandate that donors be fully informed of all risks so that no impulsive decisions are made and that proper after care would take place.⁷⁸ Finally, proponents claim that financial incentives would eliminate the black market for organs, thereby improving quality of organs donated and ending the already existing exploitation of the poor.⁷⁹

Financial incentives create many ethical and moral issues, especially if they are to be paid during the donor's life. If limited to payment of certain funeral expenses, or other post-mortem

⁷² *Id.* at footnote 68 *supra*. at 25.

⁷³ *Id.*

⁷⁴ *Id.* at 26.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at footnote 57 *supra*.

⁷⁹ *Id.* at 28.

benefits, it appears that the general public would support the system. However, it remains unclear whether this would result in a significant increase in the number of people who choose to posthumously donate their organs or those of a loved one. As is noted above, a majority of people surveyed stated that financial incentives would not impact their decision to donate their organs or the organs of a family member one way or another. Notably, many researchers have instead encouraged the removal of any financial disincentives, the loss of money that is often incurred by live donors, as a more effective way to increase donation rates, without creating the ethical problems discussed above.⁸⁰ For the foregoing reasons, use of financial incentives to increase cadaveric organ donation would likely not be the most successful route.

C. Priority for Registered Donors

Many people who have agreed to donate their organs upon death are troubled by the prospect that an individual who has not agreed to donate their own organs upon death might receive a donation ahead of a selfless individual who has also agreed to donate their organs upon death. Several measures have been privately initiated in response to this concern, but no government action has yet been taken to remedy this situation in the United States. The following three programs attempt to prevent an organ recipient from later refusing to become an organ donor, but all three are infeasible for the same reasons.

The NJ Sharing Network has recently offered the self-coined “Golden Rule proposal” which it hopes a state legislator will sponsor.⁸¹ The golden rule proposal would allow health insurance companies to refuse to cover the costs of organ transplantation for any person who

⁸⁰ Financial Incentives for Organ Donation: Removing the Disincentive to Donate, Medscape, http://www.medscape.org/viewarticle/465739_3, (last visited April 25, 2012).

⁸¹ Star Ledger Editorial Board, Stronger Measures Needed to Encourage People to Donate Organs, Star Ledger (March 25, 2012) Available at http://blog.nj.com/njv_editorial_page/2012/03/strong_measures_needed_to_enco.html.

fails to consent to donation of their organs upon death.⁸² This proposition rests upon the principle that those who are unwilling to give the gift of life, should not be permitted to receive a life saving transplant. It is unlikely that most individuals in need of a transplant would be able to afford the “hundreds of thousands of dollars”⁸³ in medical expenses normally incurred for transplant surgery. Thus, this proposal would force most would-be organ recipients to consent to donation of their own organs or face the insurmountable burden of paying for the entire operation.

Similarly, mutual insurance pools are gaining popularity. According to LifeSharers, one nationwide non-profit organization which promises its members priority to other members’ donated organs over nonmembers, about half of the people who receive donated organs have not committed to donating their own organs upon death.⁸⁴ This means that when a member of LifeSharers dies, any match within that network is considered ahead of a person who has not signed up. However, there is an exception allowing donation to a member of the decedent’s family ahead of other people registered with LifeSharers.⁸⁵ The network is free to join and accepts anyone, regardless of their health or potential ability to provide viable organs.⁸⁶ Members become eligible to receive from a donor in the network 180 days after their registration.⁸⁷ Since its launch in May of 2002, LifeSharers has attracted over 15,000 members.⁸⁸ However, no member has yet died under circumstances that made the donation of organs an option.⁸⁹

⁸² Id.

⁸³ Id.

⁸⁴ Welcome to LifeSharers, LifeSharers, <http://www.lifesharers.org> (last visited April 27, 2012).

⁸⁵ Id.

⁸⁶ FAQ, LifeSharers, <http://www.lifesharers.org/faq.aspx>, (last visited April 27, 2012).

⁸⁷ Id.

⁸⁸ Id.

⁸⁹ Id.

In at least one country, the idea that in order to receive an organ one must be willing to donate their own has been made into law. Israel has adopted a system that went into effect April 1, 2012 giving priority on waitlist to those who agree to donate their organs upon death.⁹⁰ The Israeli program is the first to allow consideration of a non-medical factor when determining which patient on the waitlist will receive a donated organ.⁹¹ A distinguishing feature of Israel's approach is that it will not allow someone with less medical need to surpass an individual whose need is more severe.⁹² Instead, it simply awards preference to individuals who have agreed to donate organs upon their deaths in the event that two individuals are otherwise equally qualified to receive the organ.⁹³ Interestingly, having a spouse or close relative who has registered as donors or who has donated organs in the past can also result in priority treatment for Israelis, where such donors did not limit their gift to a specific recipient.⁹⁴ Thus, the recent change in Israel attempts to address some of the concerns about giving waitlist priority, while still serving the principle of fairness.

While it seems acceptable theoretically that only people who are willing to donate their own organs upon death should benefit from the receipt of a needed organ during life, this approach has serious weaknesses. One issue is that a system like this presupposes that those who have not expressed an intention to donate their organs would not later decide to donate their organs. An extreme example would be that, under any of the above programs, a 60 year old alcoholic who has agreed to donate his organs upon death to receive an organ over a 14 year old child who has no legal authority to express an intention to donate one way or another. Most

⁹⁰ Danielle Ofri, M.D., In Israel, a New Approach to Organ Donation, NY Times (February 16, 2012), available at <http://well.blogs.nytimes.com/2012/02/16/in-israel-a-new-approach-to-organ-donation/>.

⁹¹ Id.

⁹² Id.

⁹³ Id.

⁹⁴ Adam Brimelow, Israeli organ donors to get transplant priority, BBC News (December 17, 2009), available at <http://news.bbc.co.uk/2/hi/8416443.stm>.

people would probably agree that a child should receive priority over an adult, especially an adult with self-destructive tendencies. However, the above methods would allow adults priority access to donated organs, in some instances even ahead of those who need them more, or others who actually have agreed to donate their organs upon death.⁹⁵ Opponents of these plans also argue that they are coercive measures which improperly limit individual autonomy by “twisting arms” so that people will register as organ donors out of fear.⁹⁶ Scholars have contended that such strong-armed tactics result in fewer donations for altruistic reasons and a general suspicion of the organ donation process. Furthermore, critics argue that this system legalizes, even enforces religious discrimination, as some religions forbid the making of anatomical gifts.⁹⁷ As a result, people with religious objections to organ donation will be unfairly treated. The recently proposed golden rule plan, in addition to giving insurance companies far more power than they ought to have to refuse to cover transplant surgeries, opponents argue that the most similar fair option would be to permit people to sell their organs, thereby honoring their autonomy while still permitting them to make the final decision over whether or not to donate without any penalties.⁹⁸ Furthermore, there is nothing to stop people from taking advantage of the system and agreeing to donate when they are in need of an organ, then revoking that consent after they have received it. For the reasons discussed herein, the different versions of waitlist preference all fail on crucial moral and practical bases, and they should therefore not be implemented in the United States.

⁹⁵ For example, LifeSharers members agree to donate their organs to other LifeSharers members ahead of anyone on the nationwide waiting list. Since the 2006 UAGA allows anatomical gifts to a specific person, LifeSharers members are permitted to make gifts to one another ahead of anyone who is registered on the national waitlist, including those who have greater medical need and those who are registered organ donors, and are simply not members of LifeSharers.

⁹⁶ *Id.* at footnote 81 *supra*.

⁹⁷ *Id.* at footnote 90 *supra*.

⁹⁸ Since this proposal is so new, scholarly articles addressing criticisms have not yet been published. However, many members of the public have expressed their concerns in the comments sections on the above cited articles which reported on the proposal, and their statements primarily reflect a concern for individual autonomy and a desire to lift the ban on organ sales to increase donation rates in a less coercive way.

D. Mandated Choice

One of the central issues in the debates over ways to improve organ donation revolves around the consent of the decedent in the use of their organs after death. Since most people do not formally express an intention as to whether or not they want to posthumously donate their organs during life, there is considerable argument over how much power the government should have to make assumptions regarding consent. The failure of individuals to declare their choice is cited as one of the main reasons for the organ shortages in the United States.⁹⁹ A mandated choice system preserves individual self-determination by giving a decedent's choice on organ donation legal effect and by requiring that the choice be made.¹⁰⁰ A donor's declaration would be a sufficient indication of intent and would relieve doctors of the task of obtaining consent from surviving next of kin for organ donation.¹⁰¹ For example, in 2006 Illinois adopted a mandated choice system that remains in place.¹⁰² Donate Life Illinois, a non-profit organization responsible for maintaining the state's donor registry, reports that 60% of adults are registered donors in Illinois, a statistic that is much higher than the national rate.^{103 104}

Proponents argue that a mandated choice program would best honor individual autonomy by making a decedent's choice legally binding and disallowing any overriding of that choice.¹⁰⁵ As is explained above, family members are often allowed to override the choice of a decedent who has expressed their intent to donate. Supporters also contend that requiring individuals to

⁹⁹ Hayley Cotter, Increasing Consent for Organ Donation: Mandated Choice, Individual Autonomy, and Informed Consent, 21 Health Matrix 599-626, 600 (2011).

¹⁰⁰ Id.

¹⁰¹ Id. at 605.

¹⁰² Richard H. Thaler, Opting in vs. Opting Out. Economic View – Making it Easier to Register as an Organ Donor, New York Times (September 26, 2009), available at http://www.nytimes.com/2009/09/27/business/economy/27view.html?_r=1.

¹⁰³ Id.

¹⁰⁴ Donate Life Illinois, Information on Organ, Tissue and Eye Donation, <http://www.donatelifellinois.org/>, (last visited April 21, 2012).

¹⁰⁵ Id. at footnote 99 supra.

make a choice, coupled with ensuring that agencies charged with obtaining consent are equipped with information to provide individuals which would educate them on the impact of their decision, would satisfy the need for informed consent that is fundamental in any moral evaluation of organ donation.¹⁰⁶ While critics argue that this will create a new class of specific non-donors, thereby limiting available organs for donation, this criticism is not in line with the fact that most Americans indicate that they would like to be organ donors.¹⁰⁷ Additionally, it will encourage donors to record their decision because they will know that it cannot be overturned by their families after death.¹⁰⁸ Opponents also argue that an individual's decision may change by the time of their death.¹⁰⁹ However, the proposed system eliminates this need for concern by making the decision revocable, and only accepting the most recent decision that one has made.

E. Opt-Out

Many countries, especially in Europe, have established an opt-out system, which is commonly referred to as presumed consent. In an opt-out system, it is assumed that an individual has consented to organ donation unless that person has explicitly indicated his or her refusal to donate organs upon death.¹¹⁰ Many countries have implemented opt-out programs, including Spain and Austria.¹¹¹ These methods vary from what are considered “soft”, like the system in Spain, to those that are considered “hard” like the program in Austria.¹¹² A soft opt-out is characterized by involvement and consultation of relatives of the decedent in the donation

¹⁰⁶ *Id.* at 606.

¹⁰⁷ *Id.* at 609.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Amber Rithalia, et al., *Impact of presumed consent for organ donation on donation rates: a systematic review*, BMJ, available at http://www.bmj.com/highwire/filestream/341460/field_highwire_article_pdf/0.pdf.

¹¹¹ *Id.* at 1.

¹¹² *Id.*

process.¹¹³ A hard system is one that does not make the views of family members a priority, proceeding with organ harvesting unless presented with a known objection of the decedent.¹¹⁴ The portion of the proposed solution contained herein that applies a switch to an opt-out program would be considered hard. While Spain's soft system has helped it to attain the highest donation rates in the world, it has been found that its success in this area has been influenced by many other factors.¹¹⁵

Some studies have indicated that the mere implementation of a switch to a presumed consent regimen result in an increase in organ donations, projecting in some instances that the change would result in a 25-30% greater donation rate.^{116 117} However, other studies indicate that a change to a presumed consent scheme does not create a notable increase in available organs.¹¹⁸ Although the level of effectiveness of opt-out programs is disputed, the combination with a mandated choice rule would likely optimize the potential success. In addition to concerns about effectiveness, one of the main criticisms of the presumed consent system is that it would infringe upon the rights of the deceased and their surviving relatives.¹¹⁹ However, the proposed system takes these into account by allowing exceptions for religious or cultural beliefs and in the event that the decedent is a minor.

The proposed system calls for mandated choice and only applies presumed consent in the event that a choice has not clearly been designated. Since a majority of people would prefer to donate organs, the default rule in the event that an individual has not made a clear declaration

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Rafael Matensanz & Beatriz Dominguez-Gil, Strategies to Optimize Deceased Organ Donation, 21 *Transplantation Reviews* 177-188, 179 (2007).

¹¹⁶ *Id.* at footnote 110 *supra* at 7.

¹¹⁷ *Id.* at footnote 4 *supra*. at 328.

¹¹⁸ *Id.* at 327-8.

¹¹⁹ Adam J. Kolber, A Matter of Priority: Transplanting Organs to Registered Donors, 55 *Rutgers L. Rev.* 671-739, 689, (2003).

should be based upon the widely held opinion, rather than the view of the minority.¹²⁰ The next section evaluates the moral implications of the suggested program.

MORAL ANALYSIS

Many theories of justice exist, and each approach has different concepts of what actions are morally right and wrong. Most theorists would agree that the common good of the community must be considered ahead of individual desires. Thus, most plans to increase organ donation, an action that allows one person to save as many as twenty-five lives, are supported across all schools of thought. This section conducts moral analyses of the proposed combined mandated choice and opt-out systems from different theoretical perspectives.

A. Utilitarian Perspective

Utilitarian theorists engage in a sort of cost-benefit analysis that seeks to maximize happiness and minimize pain.¹²¹ They look to the greatest net good, meaning the greatest good to the greatest number of people, offset by any harm the action might cause.¹²² Notably, utilitarians believe that rights of individuals can be overridden, so long as it would better serve the greater good.¹²³ Such an evaluation requires a measurement of the happiness produced by increasing cadaveric organ donation against the discomfort to the public of introducing the proposed legislation. Notably, the suggested system simply requires members of society to make a choice regarding whether or not they would consent to give others the gift of life at the time of their own death. Since the individual cannot be posthumously harmed by the harvesting of their organs, the analysis must instead be based upon the feeling of discomfort created by requiring a

¹²⁰ *Id.* at footnote 4 *supra*. at 315.

¹²¹ Karen Lebacqz, *Perspectives from Philosophical and Theological Ethics: Six Theories of Justice*, 16 (1986).

¹²² *Id.* at 25.

¹²³ *Id.* at 21.

person to contemplate his or her own death. Thus, the calculus becomes the good created by saving many lives balanced against the harm inherent in causing mental uneasiness. It is evident that the goal of saving lives far outweighs the harm of requiring a contemplation that all individuals must eventually face anyway. Therefore, the mandated choice portion of the regime that is recommended herein is clearly supported by utilitarian principles.

In the event that an individual has failed to make a decision under the mandated choice system, a default rule of presumed consent is also supported by utilitarian theory. Here, the happiness caused by the saving of lives must be weighed against the potential that an individual's autonomy will be limited and the chance that surviving family will experience mental anguish. However, it is important to note in this analysis that an individual will only be deprived of the choice in this matter by failing to respond under the primary portion of the law. Thus, individual autonomy is only limited here to the extent that a person refused to exercise their right to make a decision in the first place. As an additional safeguard of an individual's right to self-determination, opt-out systems allow for the presentation of evidence that the person explicitly expressed refusal to donate their organs. In fact, since the good of saving human life is such an important one, utilitarian theorists would most likely support any system that did not result in a corresponding loss of life. Therefore, it is clear that utilitarian theorists would support the use of a presumed consent default rule in the absence of an individual expression of intent one way or another.

B. John Rawls: Justice as Fairness

John Rawls argues that justice can best be achieved by focusing on fairness.¹²⁴ In evaluating whether a considered action is just or not, Rawls argues that the choice must be made

¹²⁴ *Id.* at 33.

from an original position, where decision makers are making the rules for a new society.¹²⁵ In the original position, individuals make the rules of their society from behind a veil of ignorance which prevents them from having any bias that could be present were they to know anything about their position in society.¹²⁶ People in this position would be best situated to address scarcity in a fair, and accordingly, just, way.¹²⁷ Therefore, to evaluate whether the methods suggested herein are just, it must be decided how those in the original position would rectify scarcity of organs.

The first thing those in the original position would do is to establish equal rights and individual liberties for all people.¹²⁸ It is likely that autonomy with regard to choices about one's own body would be one of these rights. When determining distributive issues, Rawls' difference principle states that if those in the original position are unaware whether they will be disadvantaged in society, they will act to protect those that are.¹²⁹ Applied to the present consideration, if those in the original position do not know whether or not they will be in need of a scarce resource such as an organ, they will act to ensure that those who are in need of organs actually receive them. Consequently, the drafters of the social contract would probably seek to include measures that, without unfairly limiting individual liberties, could maximize the potential organs available for donation.

The method that best fits the above described criteria is the mandated choice option which allows people to make the choice for themselves. Indeed, those in the original position might decide that the rights of individuals would be improperly limited by a program that ignores the need for consent, such as routine recovery. Mandated choice would certainly satisfy the

¹²⁵ *Id.* at 34.

¹²⁶ *Id.*

¹²⁷ *Id.* at 35.

¹²⁸ *Id.*

¹²⁹ *Id.* at 37.

negotiators in the original position. It is, however, less clear whether those individuals would support a default rule of presumed consent in the absence of a declaration made during life. Despite their concerns about individual freedoms, those in the original position might approve of an opt-out system that is triggered by a person's failure to make a decision one way or another. The argument in favor of this option would be that if someone failed to make the decision, presumed consent is not overriding their preference, but instead simply applying a default rule that reflects majority opinion. Since the goal is to reduce the scarcity of organs in order to save lives, the people drafting the social contract would likely support even the secondary portion of the proposed legislation involving presumed consent.

C. John Finnis: Natural Law Theory

In his description of natural law, John Finnis presents an exhaustive list¹³⁰ of seven equally important basic forms of good to be pursued that are held as self-evident.¹³¹ These seven goods are life¹³², knowledge¹³³, play¹³⁴, aesthetic experience¹³⁵, sociability (friendship)¹³⁶, practical reasonableness¹³⁷ and religion¹³⁸. These values guide one's practical reasoning¹³⁹ and "are all of the basic purposes of human action."¹⁴⁰ Finnis contends that when individuals make choices regarding which of these values will be priorities in their life plan, they are engaging in

¹³⁰ John Finnis, Natural Law & Natural Rights, Second Ed., 90, (2011).

¹³¹ Id. at 85.

¹³² Id. at 86.

¹³³ Id. at 87.

¹³⁴ Id.

¹³⁵ Id.

¹³⁶ Id. at 88.

¹³⁷ Id.

¹³⁸ Id. at 89.

¹³⁹ Id. at 63.

¹⁴⁰ Id. at 92.

the good of practical reasonableness.¹⁴¹ It is through this process that the natural law method of determining the morality of an action is accomplished.¹⁴²

In order to properly employ practical reasonableness, Finnis explains the following nine requirements: one must (1) have a rational life plan;¹⁴³ (2) not arbitrarily prefer one basic good over another;¹⁴⁴ (3) not make arbitrary preferences among persons;¹⁴⁵ (4) be detached;¹⁴⁶ (5) make commitments;¹⁴⁷ (6) consider consequences;¹⁴⁸ (7) not choose directly against a basic value;¹⁴⁹ (8) promote the common good;¹⁵⁰ and (9) follow one's conscience.¹⁵¹ Finnis contends that the result of satisfying these nine requirements is morality.¹⁵² Thus, each of these steps are considered in turn below, with reference to the seven common goods and the theories of community and justice which are expounded by Finnis, demonstrating that natural law dictates acceptance of the proposed methods, and may even require more radical measures.

The precondition that one must have a rational life plan corresponds closely with the fourth and fifth requirements of detachment and commitment, compelling an individual to decide upon a particular overall objective in his or her life¹⁵³, and to refuse to abandon that devotion lightly.¹⁵⁴ However, the necessity for detachment entails not allowing one purpose or project to become the sole objective of one's life, so that if one were to fail to accomplish this objective

¹⁴¹ *Id.* at 100.

¹⁴² *Id.* at 103.

¹⁴³ *Id.* at 103.

¹⁴⁴ *Id.* at 105.

¹⁴⁵ *Id.* at 106.

¹⁴⁶ *Id.* at 109.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 111.

¹⁴⁹ *Id.* at 123.

¹⁵⁰ *Id.* at 125.

¹⁵¹ *Id.*

¹⁵² *Id.* at 126.

¹⁵³ *Id.* at 104.

¹⁵⁴ *Id.* at 110.

their life would be “drained of meaning.”¹⁵⁵ These areas are not as much a part of the decision making aspect of practical reasonableness, as they are preconditions for fruitfully engaging in the process. Accordingly, for purposes of this analysis, satisfaction of these criteria is assumed.

Turning first to the statement that none of the seven values should be arbitrarily preferred to another, natural law theory stresses the importance of recognizing the magnitude of each one. Finnis expresses that any reasonable favoring of one value over others must not discount the inherent goodness of all seven, but instead be based upon an analysis of one’s own abilities.¹⁵⁶ This means that in order to meet the standards of practical reasonableness, one must not succumb to a “thin theory of the good” which only regards certain basic values as imperative.¹⁵⁷ Instead, in one’s own life and in one’s interaction with others, an individual must always bear in mind every basic value is equal to the others. Thus, one may not say that one value is more or less important. Considering the issue presented herein, it is clear that at this stage a reasonable person should find that, where all of the basic values are promoted by the suggested action and none of these goods are devalued¹⁵⁸, the proposed legislation is indeed consistent with natural law morality. The good of life is served by saving the lives of many organ recipients. Friendship is also advanced because one person, in an ultimate act of friendship, is giving the gift of life to another. Practical reasonableness is achieved by participating in this analytical framework. The basic value of religion is furthered on two accounts: (1) many religions support and even encourage organ donation;¹⁵⁹ and (2) the organ recipient has the opportunity to go on to incorporate this good into his or her own life. The goods of knowledge, play, aesthetic

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 105.

¹⁵⁷ *Id.* at 106.

¹⁵⁸ Except, perhaps, religion. This issue is discussed in detail below at pages 32-34

¹⁵⁹ Religious perspectives are considered below at page 32-34.

experience are all honored because the organ recipient whose life is saved can go on to pursue these goods, where otherwise all parties would have died.

Next is the premise that no arbitrary preferences may be made amongst persons. This aspect is of particular significance in determining the morality of the proposed legislation. Here, Finnis defines a reasonable scope of self-preference to include those actions that would be required in one's individual participation in the seven basic goods toward the end of one's own well-being.¹⁶⁰ He goes on to cite to the golden rule that people should do unto others what they would want others to do unto them.¹⁶¹ Additionally, Finnis states that one may not prevent others from obtaining that which one is attempting to get for oneself.¹⁶² Those organ recipients who do not wish to donate upon death, are in direct violation of this principle. Similarly, Finnis explains the idea of commutative justice as including a duty to many different people. One of these duties arises if one has abused "some system that is advantageous to oneself and others, knowing that one's abuse might bring about the limitation...of the scheme..."¹⁶³ Then, that person has acted unjustly to all those who might have in the future received benefits from that system.¹⁶⁴ So a person who takes advantage of the system by accepting an organ but refusing to donate upon their own death acts unjustly and unreasonably. Summarily, there is a certain point to which self-preference in the furtherance of one's own well being is acceptable, but it must not cause indifference toward other people's fulfillment of the basic values.

With respect to the morality of posthumous organ donation, conforming to this standard of practical reasonableness seems to require that all people consent to gift their organs upon death. Although some people express concern that they will not be treated as diligently if they

¹⁶⁰ *Id.* at footnote 130 *supra*. at 107.

¹⁶¹ *Id.* at 108.

¹⁶² *Id.*

¹⁶³ *Id.* at 184.

¹⁶⁴ *Id.*

agree to be an organ donor, these fears have been proven unwarranted.¹⁶⁵ Since at the time of one's death, self-preservation and one's own physical well-being are no longer concerns, there is nothing within the reasonable scope of self-preference that would support one's refusal to donate organs. "[S]elfishness, cruelty, and the like, do not stand to something as self-evidently good as the urge to self-preservation stands to the self-evident good of human life."¹⁶⁶ Any choice not to donate organs at death based upon a feeling of selfishness, such as mere concern for one's autonomy in making the decision, would not be reasonable. Hence, it appears that natural law theory would permit even a system of routine recovery, without regard to consent, because every person who is reasonable should decide that the basic values of life, friendship and practical reasonableness demand this action. In fact, failing to donate one's organs would be directly adverse to the basic value of human life, because it would deny others access to life saving opportunity for no reason.

Subsequently, one must look to the consequences of one's actions and seek to "bring about good in the world...by actions that are efficient for their (reasonable) purposes."¹⁶⁷ It is important to note that, according to Finnis, this is merely a factor in making the judgment of whether an action is morally permitted, instead of the ultimate question as consequentialism would provide.¹⁶⁸ Consequentialism or utilitarianism cannot properly address the basic values because the assertion of the greatest net good and related concepts cannot be applied to the seven goods, and could not unless humans all sought a single, dominant end.¹⁶⁹ That being established, efficiency and consequences must be considered in the process of practical reasonableness.

¹⁶⁵ *Id.* at footnote 99 *supra*.

¹⁶⁶ *Id.* at footnote 130 *supra*. at 91.

¹⁶⁷ *Id.* at 111.

¹⁶⁸ *Id.* at 112.

¹⁶⁹ *Id.* at 113.

This sixth requirement in the evaluation goes directly to the heart of the issue presented herein. In describing an example of what it means to satisfy this requirement, Finnis states the following: “Where a choice must be made it is reasonable to prefer basic human goods (such as life) to merely instrumental goods (such as property).” From this statement it can be inferred that natural law dictates that an individual place priority upon the value of human life over the mere value of property rights that they may have in their organs. Many of the objections to any type of presumed consent or routine recovery systems of organ donation place emphasis upon the property rights of an individual, or their surviving kin, over the body of the decedent. These arguments clearly fail under natural law because the inherent value in preserving human life is superior to any concern of property rights. As has been explained, all seven goods are furthered in some way by the posthumous gifting of organs. In fact, the only basic value that could potentially be interfered with by the even the most extreme routine recovery system would be the good of religion.

The issue of religious concerns with regard to organ donation warrants discussion here. While not all spiritual beliefs can be accounted for herein, a study of several widely recognized religious factions reveals that there are significant differences among treatment of cadaveric organ donation.¹⁷⁰ The following religions have found that organ donation is acceptable, if not encouraged under their faith. Generally, Christian religions support organ donation and consider it a charitable act worthy of praise.¹⁷¹ Hinduism does not require that the human body be intact, and its mythology includes tales of the “use of body parts to benefit others.”¹⁷² In fact, the

¹⁷⁰ Michael Oliver, et al., Organ Donation, Transplantation and Religion, 26 Nephrol Dial Transplant 437-444, (2011).

¹⁷¹ Id. at 438-9.

¹⁷² Id. at 440.

World Council of Hindus has expressed its full support of organ donation.¹⁷³ Sikhism does not stress any importance that bodies are intact at death, and in fact, remains in this faith are cremated.¹⁷⁴ When polled, the Sikh community showed support for organ donation.¹⁷⁵ Buddhists find that the integrity of a cadaver is not of paramount importance at death.¹⁷⁶ However, the issue of brain death presents problems for Buddhists, and scholars have reached varying conclusions.¹⁷⁷ Modern Taoist scholars also find that their faith supports organ donation.¹⁷⁸

There are also religions which, while in some instances appear to prohibit organ donation, seem to support it in at least limited circumstances. Judaism has rules prohibiting the desecration of a dead body, the delaying of a burial and the receipt of benefit from a dead body.¹⁷⁹ However, many Jewish scholars contend that the principle saving lives supersedes those rules, and that most other rules of the religion can be ignored in the effort to save a life.¹⁸⁰ According to Islam, one must not violate a human body, whether alive or not.¹⁸¹ Despite that fact, Islamic scholars have issued religious rulings finding that the act of saving a life is such an important one that organ donation is allowed by the religion because of the principle that “necessity overrides prohibition.”¹⁸² However, many members of this faith remain hesitant to donate, perhaps also because their beliefs require that burial occur within twenty-four hours of death, and organ retrieval may interfere with this timeframe.¹⁸³ Jehovah’s Witnesses, who had

¹⁷³ Id.

¹⁷⁴ Id.

¹⁷⁵ Id.

¹⁷⁶ Id. at 441.

¹⁷⁷ Id.

¹⁷⁸ Id.

¹⁷⁹ Id. at 439.

¹⁸⁰ Id. at 440.

¹⁸¹ Id. at 438.

¹⁸² Id.

¹⁸³ Id.

previously been completely opposed to organ donation, now allow each individual to make the choice whether or not organs should be transplanted, with the caveat that no blood may be removed.¹⁸⁴ Confucianism expresses the ideal that each person should die with a whole body and finds that to remove organs from that body would be disrespectful to one's parents.¹⁸⁵ While that belief is still widely held, some scholars contend that the good of sustaining others justifies organ donation.¹⁸⁶

Lastly, there is only one religion that appears to steadfastly prohibit organ donation. Members of the Shinto faith have strong feelings about cadavers and believe that any removal of organs can have consequences for the soul of their lost loved one and the surviving kin.¹⁸⁷ Therefore, they wholeheartedly disapprove of organ donation.¹⁸⁸ Through the process of practical reasonableness, religion must be taken into account but cannot be considered as more important than the other six basic values combined. In the unlikely scenario that one's religion forbids organ donation, that person must still make a reasonable choice taking all things into account. Therefore, if one wishes to be reasonable, they cannot refuse donation on religious grounds alone.

The seventh requirement of practical reasonableness is that there must be respect for every basic value in every act.¹⁸⁹ This means that one must not act in a way that satisfies some desire that is not a basic value and is adverse to any one of the those human goods.¹⁹⁰ However, where one must choose among conflicting values, as is the circumstance with posthumous organ donation, one may act contrary to a basic good indirectly, in order to promote that good or other

¹⁸⁴ *Id.* at 439.

¹⁸⁵ *Id.* at 441.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at footnote 130 *supra.* at 118.

¹⁹⁰ *Id.*

basic goods.¹⁹¹ Practical reasonableness necessitates that one must be “creatively open to all the basic goods and...adjust his projects so as to minimize their damaging ‘side effects’ and to avoid substantial and irreparable harms to persons.”¹⁹²

In applying these standards to the issue presented here, it becomes evident that objections made based upon religious grounds may defeat some of the above conclusions about what natural law supports. Since, in some circumstances, a routine recovery system would damage the basic value of religion, this course may only be taken if it promotes all of the goods in some way. As is noted above, even the human good of religion is advanced by organ donation, as the person whose life has been saved can go on to make that value a part of their life. Accordingly, natural law theory would still support a routine recovery system. However, it is worth noting that the proposed law does not cause damage to the value of religion because it allows for exception from the presumed consent portion of the system on the grounds of religious or cultural custom. Thus the seventh requirement is satisfied.

Next is the requirement of furthering the common good in one’s communities.¹⁹³ Finnis defines this common good as “a set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realize reasonably for themselves the value(s), for the sake of which they have reason to collaborate with each other...in a community.”¹⁹⁴ In this analysis, the community (United States) has a reasonable objective (improving organ donation rates) which requires collaboration toward the common good. Justice requires that the

¹⁹¹ *Id.* at 120.

¹⁹² *Id.* at 123.

¹⁹³ *Id.* at 125.

¹⁹⁴ *Id.* at 155.

good of an individual may not be regarded over the well-being of another, and that the common good of the community must be advanced to promote human flourishing.¹⁹⁵

The common good sought here is to increase organ donation rates, thereby helping to save lives that would be lost due to current shortages. None of the systems discussed herein require the favoring of one individual's well-being over another because the donor would already be deceased. Increasing donation rates would help to improve the overall quality of life for the community because people would have better access to life saving transplants. As a result, fewer people would be sick or dying unnecessarily. Therefore, the common good of the community is best served by the option which would result in the availability of as many organs for transplantation as possible.

The final requirement of practical reasonableness is that one follow his or her conscience.¹⁹⁶ According to Finnis, this means that one must not take action which he or she feels to be wrong.¹⁹⁷ While it is recognized that one's conscience may be misleading if one is not guided by the basic values of human good, Finnis argues that if one does engage in the process of practical reasonableness, his or her conscience will demand the same practical result.¹⁹⁸ Since it is clear that the process of practical reasonableness results in a finding that the method which creates a situation in which the most potential organs are available for transplant is reasonable, a person who properly applies the process will find their conscience in line with this result.

Based upon the above detailed process of practical reasonableness, it is evident that reasonableness, by natural law standards, requires that all people agree to donate their organs at

¹⁹⁵ *Id.* at 165.

¹⁹⁶ *Id.* at 125.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

death. This is the ideal situation, but is one that is unfortunately very difficult to implement. It appears that natural law would support most of the more extreme methods that would be less acceptable to the general public. While natural law theorists might argue that the proposed program does not do enough to increase organ donation rates, they would most likely agree that any increase is better than none. Thus, Finnis would likely support the suggested program.

CONCLUSION

There must be a change to the current system in order to increase rates of organ donation and save lives. There are many options available that would increase rates of cadaveric organ donation, ranging from not requiring consent of any kind, to limiting the kind of consent that matters. Although most moral theorists would agree with more radical theories that would result in higher donation rates than the program suggested herein, the likelihood of the American public accepting such radical changes is very low. In order to maximize donation rates within the bounds of acceptability to the general public, the proposed legislation is the best available alternative. Use of the mandated choice system serves autonomy interests by requiring individuals to make a choice as to whether they will donate their organs. In the event that they refuse to make such a choice the default rule of presumed consent reflects the majority opinion that most people would consent to organ donation upon death. This is fairest and most likely to be approved plan of action. Therefore, because it is the most likely to have success and it is supported on a moral basis, the system proposed herein should be pursued.