America's Organ Donation Crisis: How Current Legislation Must be Shaped by Successes Abroad

Lisa M. Derco
AMERICA’S ORGAN DONATION CRISIS: HOW CURRENT LEGISLATION MUST BE SHAPED BY SUCCESSES ABROAD

Lisa M. Derco*

I. INTRODUCTION

On February 16, 1990, Susan Renea Sutton, a twenty-eight year old from Oklahoma, took her own life after an argument with her boyfriend. Shortly after arriving at an Oklahoma City hospital, Sutton was declared brain dead. Suddenly, her parents were left with the difficult decision of whether to donate her organs, possibly to save the lives of others. After much consideration, they decided to allow Susan’s heart, liver, corneas, and some of her bones and skin to be removed for transplantation. Following the surgeries, the hospital and medical teams that participated in the transplants received thousands of dollars from the recipients’ insurance companies, Medicare, or Medicaid. The nonprofit agency involved in coordinating the

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1. Peter S. Young, Moving to Compensate Families in Human-Organ Market, N.Y. TIMES, July 8, 1994, at B7.

2. Id.

3. Id.

4. Id.

5. Id. A study by The Journal of the American Medical Association assessed the costs associated with transplantations and found that in 1991 hospitals charged an average of $15,683 for a kidney, $16,050 for a heart and $20,776 for a liver. Id. One of the doctors who conducted the study, Dr. Roger W. Evans, stated that hospitals that perform transplantations usually increase the cost of performing the procedure “by as much as 200 percent to cover such things as losses from inadequate Government reimbursement and patients’ inability to pay.” Young, supra note 1. He went on to state
transplants, the Oklahoma Organ Sharing Network, received at least $22,000 for its efforts.\textsuperscript{6} Sadly, Susan’s family did not receive any compensation for their daughter’s anatomical gifts, and therefore, was unable to afford a proper funeral for their daughter.\textsuperscript{7} Consequently, her family had no choice but to bury Susan in an unmarked grave.\textsuperscript{8}

Each day, a staggering number of candidates assume positions on the Organ Procurement and Transplantation Network’s (OPTN) national patient waiting list, a list that totaled approximately 109,967 people as of December 2, 2010.\textsuperscript{9} From January through August 2010, 19,249 transplants took place, while there were only 9,729 donors for the same time period.\textsuperscript{10} This translates into over 6,000 people losing their lives while waiting for an organ that a donor who donates more than one organ “can generate considerable revenue as each recipient is separately billed for each donor organ.”\textsuperscript{11}

\begin{itemize}
  \item \textsuperscript{6} \textit{Id.}
  \item The fee included $460 for each of four ambulance trips (pick up and delivery of the heart and the liver); $9,000 to $10,000 for the hospital where Ms. Sutton died (covering operating room, intensive care and medications to maintain the body); $300 to $400 for blood testing to protect organ recipients against illnesses like AIDS and hepatitis; $800 for kidney type matching, and $8,000 for the transplant agency’s overhead, or salaries, office space and telephone. \textit{Id.} Dr. Roger W. Evans, the Director of Health Services evaluation at the Mayo Clinic in Rochester, Minnesota and the author of many studies on transplantation costs compares the fees the doctors and nonprofit organizations to “a car at a chop shop. Somebody’s making a handsome fee off of processing the parts.” \textit{Id.}
  \item \textsuperscript{7} \textit{Id.}
  \item \textsuperscript{8} Young, \textit{supra} note 1. The debate about providing the family of donors some form of compensation is gaining momentum. \textit{Id.} However, in order to provide compensation to the families, the Federal law which bans the purchase of organs, but allows payments for the services surrounding organ transplantations, must be circumvented or abolished altogether. \textit{Id.} As Fred H. Cate, an associate professor at Indiana University School of Law states, “[w]e buy and sell body parts all the time; we just don’t call it that. What advocates are saying is, ‘Let’s call a spade a spade. And let’s not exclude the donor or the donor’s family from a market that everyone else is participating in.’” \textit{Id.}
  \item \textsuperscript{9} OPEN PROCUREMENT AND TRANSPLANTATION NETWORK, http://optn.transplant.hrsa.gov/ (last visited Dec. 2, 2010).
  \item \textsuperscript{10} \textit{Id.}
this year,\textsuperscript{11} or almost one person each hour.\textsuperscript{12} However, simply increasing the number of donors could save many of these lives.\textsuperscript{13} It is estimated that between 10,500 and 16,800 potential donors die each year,\textsuperscript{14} and if three organs were harvested from each of these potential donors, over 30,000 additional organs would become available, significantly boosting the number of organs already contributed by live donors.\textsuperscript{15}

The startling length of the waiting list alone demonstrates the dire need for legislation to address the perpetual organ shortage in the United States. In 1984, Congress passed the National Organ Transplant Act (NOTA) as an attempt to address the lack of organ donors and to prohibit the sale of organs in the United States.\textsuperscript{16} However, the number of donors has failed to increase; in fact, since the enactment of NOTA, the waiting list for organ transplants has more than quadrupled due to a lack of donors.\textsuperscript{17} The continual rise in the number of waiting list candidates evidences the failures

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\item \textsuperscript{11} Wait-Listed to Death Improving Incentives for Organ Donation, WALL ST. J., Dec. 17, 2008, at A20 [hereinafter Wait-Listed to Death]. However, the number who die waiting do not include those people who were once on the waiting list, but their health had deteriorated to the point where transplantation was no longer an option and they were removed from the waiting list. Arthur J. Matas, A Gift of Life Deserves Compensation: How to Increase Living Kidney Donation with Realistic Incentives, 604 POL’Y ANALYSIS, CATO INSTITUTE 4 (November 7, 2007), http://www.cato.org/pubs/pas/pa-604.pdf.
\item \textsuperscript{13} “It is because man is part saint and part sinner that we have the tragedy of many thousands of people needlessly suffering and dying each year while the precious organs that could restore them to health are fed to worms.” Lloyd R. Cohen, Increasing the Supply of Transplant Organs: The Virtues of a Futures Market, 58 GEO. WASH. L. REV. 1, 51 (1989).
\item \textsuperscript{14} INSTITUTE OF MED. COMM. ON INCREASING RATES OF ORGAN DONATION, ORGAN DONATION: OPPORTUNITIES FOR ACTION 22 (James F. Childress & Catharyn T. Liverman eds.) (2006).
\item \textsuperscript{15} “Although the number of potential cadaveric donors each year is difficult to estimate, studies often find that the number could provide enough transplant organs to meet or exceed the demand.” Ann McIntosh, Regulating the “Gift of Life” – The 1987 Uniform Anatomical Gift Act, 65 WASH. L. REV. 171, 185 (1990).
\item \textsuperscript{17} Wait-Listed to Death, supra note 11.
\end{itemize}
of NOTA and a need for new ways to tackle the nation’s shortage in organ donors. On one side of the issue, says Alexander M. Capron, the Director of the Ethics, Trade, Human Rights and Health Law at the World Health Organization (WHO), are transplant surgeons who believe that offering payments to donors is the best way to remedy the shortage of organs; on the other side of the issue are those who “fear[] that the line between selling organs and actually selling people is a rather fine one.” Notably, many states offer compensation to families who donate the bodies of their loved ones to scientific research, but this compensation is unavailable if donating organs. As the statistics above indicate, current regulations, including NOTA, have failed either to increase the number of organ donors or to decrease the waiting list for organs in the United States. Accordingly, new regulations are needed to solve the shortage of organs and to save the lives of thousands on the waiting list.

This Note will discuss existing legislation regulating organ donation in the United States and explore the goals behind many of the relevant statutes. It will then address foreign legislation regarding organ transplantation, in particular the donor vendor systems in Spain and Iran. Both of these

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19. “WHO is the directing and coordinating authority for health within the United Nations system. It is responsible for providing leadership on global health matters, shaping the health research agenda, setting norms and standards, articulating evidence-based policy options, providing technical support to countries and monitoring and assessing health trends.” Id.

20. Larry Rohter, The Organ Trade: A Global Black Market; Tracking the Sale of a Kidney On a Path of Poverty and Hope, N.Y. TIMES, May 23, 2004, at A1. The National Kidney Foundation is currently exploring the idea of providing financial incentives to donors, but has “recommended no action until such incentives ‘are widely accepted as being different from the purchasing of organs.’” Young, supra note 1.


In many states, for example, medical schools offer free cremation services to families that donate the bodies for medical research. Thus we have the bizarre situation where a medical school can compensate a donor for their whole body, if they use the body for teaching, but if they use an organ from that same body to save a life that would be illegal.

Id.
systems have proven to be successful, but have some drawbacks as well.\textsuperscript{22} Next, this Note will discuss the Organ Trafficking Prohibition Act of 2009 (OTPA), proposed in the 111\textsuperscript{th} Congress by former Senator Arlen Specter.\textsuperscript{23} OTPA is a solid starting point for new legislation regulating organ procurement, but legislation in this area must present a more comprehensive scheme than OTPA offers if it is to make a significant impact. This Note suggests three elements that any legislation aimed at increasing the number of organ donors should contain: (1) allowing the donee, or a non-profit agency if the donee is impoverished, to pay for any out-of-pocket expenses the donor may face as a result of the donation; (2) expanding organ procurement organizations (OPOs) currently in place and implementing a more family-centered approach to OPOs; and (3) permitting specific incentives, other than direct compensation, in order to entice more people to donate. Finally, this Note will discuss alternative ways to increase the number of donors, and as a last resort, ways to decrease the waiting list.

II. LEGISLATION

A. Prior Legislative Attempts to Address Organ Donation

The Uniform Anatomical Gift Act (UAGA), enacted in 1968, provides states with a proposed set of regulations regarding organ donation and transplantation.\textsuperscript{24} These regulations range from dictating who can make anatomical gifts of decedents' bodies to outlining the rights and duties of procurement organizations and other entities that may be involved in the organ transplantation process.\textsuperscript{25} The goal of UAGA is to provide consistency among state laws regarding organ transplants, to eliminate

\textsuperscript{22} Foreign organ donation laws and how they can impact legislation in the U.S. has been discussed previously. See generally Sarah Elizabeth Statz, Finding the Winning Combination: How Blending Organ Procurement Systems Used Internationally Can Reduce the Organ Shortage, 39 VAND. J. TRANSNAT'L L. 1677 (2006); J. Andrew Hughes, You Get What You Pay For?: Rethinking U.S. Organ Procurement Policy in Light of Foreign Models, 42 VAND. J. TRANSNAT'L L. 351 (2006). However, this Note specifically focuses on the Organ Trafficking Prohibition Act of 2009 and how it can be improved upon by looking at the successes and failures of foreign legislation.


\textsuperscript{24} UNIFORM ANATOMICAL GIFT ACT, supra note 12.

\textsuperscript{25} Id.
variations among state statutes that impede the procurement of organs, and to combat the organ shortage by providing states with mechanisms to increase the number of donors.\textsuperscript{26} It also requires that a person make a "positive affirmation of an intent to make a gift," and prohibits "the sale and purchase of organs."\textsuperscript{27} By enacting these initial standards, UAGA laid the groundwork for the current regulations surrounding organ transplantation and methods to increase donors.

Another important piece of legislation regulating organ donations is NOTA. Although the statistics suggest NOTA has been relatively unsuccessful, one positive outcome of NOTA was the establishment of OPTN, which "arrange[s] for the acquisition and preservation of donated organs and provide[s] quality standards for the acquisition of organs."\textsuperscript{28} However, NOTA also made it "unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce."\textsuperscript{29} Violators face a $50,000 fine and up to five years in prison.\textsuperscript{30} NOTA states that "'valuable consideration' does not include the reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ or the expenses of travel, housing and lost wages incurred by the donor of a human organ in connection with the donation of the organ."\textsuperscript{31} NOTA was enacted in recognition of the advancements in organ transplantation and in an effort "to encourage organ donation and to improve

\textsuperscript{26} Id. Most states have implemented some version of the UAGA and have also added their own amendments. Id.

\textsuperscript{27} Id. The UAGA is "designed to encourage the making of anatomical gifts" while "honor[ing] and respect[ing] the autonomy interest of individuals to make or not to make an anatomical gift of their body or parts." Id.


\textsuperscript{29} 42 U.S.C. § 274e (a) (2006).

\textsuperscript{30} Wait-Listed to Death, supra note 11.

\textsuperscript{31} 42 U.S.C.A. § 274e (c)(2) (2006). Consideration is required in order to form a binding contract. Consideration is defined as "a performance or a return promise [that] must be bargained for." RESTATEMENT (SECOND) OF CONTRACTS §71 (1981). "A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise." Id.
procedures for efficient organ procurement leading to successful transplantation."

The Department of Justice (DOJ) has stated that “valuable consideration” under NOTA refers to a “commercial transaction,” because the goal of NOTA, when enacted, was to make the sale of organs illegal. Therefore, the DOJ has found that NOTA does not prohibit states from using incentives that do not involve the buying or selling of organs as a way to increase the number of donors. The legislative history of NOTA supports the DOJ’s interpretation, clearly demonstrating that the objective of Congress in enacting the valuable consideration provision was to make the buying and selling of organs illegal.

However, the term “valuable consideration,” was not expressly defined in the legislative history, other than as “Congress’s intent to criminalize the buying and selling of organs for profit.” For example, the Senate’s Labor and Human Resources Committee Report stated that “[i]t is the sense of the Committee that individuals or organizations should not profit by the sale of human organs for transplantation.” The hefty fine and jail time associated with violating NOTA has caused the states to interpret the meaning of “valuable consideration” very broadly in order to avoid these severe consequences. As a result, many states have not offered any type of


34. Id.

35. Id.


38. Wait-Listed to Death, supra note 11. The large fines and the possibility of jail time have discouraged the states from passing legislation that provides incentives to donors. Id. Congress has not precisely defined “valuable consideration” as it applies to
incentives for people to become organ donors.\textsuperscript{39} The true meaning of “valuable consideration” is important to the debate surrounding organ donation because its meaning will define what incentives are legally permissible for the states to enact in order to increase the number of organ donors.

Another piece of legislation that adds to the guidelines established in NOTA is the Organ Donation and Recovery Improvement Act of 2004.\textsuperscript{40} This statute makes grants available for OPOs, which coordinate organ transplantations in designated service areas.\textsuperscript{41} It also establishes a task force that is required to submit a bi-yearly report to Congress detailing the rate of organ donation and recovery as well as recommending public education programs to increase awareness of the need for organ donors.\textsuperscript{42} The current legislative environment in the United States, while clearly encouraging organ donations, provides little to no incentive for people to donate; therefore, many people die needlessly while on the organ waiting list.\textsuperscript{43}

NOTA and the states are unwilling to gamble as to what Congress means by the term when there are harsh consequences if their interpretation is incorrect. \textit{Id.}

\textsuperscript{39} \textit{Id.} For example, Pennsylvania passed a program that paid for the burial expenses for organ donors, but the state employees would not implement the program because they feared federal prosecution under NOTA. \textit{Id.} \textit{See also} Patrick D. Carlson, \textit{The 2004 Organ Donation Recovery and Improvement Act: How Congress Missed an Opportunity to Say “Yes” to Financial Incentives for Organ Donation}, 23 J. CONTEMP. HEALTH L. & POL’Y 136 (2006).

\textsuperscript{40} 42 U.S.C. § 273 (2006).

\textsuperscript{41} 42 U.S.C. § 273(a).


\textsuperscript{43} This unfortunate effect was discovered by a Brooklyn woman who recounts her struggle:

“I had been on dialysis for 15 years and on two transplant lists for 7,” said the woman, who asked not to be identified by name, for fear of losing support payments vital to maintaining the health of her transplanted organ. “Nothing was happening, and my health was getting worse and worse.” Finally, she said, “my doctors told me to get a kidney any way I could,” or expect to die.

Rohter, \textit{supra} note 20. She took the doctor’s advice seriously and bought a kidney on the black market in Israel and received the transplantation in South Africa. \textit{Id.} The Brooklyn woman is not alone. Although most countries prohibit the sale of organs, a flourishing black market for organ sales still exists. Matas, \textit{supra} note 11, at 6.
B. Foreign Attempts to Legislate Organ Donation

1. The Spanish Model

When considering changes in the current organ donation system, the United States must examine similar efforts abroad, particularly that of Spain, which has been deemed the leader in organ donation.\textsuperscript{44} Spain, Belgium and Norway have passed presumed consent laws, which automatically consider citizens to be organ donors unless they opt-out of the program.\textsuperscript{45} Individuals can opt-out of the program by registering their wish not to donate.\textsuperscript{46} However, in Spain, eighty to eighty-five percent of potential donors donate.\textsuperscript{47} Spain has taken the presumed consent method one step further by implementing a network of transplant coordinators who are present in all 168 hospitals in the country.\textsuperscript{48} The coordinators speak to grieving families about the possibility of donating the organs of their dying or recently deceased loved ones for the benefit of others.\textsuperscript{49} This family-based approach is instrumental to the success of Spain’s organ donation program.\textsuperscript{50} The benefits of the family-based approach are significant, as evidenced in a study of the system that noted, "of families who had initially refused consent, seventy-eight percent changed their mind after having had discussions with the transplant coordinators."\textsuperscript{51} The coordinators’ efforts have led to an increase in the number of deceased donors from fourteen per one million


\textsuperscript{45} Wong, \textit{supra} note 44.


\textsuperscript{47} Wong, \textit{supra} note 44.

\textsuperscript{48} Silva, \textit{supra} note 44.

\textsuperscript{49} \textit{Id}.

\textsuperscript{50} R. Matesanz, \textit{A Decade of Continuous Improvement in Cadaveric Organ Donation: the Spanish Model}, 21 \textsc{Nefrologia} 59, 60 (2001).

\textsuperscript{51} \textit{Id}.
citizens in 1989, when the system was implemented, to approximately thirty-four per one million citizens in 2008, which is the highest rate in the world.\footnote{Silva, supra note 44. The rate for the European Union was 18.2 per one million in 2008 and 26.3 in the United States. \textit{Id.} Further, only about fifteen percent of families refused to allow their family’s organs to be donated. This rate was forty percent in the 1980s. \textit{Id.}}

The family-based approach used in Spain would easily convert to a system implemented in the United States. OPOs could train their employees on how to counsel families and achieve the best result for all parties involved. However, implementing the presumed consent aspect of the Spanish model in the U.S. would prove to be more difficult, because it takes away the choice of an individual to become an organ donor, and could potentially raise issues concerning one’s fundamental Constitutional rights.\footnote{See Alexander Powhida, \textit{Forced Organ Donation: The Presumed Consent to Organ Donation Laws of the Various States and the United States Constitution}, 9 \textit{ALB. L.J. SCI. \& TECH.} 349, 364 - 74 (1999).}

These issues are currently being debated in New York, where the idea of implementing a presumed consent system is being discussed.\footnote{See \textit{Should Laws Push for Organ Donation?}, N.Y. TIMES, (May 2, 2010, 7:00 PM), http://roomfordebate.blogs.nytimes.com/2010/05/02/should-laws-encourage-organ-donation/.} The United States must examine all of the alternatives that are currently being used abroad and form them into a unique system that can be successful in America.

2. The Iranian Model

The organ donation system of Iran must also be considered by the United States when revising the current organ donation system, because Iran is the only country in the world without an organ shortage.\footnote{Benajmin E. Hippen, \textit{Organ Sales and Moral Travails Lessons Learned from the Living Kidney Vendor Program in Iran}, 614 POL’Y ANALYSIS, CATO INSTITUTE 1 (March 20, 2008), http://www.cato.org/pubs/pas/pas-614.pdf.} Since 1996, Iran has permitted the sale of organs through a state-regulated system.\footnote{Rohter, supra note 20.} Iran is both the only country in the world without a shortage of organ donors and the only country that allows organs to be sold.\footnote{Hippen, supra note 55.} In Iran, the organ donation
process begins when donors independently contact the Dialysis and Transplant Patient Association (DATPA).\textsuperscript{58} Donors are then referred to a transplant center and are evaluated by medical personnel.\textsuperscript{59} Donors receive $1,200 and health insurance from the government for their donation.\textsuperscript{60} Donors also receive compensation from the recipient; however, if the recipient cannot afford to compensate the donor, several charities have been established to provide compensation to the donor.\textsuperscript{61} While the Iranian system provides direct donor compensation from both the government and the recipient, it also has safeguards in place to ensure organs are distributed in an equitable manner.\textsuperscript{62}

The Iranian system, although controversial, has been very successful. The effectiveness of the Iranian system in increasing the number of donors is clear: as of 1999, just eleven years after Iran legalized the sale of organs, there is no longer a waiting list for kidneys.\textsuperscript{63} The Iranian system has also increased the country's donations by uncompensated deceased individuals tenfold in the past eight years.\textsuperscript{64} Furthermore, the Iranian system acts as a deterrent to illegal organ sales.\textsuperscript{65} DATPA ensures that donors are truthful when making medical history disclosures, which encourages people seeking organs to use the system rather than attempting to buy an organ on their own.\textsuperscript{66}

\begin{itemize}
\item \textsuperscript{58} Kerry Howley, \textit{Kidneys for Sale: Iranian Organ Donation}, \textsc{Reason.com} (June 2008), http://reason.com/archives/2008/05/13/kidneys-for-sale.
\item \textsuperscript{59} Hippen, \textit{supra note} 55, at 3. This separation between the role of identifying donors “from the role of evaluating their medical, surgical, and psychological suitability permits transplant professionals to avoid confusing judgment on a vendor’s candidacy with various financial and professional incentives to perform more transplants.” \textit{Id.} at 4.
\item \textsuperscript{60} Howley, \textit{supra note} 58.
\item \textsuperscript{61} \textit{Id.} This amount is usually around $2,300 to $4,500. Hippen, \textit{supra note} 55, at 4.
\item \textsuperscript{62} Rohter, \textit{supra note} 20.
\item \textsuperscript{63} Hippen, \textit{supra note} 55, at 4.
\item \textsuperscript{64} Howley, \textit{supra note} 58. Posthumous donations began in 2000 and have grown alongside living donations. \textit{Id.}
\item \textsuperscript{65} Hippen, \textit{supra note} 55, at 4.
\item \textsuperscript{66} \textit{Id.}
\end{itemize}
America's Organ Donation Crisis

The system has avoided discrimination based upon the income of the recipient by developing charities to provide compensation to the donor, if the recipient cannot afford to do so. Possible discrimination based upon the income of the recipient is a major argument for opponents to the establishment of a similar vendor program in the United States. The Iranians, however, have ensured that donors are not exploited by physicians, middlemen, or procurement institutions by allowing DATPA to monitor all transplantations. Finally, providing compensation to the donors is cost-effective because it is less expensive than the treatment of the failing organ.

However, even with precautions in place, the system in Iran has produced negative effects on donors. Many Iranian donors have come to regret their decisions to donate their organs and have suffered medical complications as a result of donating. Two studies performed by Javaad Zargooshi from the Department of Urology at Kermanshah University Medical Sciences in Iran reflect the negative views held by donors post-donation. The studies show that ninety-two percent of donors said their “surgery and recovery” was “more painful than expected” and fifty-eight percent reported that vending had a “very negative impact on [their] health.” Thirty-eight percent of donors also reported that they lost their jobs as a result of “postoperative pain and disability.” Given these negative consequences, it is no wonder that eighty-five percent of donors regret their decisions and, in hindsight, would not have donated. Adding to the donor’s disappointment is the fact

67. Id.

68. Id. at 4-5.

69. Matas, supra note 11, at 6. For example, dialysis treatment for one person costs around $95,000 and the person being treated costs the government an additional $75,000 in lost income taxes and nonmedical services resulting in around $270,000 being spent total. Id. Therefore, compensating donors with anything less than this amount would result in a gain. Id.

70. Guttman, supra note 23.


72. Zargooshi, Quality of Life, supra note 71, at 1797-98.

73. Id. at 1793.

74. Id. at 1790.
that the financial incentives are not significant enough to make an impact on
the donor's life. Moreover, a majority of the organ donors in Iran are
impoverished, which may spark concerns that the donors are coerced into
donation. However, this fear can be dispelled by the fact that donors
present themselves to DATPA and doctors are not permitted to solicit
dons themselves.

Despite the cultural, political and religious differences between the
United States and Iran, the United States could greatly benefit from
reviewing the Iranian model when considering options for a domestic organ
donation system. Analyzing the costs and benefits of the Iranian system
would enable the U.S. to tackle the potential downfalls in the planning stage,
before they occur in a new system. Additionally, the United States can
ehance its system by evaluating the great success of the Iranian system in
reducing the shortage of organs in its country. The U.S. must combat the
unfortunate consequences associated with the Iranian system by examining
the long-term side effects associated with organ donation and ensuring that
that these risks are adequately communicated to all donors. Also,
“providing more legal and social benefits to paid donors, in addition to
financial incentives, will satisfy them better in the long term.” The U.S.

75. Ahad J. Ghods & Shekoufeh Savaj, Iranian Model of Paid and Regulated Living-

76. Hippen, supra note 55, at 7.

77. Id. at 3. “An offer cannot be coercive if the relationship is initiated by the person
in danger of being coerced” and “the donor makes an autonomous decision and, in return,
receives substantial compensation that may significantly improve his or her quality of
life,” thus alleviating the fear of any exploitation. Matas, supra note 11, at 17. This view
that the quality of life of the donor is greatly increased as a result of the donation was
echoed by the donor of the Brooklyn women’s kidney when he stated that money initially
motivated his choice to become a donor he also became “moved by the chance to help a
stranger.” Rohter, supra note 20.

78. Hippen, supra note 55, at 3.

79. For example, the Catholic Church has taken a firm stance against the sale of
organs. ZENIT NEWS AGENCY, Pope Warns of the Dangers of Selling Human Organs,
=30460. Pope Benedict XVI has stated that “[t]he donation of one’s organs is a free act
of charity, and should not be submitted to the ‘logic of the market.’” Id.

80. Hippen, supra note 55, at 10-11.

81. Ghods & Savaj, supra note 75, at 621.
must examine the pros and cons of the Iranian model and use that information to develop a system that will work successfully in the United States.

3. Organ Donation Systems in Other Countries

Several countries, such as France, Canada, and the United Kingdom, allow for some type of reimbursement to organ donors. France requires that donors be reimbursed for all travel and accommodation expenses. Canada has federal incentives for donors, including employment insurance, short-term disability, and tax credits for medical expenses. While the United Kingdom permits reimbursement of lost wages, travel costs and accommodation expenses, it is not mandatory that the health service reimburse donors. These statutory schemes are particularly effective because they give the jurisdiction within each country discretion to determine which method is best to increase the number of organ donors. This is not the case in the United States, where the federal government has effectively banned similar state-determined incentives by not clearly stating what is considered “valuable consideration.” This ambiguity has restricted the states’ ability to determine the best way to procure resident donors.

In a model similar to that employed in the United States, other countries such as Hungary, Portugal, Slovakia, and Turkey do not permit any form of compensation to donors. However, foreign organ donation laws are anything but consistent. The World Medical Association and the


83. Id.

84. Id.

85. Id.

86. See Lori Hartwell, Global Organ Donation Policies Around the World, www.lorihartwell.com/GlobalOrganDonationPolicies.pdf (last visited Dec. 2, 2010). Additionally, OTPA references legislation enacted in Israel as an example of how other countries are providing incentives to increase the number of organ donors. Guttman, supra note 23. Israel currently compensates donors with $5,000, additional health care and social security benefits. Id. The goal of Israel’s organ donation statute was for Israel to be able to meet the need for organ transplants within the country and to prevent people from traveling elsewhere to find needed organs. Id. The law was passed in March 2008, but there are currently no studies available on its impact. Id.
American Medical Association Council on Ethics and Judicial Affairs found a difference between reimbursing a donor for medical expenses and a donor receiving a financial gain for selling an organ. Providing organ donors with compensation for medical expenses makes the donor whole again; it puts the donor back to where he or she was prior to the donation. However, even this sort of reimbursement is not a strong incentive to donate.

C. The View of the World Health Organization

WHO outlines guiding principles on human cell, tissue, and organ transplants that are “intended to provide an orderly, ethical and acceptable framework for the acquisition and transplantation of human cells, tissues and organs for therapeutic purposes.” WHO advocates that organs should not be sold, but that donation systems should “not preclude reimbursing reasonable and verifiable expenses incurred by the donor, including loss of income, or paying the costs of recovery, processing, preserving and


89. Klarenbach, supra note 82.

90. The other side of this argument is that “banning payment on ethical grounds to prevent [exploitation] overlooks one important fact: to the person who needs money to feed his children or to purchase medical care for her parent, the option of not selling a body part is worse than the option of selling it.” L.B. Andrews, My Body, My Property, 5 HASTINGS CTR. REP. 28, 32 (1986). As evidenced by the donor of the Brooklyn woman’s kidney who stated, “[s]ix grand is a lot of money, especially when you don’t have any.” Rohter, supra note 20.

supplying . . . organs for transplantation." However, WHO states that "free periodic medical assessments related to the donation and insurance for death or complications that arise from the donation may legitimately be provided to living donors."

The United States should consider the points expressed by WHO, and allow more flexibility in the means used to attract people to become organ donors. It is not necessary that incentives include financial gain for donors, but the donors should, at the very least, be returned to the position they were in before the donation. Ideally, there should be incentives, but not direct payments, to entice more people to become donors.

Additionally, if other nations would look to the guidelines defined by WHO and establish their organ procurement systems accordingly, it would result in consistent statutes across the world. The consistency of banning the express sale of organs in international statutes would restrict people from traveling abroad in order to purchase an organ. However, countries would still be permitted to find ways of offering incentives to increase the number of donors in their respective jurisdictions.

III. PROPOSED LEGISLATION: ORGAN TRAFFICKING PROHIBITION ACT OF 2009

A. Background on the Organ Trafficking Prohibition Act

The OTPA proposal was drafted to alleviate the consequences of NOTA's prohibition against providing organs for valuable consideration. Former Senator Arlen Specter, along with co-sponsoring Senators Tom Harkin (D-IA) and Bob Casey, Jr. (D-PA), were responsible for drafting and circulating the proposed legislation throughout the Senate, although as of December 2010, it has yet to be formally introduced. OTPA clarifies NOTA by

92. Id. at 5. The notes on this particular guiding principle reflect the controversial nature of implementing regulations in the area of organ transplantation, especially when considering incentives. Id.

93. Id. Further, "health authorities should promote donation motivated by the need of the recipient and the benefit for the community." Id. The guiding principle also cautions that any incentives should be defined explicitly. Id.

94. Wait-Listed to Death, supra note 11.

95. Support Introduction, supra note 33. See also Guttman, supra note 23. Both Senator Harkin and Senator Casey are graduates of the Catholic University of America Columbus School of Law, class of 1972 and class of 1968, respectively. Lawyers in the 111th Congress - Senate, A.B.A., http://www.abanet.org/poladv/documents/lawyers111 congress_senate.pdf (last visited Dec. 3, 2010). OTPA has been endorsed by many
permitting states to provide incentives to donors, on the condition that the incentives do not include any direct payments.\textsuperscript{96} Permissible incentives under OTPA include tax deductions, coverage of burial costs, life insurance, and health insurance.\textsuperscript{97} OTPA does not establish or fund any particular incentive plan; therefore, it does not condone commercial transactions for organs, but gives individual states more flexibility in determining the best way to increase the number of donors within its jurisdiction.\textsuperscript{98} While providing these incentives, OTPA also “increase[s] supervision to avoid the buying and selling of human organs.”\textsuperscript{99} One way OTPA accomplishes this is by increasing the criminal penalty for organ trafficking by imposing a seven-year sentence on such acts.\textsuperscript{100}

\textbf{B. Rationale Behind the Organ Trafficking Prohibition Act}

Many donors are adversely affected by the costs associated with donating an organ.\textsuperscript{101} Donors face many financial obstacles, including “travel for tests, appointments and hospital admission; accommodation; long-distance telephone charges; and incidental medical costs such as fees for medications after discharge.”\textsuperscript{102} They also face more indirect financial consequences, such as being unable to work or engage in leisure activities, having to hire someone to take care of their house and perform daily tasks, and having to

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96. Support Introduction, supra note 33. See also Guttman, supra note 23.

97. Guttman, supra note 23. See also Wait-Listed to Death, supra note 11.

98. Support Introduction, supra note 33.


100. Wait-Listed to Death, supra note 11.

101. Klarenbach, supra note 82. As Arthur Matas, Professor of Surgery and Director of the Kidney Transplant Program at the University of Minnesota stated, “[a]t the end of the day, one must ask this simple question: [w]hich is the better option – establishing a system of compensation (even though it might not be easy) or maintaining the status quo (while transplant candidates suffer and die)?” Matas, supra note 11, at 19.

102. Klarenbach, supra note 82.
employ caretaking services following the donation procedure.\textsuperscript{103} The goal of OTPA is to alleviate the obstacles that prevent people from becoming donors in the first place. This would have the overall effect of increasing organ donation rates in the United States.

Studies by the University of Minnesota and the Cleveland Clinic Foundation Department of Urology found that twenty-three percent of kidney donors faced financial hardships or significant financial burdens, including loss of income averaging $4,410.\textsuperscript{104} Although that figure does not seem particularly high, it is often significant when considered with the fact that most donors are family members of the recipient. Therefore, in addition to the financial burdens associated with the donation itself, donors are also faced with the costs associated with having to care for a chronically ill loved one.\textsuperscript{105} The significance of this financial burden is apparent in the results of a study involving 133 potential donors to a family member.\textsuperscript{106} Twenty-four percent of the study participants chose not to donate due to the anticipated financial hurdles they would face as a result of the donation.\textsuperscript{107} The passage of OTPA, which would allow incentives that target this group of potential donors, would have the overall effect of increasing the number of donors.

Critics of OTPA, including activists from the Coalition for Organ-Failure Solutions,\textsuperscript{108} argue that although OTPA does not provide direct cash compensation to donors, it still carries all of the negative consequences associated with that model, including targeting the impoverished population for organ donations.\textsuperscript{109} However, these allegations are unfounded because OTPA can be read as providing for those donors who choose to donate their

\begin{itemize}
\item \textsuperscript{103} Id.
\item \textsuperscript{104} Id.
\item \textsuperscript{105} Id.
\item \textsuperscript{106} Id. (citing R.S. Knotts, W.F. Finn, & T. Armstrong. \textit{Psychosocial factors impacting patients, donors, and nondonors involved in renal transplant evaluation}, 15 \textit{KIDNEY FOUND. PERSP.} 11 (1996)).
\item \textsuperscript{107} Id. The same study found a positive correlation between receiving a kidney from a living donor and the income level of the recipient. Klarenbach, \textit{supra} note 82.
\item \textsuperscript{108} The Coalition for Organ-Failure Solutions is a “non-profit . . . organization committed to combating the trafficking of humans for organs and ending the exploitation of the poor as a source of organ and tissue supplies.” COALITION FOR ORGAN-Failure SOLUTIONS, http://www.cofs.org/ (last visited October 25, 2010).
\item \textsuperscript{109} Gutman, \textit{supra} note 23.
\end{itemize}
organ to another without targeting impoverished populations by providing direct cash payments. OTPA merely attempts to make the donor whole again by allowing the government to redress the donor’s losses, and to provide reasonable incentives to encourage donations.\textsuperscript{110}

\textbf{C. The Need to Redress the Failures of NOTA}

Reliance on altruistic donations under NOTA has not been successful in increasing the number of donors. There are two main reasons for NOTA’s failure. First, donations from deceased donors can provide only a limited number of viable organs, usually around 15,000 per year.\textsuperscript{111} Second, organ donations by living family members are similarly limited.\textsuperscript{112} NOTA has failed to find a way of effectively increasing the number of organ donors in the United States.

Additionally, NOTA is currently under attack by an October 2009 lawsuit filed in the U.S. District Court for the Central District of California.\textsuperscript{113} The plaintiffs seek to allow incentives, such as tuition payment and mortgage

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\item \textsuperscript{110} The National Kidney Foundation supports providing donors with compensation for donation-related expenses. Dolph Chianchiano, the Vice President for Health Policy and Research at the Foundation says, “The main reason [we support reimbursement] is that it’s the right thing to do for the living donors... [b]ut one would hope that it would alleviate some concerns that potential living donors might have.” Rachel Rettner, Great Debate: Should Organ Donors be Paid?, LIVE SCIENCE (Aug. 10, 2009, 9:16 AM), http://www.livescience.com/health/090810-organ-donation-incentives.html.


\item \textsuperscript{112} Id.

\item \textsuperscript{113} The plaintiff is suing U.S. Attorney General Eric Holder, Jr. to enjoin enforcement of NOTA, which criminalizes compensating donors, arguing that this statute violates the plaintiff’s equal protection rights and substantive due process rights. Complaint at 2, Flynn v. Holder, No. CV09-07772 (C.D. Cal. 2009). “This criminal prohibition violates the Due Process Clause of the Fifth Amendment to the U.S. Constitution in two respects. First, the bone-marrow provision denies equal protection by arbitrarily and irrationally treating renewable bone-marrow cells like nonrenewable solid organs such as kidneys, instead of treating them like other renewable or inexhaustible cells such as blood cells, sperm cells, and egg cells for which compensated donation is legal. Second, the statute violates Plaintiffs’ substantive-due-process right to participate in safe, accepted, lifesaving medical treatment.” Id.
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payments, for bone marrow donors. The complaint states, "[t]his constitutional challenge is about an arbitrary law that criminalizes a promising effort to save lives." While this lawsuit is limited in scope to bone marrow donations, the outcome could be the starting point for new regulations regarding incentives for organ donations.

OTPA will be more effective in reaching the goals set out in NOTA, particularly those which NOTA fails to accomplish. OTPA gives the states flexibility in determining the best way to increase the number of organ donors. Clearly establishing that states have the authority to provide certain incentives to potential donors will alleviate many of the financial burdens that preclude people from donating, thereby increasing the amount of organ donors.

IV. NEW LEGISLATION IS NEEDED TO INCREASE THE NUMBER OF DONORS IN THE UNITED STATES

A. Three Mandatory Elements for Legislation Attempting to Increase Organ Donation Rates

The need for legislation to increase the number of organ donors is clearly evident. However, it is difficult to determine the best way to accomplish this goal. This is especially true in light of the fact that many people do not become donors due to the financial restraints they will face as a result of donating. However, providing direct compensation to donors would target the impoverished population, thus demonstrating that, without significant regulation, the organ procurement problem will not improve. The United States must examine the successes and failures of organ donation programs abroad in order to establish a comprehensive and viable system. The systems of Spain and Iran should serve as guides because Spain is the


115. Baldas, supra note 114. As Jeff Rowes, the lead attorney for the plaintiffs points out "when Congress passed the statute, it was to prevent kidneys, lungs and other organs from being sold on the black market. Bone marrow got tucked in at the end of the legislation." Id.

116. Klarenbach, supra note 82.
leader in organ donation and Iran, despite the drawbacks its program presents, is the only country in the world without an organ shortage.

In order to be effective, legislation regulating organ donations must contain three elements. First, the legislation must make the donor whole again by allowing the donee, or a non-profit agency on the donee’s behalf, to pay for any out-of-pocket expenses resulting from the donation. Second, the OPOs currently in place must be expanded to adopt a more family-centered approach. Third, the legislation should provide specific incentives to entice more people to donate organs, above and beyond the effort to compensate the donee.

Any legislation regarding organ donation should not only provide incentives to increase donors, but should also allow donees to pay the expenses donors face such as travel, lost wages, and subsequent medical bills. Additionally, the government should develop non-profit agencies to reimburse expenses to donors if donees are unable to do so. This will alleviate the concerns that prohibit many from becoming donors: people will be more likely to donate if they know they do not have to be concerned with paying for costs associated with being a donor.

The OPOs currently in place must be expanded to have a major presence in every hospital in the country, and they must take a more family-centered approach. OPOs must devote a majority of their efforts to informing families of the recently deceased about the benefits and the need for organ donors. This can be accomplished by increasing the number of coordinators present in each hospital and by providing training concerning the best ways to effectively discuss the subject with grieving families. Since OPOs are currently in place, the implementation of the family-centered approach will simply require additional training and support. Furthermore, the United States can use Spain’s system as a guide.

Incentives, but not direct payments, for donating organs are also a vital element of any legislation as illustrated in OTPA. Direct payments may indirectly target the impoverished, but incentives merely attract people into becoming donors. Providing a reasonable incentive, one not so drastic as to influence a potential donor’s decision, would increase the number of organ donors in the country without the ethical concerns associated with direct payment.

117. Wong, supra note 44; see also Silva, supra note 44.

118. Hippen, supra note 55.

119. Wong, supra note 44.
B. A Closer Examination of OTPA

OTPA provides a solid framework for increasing the number of donors in the United States in the most equitable manner possible. However, in its current state, it primarily addresses the third element detailed above, allowing states to determine which, if any, incentives should be implemented in order to increase donations. OTPA can be improved by adding provisions regarding the first two elements addressed above, allowing a donor to be compensated for expenses incurred as a result of the donation and developing a more family-centered approach to OPOs.

Under OTPA, the states have broad discretion to determine what incentives to offer in order to increase organ donation. One example is to issue tax breaks to donors. This method was enacted in Wisconsin in 2004, and allowed a state income tax deduction of up to $10,000 to cover the expenses a donor may face. Many critics of the bill, including Howard M. Nathan, President and Chief Executive of the Gift of Life Donor Program, say that the $10,000 incentive violates NOTA. Conversely, proponents, including former State Representative Steve Wieckert, argue that such deductions merely remove the financial obstacles preventing many people from becoming donors. Kansas considered similar legislation in 2000, but the state attorney general believed that the legislation would violate NOTA and, as a result, it was never passed. This disagreement demonstrates the


124. Napolitano, supra note 120.

125. Id.
inconsistency in the states' understanding of the meaning of valuable consideration under NOTA, and the need to clarify what is permissible in order to increase the number of organ donors.

Another means of increasing the number of donors under OTPA would be to discount fees associated with obtaining and renewing a driver license.\(^{126}\) This is a prime opportunity to reach individuals because most states ask people if they would like to be organ donors and place this information on their license. Georgia previously offered a nine-dollar discount to its residents who registered as donors, but this incentive is no longer used because the state was losing too much money.\(^{127}\) The legality of offering driver's license discounts under NOTA is also a cause for concern.\(^{128}\)

OTPA would also allow a donor's family to be compensated for reasonable burial expenses.\(^{129}\) Given how much the hospitals and doctors gain from performing organ donations, “a 'standardized and small' amount, perhaps $2,000, given through an agency like the Health Care Financing Administration to 'a third party, like a funeral director'” should be permitted in order to assist the families of donors.\(^{130}\) Incentives such as those discussed above would meet the goals established in NOTA by increasing the number of organ donors, while also discouraging people from seeking organs on the black market. Furthermore, OTPA would not establish an environment targeting or discriminating against the impoverished because it still bans direct compensation to donors and merely provides incentives for the donor.\(^{131}\)

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127. *Id.*


129. This method has been previously suggested to Congress. A. Bruce Bowden, General Counsel for the National Kidney Foundation and Partner at Duane Morris LLP suggested this method to Congress in 1994. See Young, *supra* note 1.


Critics of financial incentives, such as Dr. Francis Delmonico, a transplant surgeon at Massachusetts General Hospital, argue that "any attempt to assign a monetary value to the human body or its body parts, even in the hope of increasing organ supply, diminishes human dignity and devalues the very human life we seek to save." However, OTPA does just the opposite. Allowing the donation of human organs increases human dignity and encompasses the value of human life. A person is giving up a part of himself in order to save the life of another who the donor may not even know. This is the very essence of valuing human life. The fact that the donor may need some help along the way in order to donate is not unreasonable. If the government values human life, it should pass legislation that would increase the number of organ donors and save as many lives as possible rather than maintain the flawed system currently in place.

V. ALTERNATIVES TO OTPA

There are other alternatives to consider that can be implemented in addition to or in replacement of OTPA. These alternatives would increase its effectiveness by also addressing the first recommendations detailed previously. One such alternative would be to create a future market in which donors would be paid. In a future market system, donors' organs would be harvested only after death, and the donor's estate or designated beneficiary would receive the compensation. Professor Lloyd Cohen of George Mason University believes that compensation is the only way to encourage organ donation. Professor Henry Hansmann of Yale

132. Dr. Francis L. Delmonico is a professor of surgery at Harvard Medical School and the Director of Renal Transplantation at the Massachusetts General Hospital. FACULTY BIOS, http://www.hdcn.com/symp/00asnsatg/facbios.htm (last visited Oct. 27, 2010).

133. Clark, supra note 111.


135. Professor Lloyd R. Cohen is a law professor at George Mason University. He has published articles on a variety of topics, including the market for transplant organs. Professor Cohen's Home Page, GEORGE MASON UNIVERSITY, SCHOOL OF LAW, http://mason.gmu.edu/~lcohen2/ (last visited Oct. 26, 2010).

University also believes in a future market, but he believes those who indicate their wish to be donors upon their death should receive a reduction in their insurance premiums during the course of their life rather than a cash payment upon their death. Either method proposed would silence critics who fear providing any compensation would be targeting the impoverished, because these future market scenarios do not provide direct compensation until death or merely provide reasonable incentives to entice people to become donors.

Another alternative would be to employ a presumed consent system. This method, which does not take into account the wishes of the family, is used in many foreign countries, including Austria, Denmark, France, Poland, and Switzerland. Another, more flexible approach to a presumed consent system is used in Finland, Greece, Italy, Norway, Belgium, Sweden, and as previously discussed, Spain. In these countries, the family can override the decision of the deceased to donate. The more strict presumed consent system would be effective in the United States given that polls have shown that over seventy-five percent of Americans say they would donate their organs, but less than half actually choose to donate a family member’s organs when it comes time to make the decision. However, a subcommittee of the United Network for Organ Sharing (UNOS) Ethics Committee rejected a presumed consent system as an option for three reasons. First, the subcommittee thought the system does not adequately

137. Henry Hansmann is the Augustus E. Lines Professor of Law at Yale Law School. He focuses on the law and economics of organizational ownership and structure. *Faculty, Yale Law School*, http://www.law.yale.edu/faculty/HHansmann.htm (last visited Oct. 26, 2010).


141. *Id.*

142. *Id.*

143. Clark, *supra* note 111.

144. *Id.*
protect the donor’s autonomy.145 Second, the subcommittee was concerned about ensuring that the wishes of those who chose not to be donors were met.146 Finally, the subcommittee thought it was a better policy to require prospective donors to express their preference.147 Under the presumed consent system, providing incentives to donors is not as vital, but for this system to be successful and reasonable, any possible side effects of donation must be adequately conveyed to the entire population to ensure that each person is making an informed decision.

A “mutual insurance pool” is yet another creative incentive states could utilize to increase the number of donors.148 Under this method, persons willing to donate their organs at death to other pool participants would receive priority if they ever needed an organ.149 It would be necessary, however, to determine if this type of incentive would be considered valuable consideration under NOTA, unless that provision of NOTA is revised or clarified.150 Additionally, the success of this method would need to be closely monitored to ensure that it is increasing the number of organ donors who are matches for those on the waiting list.

Another incentive option builds upon the idea that people may be more likely to become donors if they have more opportunities to register. That is the reasoning behind two bills proposed in Massachusetts that intend to “revive a state organ-donation advisory board that would promote donor registration, and to create a state fund to assist with the effort.”151 Both bills would continue to allow people to sign up to be donors when they renew their driver’s licenses, but would also present the opportunity to become a donor when they renew their car registrations.152 One bill would even allow

145. Id.
146. Id.
147. Id.
149. Id. at 728.
150. Id.
152. Id.
people to register as donors on their tax returns, while the other bill suggests permitting organ donor registration on voter registration cards.\textsuperscript{153} The success of this approach is evident in Colorado, where people are required to state whether they want to be an organ donor in order to obtain a driver’s license, and sixty percent become donors.\textsuperscript{154} Ensuring that the public understands the scope of the problem and is provided more opportunities to make the informed decision to become a donor can only improve the current situation.

Finally, if efforts to increase the number of organ donors prove unsuccessful, legislators may consider ways to decrease the number of people on the waiting list. This controversial move can be accomplished by eliminating alcoholics, chronic smokers, and convicted felons from those eligible to receive an organ.\textsuperscript{155} The reasoning behind barring alcoholics and smokers is to hold individuals responsible for their actions and the consequences that result, such as cirrhosis of the liver and lung cancer.\textsuperscript{156} It seems unfair to allow a person who has liver or lung problems due to his conscious and voluntary decisions to receive an organ donation over someone who needs an organ through no fault of his own.\textsuperscript{157} Some experts, including Dr. Lawrence Schneiderman, a medical professor at the University of California,\textsuperscript{158} suggest that people who are convicted of murder or other

\begin{enumerate}
\item \textsuperscript{153} \textit{Id.}
\item \textsuperscript{155} See, e.g., Alvin H. Moss \& Mark Siegler, \textit{Should Alcoholics Compete Equally for Liver Transplantation}, 265 JAMA 1295 (1991). The waiting list could also be reduced by minimizing access for older candidates and those with significant health problems as those people are not as likely to fully recover from transplantation. Matas, \textit{supra} note 11. It may be more beneficial to allow this group access to organs that are derived from donors who are less ideal. \textit{Id.} However, “the logical extension of this argument would be to limit access to diabetics, to women, to children, and to blacks (who have worse long-term results than nondiabetics, men, adults, and whites).” \textit{Id.}
\item \textsuperscript{156} Moss \& Siegler, \textit{supra} note 155, at 1296.
\item \textsuperscript{157} \textit{Id.}
\item \textsuperscript{158} Dr. Lawrence Schneiderman is a professor emeritus in the Department of Family and Preventive Medicine at the University of California, San Diego Medical Center, Moores Cancer Center. He has published more than 170 medical and scientific publications. \textit{Research/Clinical Summary, Moores Cancer Center, Univ. of Cal., San
“heinous” crimes should not be eligible to receive transplants because they should be barred from receiving “benefits from a society they violated.” These issues raise the question of whether ethical factors surrounding a person’s behavior should be raised when considering whether a person should be added to the organ waiting list at all, or, conversely, where on the list they should be placed. These methods to exclude individuals or place them lower on the list should be of last resort, and the focus should remain on increasing the number of donors rather than allowing more people to die while waiting for organs, regardless of their past choices in life.

VI. CONCLUSION

Congress must address the dire need for organ donors in the United States. OTPA is a solid stepping stone in reaching this goal. It directly addresses the fact that many people do not donate for fear of the financial burdens they will face as a result of being a donor. OTPA would allow the states to help alleviate these concerns by directly addressing many of the hurdles donors face, and, at the same time, would remain firm on the view that donors should not be directly compensated with cash payments, as they currently are in Iran. However, while OTPA is a good starting point, it falls short of having any significant, long-term effect on the organ donation rates in the United States.

Any successful piece of legislation must contain three elements in order to be comprehensive and have a lasting impact: (1) allowance for the donee, or a non-profit agency if the donee is impoverished, to pay for any out-of-pocket expenses the donor may face as a result of the donation; (2) expansion of OPOs currently in place and adoption of a more family-centered approach; and (3) permission of specific incentives that do not


159. Prisoner Gets $1M Heart Transplant, ASSOCIATED PRESS (Jan. 31, 2002), http://www.cbsnews.com/stories/2002/01/31/health/main326305.shtml. “You have to wonder if a law-abiding, taxpaying citizen drew one last breath while Jailhouse Joe was getting a second wind,” wrote Los Angeles Times columnist Steve Lopez. Id. However, in regard to inmates who did not commit violent crimes (e.g., a prisoner serving a fourteen year sentence for robbery) and receive life-prolonging transplants, Schneiderman believes “[i]t’s reasonable to think the benefit we are giving him [the prisoner] will be experienced by him with plenty of life left. Socially, he violated society, but not so severely that he gives up his right to experience medical care.” Id.

160. Wong, supra note 44.
include direct compensation in order to entice more people to donate.\footnote{161} Some permissible incentives include providing health or life insurance coverage, funeral costs, and tax benefits. These incentives are enough to return the donor to where he was prior to the donation, as well as to provide some enticement for people to become donors in the first place without the inherent risks of direct compensation.

OTPA focuses on the third recommendation, that legislation must provide incentives to increase the number of donors only, and could be improved upon by adding provisions regarding the first two elements. The United States should not overlook the positive and negative results of the programs in Iran and Spain. The United States can learn from these schemes and improve upon those organ donation systems to fit the goals and principles of our nation. This can be accomplished without advocating the sale of organs, as in Iran, and without taking the choice away from the individual, as in Spain. Without helping individuals to become donors, the organ waiting list will continue to grow, countless numbers of viable organs will be wasted, and, ultimately, more lives will be lost. The current organ donation systems of Spain and Iran demonstrate that a well-designed legislative scheme can effectively solve the shortage of organs. If the U.S. tailors the Spanish and Iranian systems to its own domestic cultural and political ideals, it can solve America’s current organ shortage.

\footnote{161. This view is endorsed by the American Society of Transplant Surgeons, the American Medical Association (AMA) and the United Network for Organ Sharing. \textit{CEJA Report 6 – I-93, Financial Incentives for Organ Procurement: Ethical Aspects of Future Contracts for Cadaveric Donors}, AM. MED. ASS’N, http://www.ama-assn.org/ama1/pub/upload/mm/369/ceja_6i93.pdf (last visited Oct. 26, 2010). AMA stated that the “time has come” and that “[t]here is enough evidence in favor of employing some form of financial incentive to justify the implementation of a pilot program.” \textit{Id}.}