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Combatting the Problems of Human Rights Abuses and Inadequate Organ Supply Through Presumed Donative Consent

Christian Williams*

I. INTRODUCTION

Internationally, organ transplantation has been established as a feasible solution to the problem of end-stage organ failure. As medical technology and surgical techniques improve, the capability for successful organ transplantation grows, which in turn, allows people who were once classified as terminally ill to dramatically extend their lives.¹ As organ transplantation becomes a more available therapy, the demand for transplantable organs increases. Unfortunately, not all countries have taken measures to increase domestic supplies of transplantable organs in order to meet the rising demand. Part of the cause of some countries’ organ shortages is the mixed goals of their organ procurement laws; in others, society’s moral or cultural biases against organ harvesting prevents effective organ procurement. Some countries have not developed a comprehensive system of organ procurement, leaving those in need of an organ to find one for themselves.

Obviously, a shortage of transplantable organs results in death when potential recipients do not receive a transplant in time. However, other problems are developing due to the worldwide organ deficit. Internationally, one of the most pronounced problems is the human rights violations occurring as a result of the highly questionable, if not illegal, methods of satisfying organ demands.² The current shortage of legally collected

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¹ J.D. Candidate, Case Western Reserve University School of Law (1994).
² See Audrey Magee, MEPs Vote to Ban Trade in Organs for Transplant, IR. TIMES, Sept. 15, 1993, at 2 (noting that “there was a chronic shortage of transplant organs which not only reduced opportunities to save lives but also increased the danger of fraud or even more serious crimes[”]). See also infra notes 33-77 and accompanying
organs is due to the lack of efficacy of most domestic laws, the lack of legislative consistency from nation to nation, and the lack of consistent and aggressive enforcement of such laws.\(^3\) The variation between legal systems has allowed abuse of the simplest method of organ procurement — organ sales from live donors. This system is generally poorly regulated and fraught with health risks to both the donor and recipient. Often, it is the poorer citizens of developing countries who are supplying organs for the members of the upper class who can afford them, either directly or through organ brokers. However, when the organ, like any other valuable commodity, cannot be bought, it is stolen resulting in flagrant violations of human rights.

Since organ demand generally is not met through legal methods of collection,\(^4\) there are a significant number of people suffering and dying in hospitals\(^5\) who could not only be living normal lives, but expending fewer hospital resources.\(^6\) An organ deficit forces doctors to decide which patient receives an organ and which one does not.\(^7\) Desperate patients who feel they can no longer wait for an organ to be legally supplied, and who can afford the high cost, look to the black market for organs.\(^8\) If the demand for human organs was met legally and cheaply, there would be little incentive to seek organs illegally. A legal high organ procurement rate would, therefore, lead to the eventual elimination of the human rights violations inherent in the human organ black market.

Assuming that saving lives is the goal of any organ procurement and transplantation program,\(^9\) each nation should enact uniform legislation

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Efficiency varies tremendously from center to center both with respect to organ retrieval and organ transplantation. As a result, wide disparities in supply and demand occur with a resulting situation in which programs have excess organs while individuals in other locations, desperate for a transplant, become susceptible to a commercial endeavor.

*Id.* at 10.


\(^8\) See infra notes 13-30 and accompanying text.

\(^9\) This is not the goal of all organ procurement systems. See infra note 12.
allowing for the procurement of as many organs as possible from the potential pool of adequate cadavers and willing living donors. However, there are numerous restraints that differ greatly from region to region, country to country, and religion to religion, which prevent the thorough collection of organs. These factors include, but are not limited to, the education of the public concerning the benefits of organ donation; the attitude of the public toward organ donation; the attitude of the government and health professionals toward organ collection; moral or ethical objections to organ donations resulting from religious or cultural traditions or enacted laws; the possible property rights the donor or his family might have in the organs; the civil or privacy rights the donor may have in the disposition of the body; the cost of the transplant operation; hospital resources for transplants; organ resources for transplants; political or social motives to be accomplished with organ donation; and the determination of time of death in relation to the usefulness of the cadaveric organs. The ideal legal philosophy should attempt to promote prodigious collection while retaining flexibility, so as to accommodate local objections to certain practices.

Section II of this Note addresses the existence of international forces of supply and demand for transplantable human organs, and discusses why domestic organ demand is not limited to national borders. Section III documents the crimes being committed by individuals and states as a result of the worldwide inadequacy of organ procurement legislation. Section IV examines the current patchwork of domestic laws in an effort to determine what states can do to maximize the safe, effective, and socially equitable collection of human organs for transplantation. Section V addresses the principles of international law under which one country can prosecute another country, or its nationals, for the absence of human rights abuses. Section VI concludes that the worldwide harmonization of domestic legislation, which would enact an organ procurement system,

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10 See infra notes 78-230 and accompanying text.
11 Cohen, supra note 6, at 11-12. The varying systems of organ procurement "have much in common as they are all motivated by similar values. Each seeks to preserve life and reduce suffering, and at the same time to honor the autonomy of the individual and respect the property right that he and his family have in his body." Id.
12 It should be noted that while this is the general philosophy in organ procurement, not all states follow it. The U.S. Task Force on Organ Transplantation, in forming its organ procurement philosophy, "believed in the importance of developing organ transplantation policies that promote 'the value of social practices that enhance and strengthen altruism and our sense of community.'" James F. Blumstein, Federal Organ Transplant Policy: A Time for Reassessment?, 22 U.C. DAVIS L. REV. 451, 466 (1989) (quoting U.S. DEP'T OF HEALTH & HUMAN SERV., ORGAN TRANSPLANTATION: ISSUES AND RECOMMENDATIONS (1986)).
presuming the consent of the individual to donate organs while maintaining the option to withdraw consent, will best alleviate the demand for transplantable organs. This system should also provide a framework for the extraterritorial prosecution of human rights violators, thereby eliminating the existence of the black market.

II. THE EXISTENCE OF THE INTERNATIONAL MARKET IN HUMAN ORGANS

Modern techniques of organ transplantation have so substantially increased the viability of organ transplantation as a worldwide therapy that 300,000 people annually receive an organ transplant.\(^{13}\) The medical advances in transplantation techniques, incredible for their growing success rate, have resulted in increased need for transplantable organs.\(^{14}\) The advent of immunosuppressant drugs that increase compatibility between donors, preservation techniques that allow for increased organ life outside of the body, increased effectiveness of recipient registries, greater numbers of transplant teams that can transport organs, and more skilled surgeons who can perform the surgery has changed organ trans-

\(^{13}\) *Discovery Journal: The Great Organ Bazaar* (Discovery Channel television broadcast, Mar. 23, 1993) [hereinafter *Organ Bazaar*]. See also David Price & Ronnie Mackay, *The Trade in Human Organs*, NEW L.J., Sept. 20, 1991, at 1272 (stressing that "we have regularly witnessed in the field of transplantation procedures which, only a few years earlier, would have been viewed as incredible, even miraculous . . . [these] procedures have now ceased to be viewed as experimental, and are highly successful, almost standard treatments for certain conditions["]").

\(^{14}\) In 1985, commentators had already noted that "the demand in recent years has risen significantly because [of medical] improvements . . . . Unfortunately, the supply of donor organs has not kept pace with the increased demand, resulting in greater shortages than ever before." Note, *Regulating the Sale of Human Organs*, 71 Va. L. Rev. 1015, 1018-19 (1985). At that time, nearly 6,000 people were waiting on dialysis for a kidney transplant. *Hearing Before the Subcomm. on Investigations and Oversights of the House Comm. on Science and Technology*, 98th Cong., 1st Sess. 128 (1983) (testimony of Donald W. Denny). As of September 30, 1992, there were 21,492 registrations in the United States for a kidney transplant. Hartford Transplant Center, ORGAN AND TISSUE DONATION: WHAT ARE THE RESPONSIBILITIES OF THE INDIVIDUAL PHYSICIAN? (Sept. 30, 1992) (on file with the *Case W. Res. J. Int'l L*). This number will continue to grow, as there are almost 1,000 new names added each month to the list of people waiting for an organ transplant. *Organ Bazaar*, supra note 13. As of early March, 1993, UNOS reported that over 31,000 people were waiting for an organ transplant in the United States. *UNOS Releases 1992 Transplant Statistics*, PR NEWSWIRE, Apr. 16, 1993, available in LEXIS, News Library, Prnews File. It has been estimated that there are another 75,000 candidates for an organ transplant who simply do not have the money to get on a waiting list. Scott Shepard, *Diamond Aims to Spark National Debate on Organ-Procurement Issues*, MEM. BUS. J., Aug. 16, 1993, at 14.
plantation from an experimental scientific phenomenon to an accepted solution to organ failure.\footnote{Hawley, supra note 4, at 1106-07.}

Unfortunately, there have not been similar advances in creating laws that facilitate increasing the supply of organs to meet the demand.\footnote{DAVID MEYERS, THE HUMAN BODY AND THE LAW 182-83 (2d ed. 1990) (stating that "[t]here are many who feel that . . . legal problems are the greatest present impediment or roadblock to progress in human organ transplantation")]\footnote{See generally Theodore Silver, The Case for a Post-Mortem Organ Draft Act and A Proposed Model Organ Draft Act, 68 B.U. L. REV. 681 (1988) (discussing the failure of current organ procurement laws to produce an adequate organ supply).} The initial effect of the demand for transplantable organs was a deficit on the domestic level, with the effect on particular states determined by distinct supply and demand factors. Local demand for transplantable organs is determined by the number of patients diagnosed as potential organ transplant recipients.\footnote{Roger D. Blair & David L. Kaserman, The Economics and Ethics of Alternative Cadaveric Organ Procurement Policies, 8 YALE J. ON REG. 403, 413 (1991) (explaining that "[i]f kidneys were not employed as an input in the production of transplant operations, there would be no demand for these organs . . . demand is derived from the demand for transplant operations which, in turn, is derived from the demand for health")] With the increased availability of medical technology making organ transplantation more of a therapy, as opposed to an experimental option, the number of patients who could be saved, but die due to a lack of transplantable organs, also increases.\footnote{Cohen, supra note 6, at 4-5.}

However, according to current classifications of patients who need a transplantable organ, a sufficient supply of potentially transplantable organs exists to meet the demand for almost every type of organ.\footnote{Id. at 6 (stating that "the current untapped supply of cadavers appears to be more than adequate to meet the current demand of all organs, with the possible but doubtful exception of the heart")] The problem is that these potential donor organs are not being adequately collected by the states. This means that, on any given day, for each patient who dies for lack of a transplantable organ, an equal or greater number of viable organs are buried in the ground.\footnote{Id. at 4.} While some may look at this as merely a social problem, the forces of supply and demand in this allocation system have created a market, albeit a black market, for
human organs. It is obvious that in its current condition, most state allocation schemes are failing as effective suppliers of donor organs.

These problems are not only domestic, but increasingly, they take on an international dimension due to the failure of domestic allocation schemes and the increasing relative ease of organ transplantation. There are many reports of nationals of a particular country traveling to a foreign country in search of a transplantable organ. The result is that patients are traveling to the countries with the fewest restrictions on the sources of organs and the methods of procuring these organs. In the current international market, this is reflected by the fact that organs are being bought and traded, virtually unregulated, in some countries. States that cannot meet their domestic demand are, in effect, forcing their citizens to travel elsewhere for life-saving treatment, encouraging an international market that survives on violations of basic human rights and organ sales by the poor.

Such an international procurement scheme is ineffective and undesirable. The challenge is to identify the form the international market should take, and the domestic policies that would best encourage such an international market. States need to determine what rights they have under international law in creating minimum standards to be adhered to by other states. This challenge should be met, not only because it can have a

21 David Lamb, Organ Transplants and Ethics 135 (1990)
The sale of human organs is no longer a myth and the wealthiest can buy life at the expense of the underprivileged . . . . Very many countries, be they poor or very rich, are also confronted with the increasing development of an organ market, whatever the ostensible ethics and whatever the legislation.


22 Hansmann, supra note 7, at 60 (noting that only 15% of the 20,000 viable United States organ donors actually had their organs harvested).

23 See infra notes 13-30 and accompanying text.

24 Maud Beelman, Body Parts Needed for Transplants: Trade in Human Organs Stirs Global Attention, L.A. Times, July 16, 1989, at A6 (stating that “[t]he forces of supply and demand in the desperate world of organ transplants have created a commercial trade in human organs that worries health officials and ethicists worldwide[”]).

25 Renée C. Fox & Judith P. Swazy, Spare Parts: Organ Replacement in American Society 68 (1992) (noting that “[b]y 1990, trafficking in ‘human spare parts’ was a booming business in developing countries such as India, which had no organized systems for procuring cadaveric donor organs, no brain death statute, and no specific laws banning the sale of human organs and tissues[’]).

26 See generally Charles P. Wallace, For Sale: The Poor’s Body Parts, L.A. Times, Aug. 27, 1992, at A1 (noting that “[t]he wealthy are motivated by the fact that dialysis treatments, which can replace malfunctioning kidneys, are often prohibitively expensive and can severely restrict a patient’s lifestyle[’])

positive impact on other states' markets, but because better organ procurement methods elsewhere will positively affect their own domestic market. It is important for states to realize that the illegal trafficking of human organs cannot be categorized as just a violation of basic human rights. Such a crime is motivated, not by politics or religion, but by greed for the potentially great profit available to unscrupulous organ brokers dealing with both donors in dire need of money, and recipients in dire need of organs. Therefore, laws that deal with such criminals should not be organized around policies that address primarily religious taboos and cultural mores; rather these laws should seek to avoid the victimization and exploitation of people, both domestically and internationally.

Ideally, every domestic system would operate in a similar, efficient fashion, such that international problems and abuses could be averted. Of course, this is quite unrealistic, if only because of the disparate medical resources that exist between countries. Domestic concerns have naturally been preeminent in formulating a national policy toward organ procurement. However, it is not enough to limit policy decisions to immediate domestic concerns. States must be aware that failure to satisfy demand locally will have international ramifications. Similar to other international markets, repercussions of the ill effects created by some domestic markets in organ procurement will be felt by similar markets in other nations. For example, consider the spread of disease through foreign organ transplantation and the higher percentage of unnecessary organ recipient deaths due to the lax medical standards which often accompany lax legal stan-

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27 If other countries' organ demands are met, nationals of those countries will have a much lower incentive to enter another domestic market for transplantable organs, thereby allowing a nation to allocate more organs for its own citizens. See Clarisse Lucas, Egypt Becomes Crossroads for Trade in "Human Spare Parts," AGENCE FRANCE PRESSE, Jan. 26, 1992, available in LEXIS, News Library, AFP File (reporting that Egypt banned the sale of kidneys to foreigners to meet their own needs, since Egypt's rate of kidney failure is almost twice the world average). See also Judy Siegel, France Bars Organ Transplants for Israelis, JERUSALEM POST, June 29, 1992, available in LEXIS, News Library, Jpost File (explaining that a state has the right to exclude foreigners from procuring domestic organs). Also, for those who participate in international organ procurement agencies, such as Eurotransplant, the greater the number of organs that participating countries procure, the greater the number of organs available for all other participating countries. See generally Galina Vromen, Dutch Organ Transplant Centre Gives Hope To Thousands, REUTER LIBR. REP., Dec. 30, 1988, available in LEXIS, News Library, Reuwild File.

28 It is not uncommon in Bombay for an organ broker to make as much money from the sale of the organ as the donor makes. Organ Bazaar, supra note 13.

These are two of the many growing international problems, as demonstrated in the following section.

III. PROBLEMS AND ABUSES OCCURRING DUE TO THE COEXISTENCE OF DIFFERENT LAWS AND PROCUREMENT SYSTEMS

Few nations are meeting organ demand locally and as a result, more people are traveling abroad hoping to acquire an organ. Transnational travel for transplantable organs provides the basis for the assertion that organ procurement must be examined as not just a collection of domestic allocation systems, but as an international market. The domestic allocation systems that are producing the fewest organs are essentially forcing their citizens in need of an organ to obtain a transplant in a state that does not have a shortage. In our current international market, the nations that procure the greatest number of organs are those that allow their residents to sell their organs and have them removed while they are still alive. Unfortunately, empirical evidence suggests that this type of system “start[s] with unregulated organ removal and end[s] with a vicious traffic whereby the poor and uneducated [are] exploited in the interest of the wealthy.” Further, such systems allow for human rights violations to occur, and fail to meet medical standards that protect against the spread of disease and infection. While one can argue that these are problems endemic to a particular nation, and not the international market, careful examination reveals this to be false for two reasons. First, if domestic supply met domestic demand, people would not feel the need to travel to risky, abusive markets to obtain organs. Second, patients who do travel abroad to receive an organ sometimes return with a diseased or infected organ that needs immediate emergency treatment in the patient’s home state.

Poor people are being exploited through unsafe, and often unethical, sales of their kidneys, for paltry sums of money. While many may

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30 Of 149 Singaporean kidney patients who went to India and China for transplants, nine died and another nine had to have their implanted kidneys removed. “The others returned with infections like hepatitis and AIDS, or had caught diseases like tuberculosis, chicken pox, and malaria from improperly screened donors.” Lisa Kong, The Kidney Lottery, STRAITS TIMES, May 27, 1992, at L2.

31 However, the market with excess organs must also be willing to sell to foreigners.

32 LAMB, supra note 21, at 135.

33 FOX & SWAZEY, supra note 25, at 66-67. Fox & Swazey relate that “a major newspaper has described the buying of kidneys from impoverished donors for transplantation in private hospitals in Western countries. Some donations were coerced, some for meager fees . . . . It seems clear that . . . the less privileged can be exploited to
consider this a problem, there are some who prefer to look at inter-vivos sales\(^4\) as a maximization of resources, where the patient receives a much needed organ, and the donor receives some much needed money.\(^5\) However, the numerous horror stories exemplifying such exploitation of the poor and needy do, themselves, border on human rights violations.\(^6\) Additionally, the World Health Organization has condemned the trade in human organs.\(^7\)

The list of human rights violations varies from state-sponsored activities to those which are undertaken by mafia-like organ brokers who arrange organ sales. The most common state-sponsored human rights violation is the procurement of organs from criminals, both executed\(^8\) and those on death row.\(^9\)

\(^{32}\) improve the health of the more privileged." Id. (quoting COUNCIL OF THE TRANSPLANT SOCIETY 716 (1985)).

\(^4\) An inter-vivos sale is one between a live donor and a live recipient. Hence, only a non-necessary organ can be the subject of such a sale; for example, an eye, bone marrow, or a paired kidney.

\(^5\) See Bjorn Edlund, West German Baron in Controversial Organ Business, REUTER LIBR. REP., Oct. 27, 1988, available in LEXIS, New Library, Reuwld File. In 1988, a West German baron attempted to start up an organ brokerage, offering live donors $44,000 to sell a kidney. His selling point was, "[e]ven if the recipient of the kidney does not survive — you will, both medically and financially." Id. See generally Organ Bazaar, supra note 13.

\(^6\) In India, it was reported that a man sold one of his kidneys to raise money for drugs, and that he was willing to sell one of his eyes to buy more drugs. India Moves Tough Bill to Stop Trade in Human Organs, AGENCE FRANCE PRESSE, Aug. 20, 1992, available in LEXIS, News Library, AFP File [hereinafter India Moves Tough]. One desperate mother of four in Brazil was willing to sell her heart in return for jobs for her unemployed children. Lisa Genasci, Organ Sales Legislation Could Cut Down Sales of Human Organs, UPI, Nov. 8, 1986, available in LEXIS, News Library, UPI File. Loan sharks in Japan are reported to have accepted human organs as repayment for debts. Owen Bowcott, UK Disciplinary Hearing Exposes Third World Market for Donor Organs, REUTER TEXTLINE GUARDIAN, Apr. 5, 1990, available in LEXIS, News Library, Txprim File. Hotels in Cairo often put up young Somali, Nigerian, and Sudanese men who are looking for potential buyers for their kidneys. Lucas, supra note 27.

\(^7\) FOX & SWAZEY, supra note 25, at 68 (noting that "[t]he World Health Organization thought that the practice had become so rampant and problematic that it issued a resolution condemning trafficking in human organs, asking member nations to take appropriate measures against it"); Gary Regenstreif, Kidneys for Cash Increases, Sparks Moral Debate, REUTER LIBR. REP., Aug. 23, 1989, available in LEXIS, News Library, Reuwld File.

and living.\textsuperscript{39} According to a Bush administration study, a similar type of crime has occurred in Bosnia, where a Serbian internment camp doctor is alleged to have killed prisoners of war and removed their organs.\textsuperscript{40} While these state practices are abhorrent, the organ brokers that prey upon the citizens of states that do not have effective organ procurement systems are even more disturbing. These type of human rights violations, many involving children,\textsuperscript{41} have been reported in Poland,\textsuperscript{42} Russia,\textsuperscript{43} to 1984 entitled “Temporary Regulations Concerning the Use of the Corpses and Bodily Organs of Executed Criminals.” This directive, allegedly issued by the six top government departments, including the Supreme People’s Court and the Supreme People’s Procuratorate, revealed that China has officially condoned the practice of harvesting organs from executed prisoners, despite official denials to the contrary. \textit{Id. see also} Lynne O’Donnell, \textit{Organs Ripped from Executed Chinese Prisoners Make Money}, \textit{REUTER LIBR. REP.}, Nov. 21, 1991, \textit{available in LEXIS, News Library, Reuwlrd File}. In China, “[k]idneys are usually obtained from prisoners who are executed for offences [sic] such as rape, burglary, or political ‘crimes’ against the state . . . .” \textit{Id.} (quoting Dr. Law Siu-Keung of Hong Kong’s Queen Mary Hospital). Other sources have confirmed this claim. \textit{See, e.g.}, Barbara Basler, \textit{Kidney Transplants in China Raise Concern About Source}, \textit{N.Y. TIMES}, June 3, 1991, at A1. A prominent renal specialist, Dr. M.K. Chan, explained that “[a]lmost all kidneys transplanted in China come from executed prisoners. That’s the main source, along with a few donated by living relatives.” \textit{Id.} In one scenario described by the International League for Human Rights, if a patient needed an eye transplant, the prisoner was shot in the heart. O’Donnell, \textit{supra} note 38. If a donor heart was needed, the prisoner was shot in the head. \textit{Id.} The organs are used not only for Chinese patients, but are also sold abroad. \textit{See} Alexandra George, \textit{Australian Woman Travels to China for Executed Man’s Kidney}, \textit{REUTER LIBR. REP.}, Sept. 5, 1990, \textit{available in LEXIS, News Library, Reuwlrd File}. \textit{See also} Basler, \textit{supra} note 38; \textit{Organ Bazaar, supra} note 13. “Filipino Death Row prisoners began donating organs in 1976 as a part of a program to reduce overcrowding without resorting to widespread executions . . . . [M]ost donor inmates avoided execution and some were freed after spending a few more years in prison.” Beelman, \textit{supra} note 24. This practice became part of an organ brokerage, in which Filipino prisoners were selling their organs through a Japanese middle man to Japanese patients. Isagani de Castro, \textit{Philippines: For Sale Kidneys, at Bargain Prices}, \textit{INTER PRESS SERV.}, May 4, 1989, \textit{available in LEXIS, News Library, Inpres File}. \textit{See also} Suvendrini Suguro, \textit{Japan: Controversy Brewing Over Overseas Organ Transplants}, \textit{INTER PRESS SERV.}, Aug. 12, 1988, \textit{available in LEXIS, News Library, Inpres File}.\textsuperscript{40} Norman Kempster, \textit{New Study Cites Thousands of Bosnia Atrocities}, \textit{L.A. TIMES}, Oct. 23, 1992, at A4. \textsuperscript{41} \textit{Human Organs Sold by Poor for Transplants, Conference Told}, \textit{XINHUA GEN. NEWS SERV.}, Aug. 22, 1989, \textit{available in LEXIS, News Library, Xinhua File} (“Rosalie Bertell, a member of the International Commission of Health Professionals, said that children routinely disappear from the streets in some countries and are believed to be slaughtered for their organs, or sold for adoption and prostitution.”). Children in need
Uruguay, Italy, Argentina, and Brazil. The problem is believed to be so severe that the United Nations has recommended an investigation into the existence of an international network of buying and kidnapping Latin American children for their organs.


43 *Russian Mafia Controls Polish-German Trade in Kidneys*, PAP POLISH PRESS AGENCY, June 25, 1993 (alleging that “many Germans buy kidneys in Poland for 120,000 DM each and have doctors transplant them . . . .” [T]he Russian mafia (also) exploits the anxieties of the terminally ill through press advertisements and direct contacts with hospitals, in order to sell transplant organs . . . .”).

42 *See id.; Sales of Human Organs Thriving in Some Parts of the World* (National Public Radio broadcast, Nov. 27, 1993) [hereinafter *Body Parts Documentary*]. According to Colonel Yuri Dubiyegen, “[o]rgan transplantation is the most profitable business in Russia and it will grow. Everyone knows that you can get away with abducting people for a kidney or for any other organ and they’re convinced the criminals can get off scot-free.” *Id.* See also Anthony Boadle, *Film Exposes Black Market in Human Body Parts*, REUTER LIBRARY REPORT, Nov. 12, 1993, available in LEXIS, News Library, Reuwld File (Commercial documents obtained by the makers of a documentary entitled “The Body Parts Business” showed that one Russian company “sold 700 kidneys, hearts and lungs, 1400 livers, 18,000 thymus glands, 2000 eyes, and 3000 pairs of testicles, which are used for rejuvenating creams.”).

41 *Uruguay Cracks Ring Selling Human Organs*, CHI. TRIB., Nov. 27, 1991, at C10. Police arrested members of a trafficking ring that obtained organs from the poor and sold them for transplants abroad. Their largest market was Brazil. *Id.*

40 *Italy: Denounce Traffic in Peruvian Children*, INTER PRESS SERV., May 28, 1991, available in LEXIS, Nsamer Library, Alnsa File. Italian police discovered a network of traffickers who were kidnapping children from Peru and Brazil, quite possibly to be used for their organs. *Id.*

43 *Body Parts Documentary*, supra note 43. According to Bruce Harris, narrator of the documentary “The Body Parts Business,” an Argentinian judge is investigating a state psychiatric clinic in Montes Dioca where it has been alleged that over 300 corneas have been stolen from the patients living there. *Id.; Maria L. Avignolo, Argentina: Children Robbed of Their Kidneys*, REUTER TEXTLINE SUN. TIMES, Dec. 8, 1991, available in LEXIS, World Library, Txtline File (noting that Julie Cesar Araoz, the Health Minister of Argentina, reported that several children had been kidnapped, had an organ removed, and were sent back home with money in their pocket).

45 Bowcott, supra note 36 (explaining that “[i]n Brazil, bodies have reportedly washed up on the beach, their kidneys surgically removed[”]).

44 Blair & Kaserman, supra note 17, at 416-17 (noting that “the World Health
As immunosuppressant drugs have become more effective in their role of decreasing organ rejection, it has become easier to receive the organ of a stranger. Unfortunately, the medical standards at these “kidney-marts” are so poor that foreigners are being sent home with disease and infection. Oman, the United Arab Emirates, Saudi Arabia, Kuwait, and Singapore have all reported citizens returning home with

Organization is encouraging member countries to outlaw organ sales . . . in part in response to undocumented reports that children from Brazil and Honduras were being sold to organ and tissue traders in other countries who were converting them into ‘organ farms’

See also EP Debates Organ Transplants and Blood Transfusions, REUTER EUR. COMMUNITY REP., Sept. 13, 1993, available in LEXIS, News Library, Reuec File; UN Investigates Traffic of Children’s Organs in Latin America, NOTIMEX MEX. NEWS SERV., Aug. 6, 1992, available in LEXIS, News Library, Notimx File (reporting that children are kidnapped and bought as part of illegal traffic in organs that leads from Latin America into the United States, as well as Israel, Honduras, Guatemala, Paraguay, Mexico, and Brazil). It has been reported that a baby’s kidneys can sell for £25,000, and its heart for £55,000. William Vanvolsem, Britain Linked to Baby Smuggling, DAILY TELEGRAPH, Aug. 13, 1993, at 10. But see Linda Feldman, Soviets Smile, But Fake Stories Continue, CHRISTIAN SCI. MONITOR, Sept. 6, 1988, at 1 (claiming that reports of Latin American children being kidnapped and slaughtered for their organs by the United States are rumors that are being perpetuated by the Soviet government); David Schreiber, Postcard — Mexico: Dead Babies; Persistent Media Sensationalism Keeping False ‘News’ Story of American Kidnapping of Mexican Children for Organ Piracy, NEW REP., Dec. 24, 1990, at 12.


Thomson Prentice, Bombay Is Accused Over Kidney Deaths, THE TIMES, Sept. 21, 1990, available in LEXIS, News Library, Times File (stating that “[t]he HIV epidemic in Bombay is expected to spread wildly since infected people continue to sell blood. Only 5 percent of the blood is checked for HIV, and the virus can be transmitted by a kidney graft even when the donor tests negative.”). See also Wallace, supra note 26 (reporting that “[o]ne facility in southern China, which performs transplants by day, is a disco at night[.]”).

Organ Bazaar, supra note 13 (illustrating that one in fifteen Omanis who received an organ transplant abroad contracted the HIV virus, and many have died); Oswald Pereira, Oman Warning on Kidney Transplants, MIDDLE E. NEWS NETWORK, July 9, 1992, available in LEXIS, News Library, Menn File (“At least five Omani patients who went abroad for kidney transplants ha[ve] died of surgical complications.”).

Prentice, supra note 50 (“Twenty-four Arabs who had kidney transplants with organs they bought from living donors in India died within a year of their operation.”).


AIDS Brought to Kuwait From Abroad, ARAB TIMES, Dec. 13, 1992, available
an organ that was potentially more life-threatening than the one removed. Note, however, that substandard medical practices also plague intra-state organ transplantation. These lax medical standards are a result of lax legal standards allowing the sale of transplantable organs between virtually any two individuals who enter the transplantation clinic.

As a result of these various offenses, a number of "problem" countries where commercial organ sales flourish, as well as many other countries, have decided to ban the practice. Some of these countries include the Philippines, Egypt, Hong Kong, Thailand, Japan, the United Arab Emirates, Russia, Venezuela, Singapore, Ar-

in LEXIS, News Library, Nonus File.

55 India "May Ban Trade in Organs by End of Year," STRAITS TIMES, May 1, 1992, at 30 [hereinafter India May Ban].

A Singapore General Hospital study of patients from 1986 to May 1991 showed that about 150 of the patients who went to India and China returned with serious diseases and infections such as hepatitis and AIDS. Nine died, and another nine had to have their kidneys removed because of infection and rejection.

Id. See Kidney Transplant Patients Infected With Leukemia Virus, KYODO NEWS SERV., May 15, 1993, available in LEXIS, News Library, Nonus File (noting that three Japanese kidney transplant patients from a Hokkaido hospital were infected with a leukemia virus because of unconfirmed donor blood tests).

57 Fox & Swazy, supra note 25, at 68 (reporting that "[b]y 1989 more than 20 countries had instituted political or legal provisions against commerce in organs").


Lucas, supra note 27.


Trading in human organs is prohibited and if it comes to the knowledge of a doctor that the organ has been obtained through pecuniary considerations, he should not perform the transplant . . . . Those violating the law will render themselves liable to jail terms and a fine not exceeding Dh30,000 or both.

Id.

64 Svetlana Tutorskaya, Henceforth, Donated Organs Cannot be Bought and Sold,
Argentina, Uruguay, France, Canada, the United States, the United Kingdom, and the European Parliament. A number of coun-

CURRENT DIG. OF THE POST-SOVIET PRESS, Feb. 17, 1993, at 6 (noting that the law states that if Russian legal norms do not conform to international ones, international norms will prevail).


(1) Subject to this section, a contract or arrangement under which a person agrees, for valuable consideration . . . to the sale or supply of any organ or blood from his body or the body of another person . . . shall be void. (2) A person who enters into a contract or arrangement of this kind . . . shall be guilty of an offense.

Id.

CODIGO PENAL DE LA NACION ARGENTINA [COD. PEN.], Ley 21.541, art. 29, as amended by Ley 23.464 (Eduardo Carlos Hortel ed., 4th ed. 1989) (Arg.). Anyone caught selling or who has the intention of selling organs or other anatomical materials from persons or cadavers will be sentenced to six months to five years in prison. This law also applies to foreigners, and contains a provision for a harsher sentence if the individual is a repeat offender. Id.

CODIGO PENAL DE LA REPUBLICA ORIENTAL DEL URUGUAY [COD. PEN], Ley 14.005 de 17 Agosto 1971, § 34, art. 14, (Antonio Camañio Rosa ed., 3d ed. 1980) (Uru.) (indicating that the transfer of organs or tissues for money or other consideration is punishable by six months to four years in prison, and that it is also illegal to receive money for the actual transplantation of an organ that has been bought).

Loi No. 76-1181, 1976 J. OFFICIEL DE LA REPUBLIQUE FRANCAISE 7365, art. 3, reprinted in 1977 RECUEIL DALL'OEIL SIREY: DE DOCTRINE DE JURISPRUDENCE ET DE LEGISLATION 13 (Without prejudice to the reimbursement of all costs that may occur due to the removal of an organ done in accordance with law, one may not give the donor any monetary compensation for the organ.).

Human Tissue Gift Act, R.S.O., ch. 210, §10 (1980) (Can.), reprinted in Randy W. Marusyk & Margaret S. Swain, A Question of Property Rights in the Human Body, 21 OTTAWA L. REV. 351, 363 (1989). No person shall buy, sell, or otherwise deal in, directly or indirectly, for a valuable consideration, any tissue for a transplant, or any body part or parts thereof other than blood or a blood constituent, for therapeutic purposes, medical education, or scientific research, and any such dealing is invalid as being contrary to public policy. Id.

42 U.S.C. § 274e(a) (1988) ("It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce.").

Human Organ Transplants Act, 1989, ch. 31, §1 (Eng.).
tries, including Poland,\textsuperscript{74} India,\textsuperscript{75} and China,\textsuperscript{76} are considering banning or limiting organ sales.\textsuperscript{77} However, the question lingers whether such bans will be effective in stopping the trade, or whether it will only succeed in driving it underground.

IV. CURRENT LEGISLATIVE PHILOSOPHIES USED IN THE PROCUREMENT OF HUMAN ORGANS

A vast range of organ procurement systems has been employed by different nations, with some states switching from one strategy to another in the process of searching for the most effective system.\textsuperscript{78} Typically, these systems attempt to balance the need to maximize the number of organs procured, and the restraints that religious, ethical, constitutional,

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A person is guilty of an offense if in Great Britain he . . . makes or receives any payment for the supply of, or for an offer to supply, an organ which has been or is to be removed from a dead or living person and is intended to be transplanted into another person whether in Great Britain or elsewhere.

\textit{Id.}

\textsuperscript{73} The European Parliament adopted two resolutions on September 14, 1993: one calls for the unpaid donations of blood; while the other calls for a prohibition on the trading of human organs. Magee, supra note 2, at 2.

\textsuperscript{74} \textit{The Transplant People}, THE WARSAW VOICE, June 20, 1993 (reporting that the proposed law would make trading and transplanting commercially obtained organs illegal).

\textsuperscript{75} \textit{Organ Bazaar}, supra note 13. The Indian Parliament has proposed banning organ sales because they are unethical, and they will be harmonizing their law with the World Health Organization. Experts doubt such a ban will occur because of the fear that all the ban will do is drive kidney sales underground and make them much more dangerous. \textit{Id.} See also India May Ban, supra note 55; India Moves Tough, supra note 36; India to Outlaw Trade in Human Organs, XINHUA GEN. NEWS SERV., Nov. 4, 1991, available in LEXIS, News Library, Xinhua File.

\textsuperscript{76} \textit{China to Crack Down on Organ Sales for Transplant}, REUTER LIBR. REP., Oct. 6, 1992, available in LEXIS, News Library, Reuwlid File.


\textsuperscript{78} Sixth Parliament Report, supra note 66, at A7-A10. Singapore decided in 1987 to switch organ procurement strategies from voluntary donations to a presumed consent system due to the ineffectiveness of the voluntary system, as well as to the success of the Spanish change from voluntary donations to presumed consent. \textit{Id.} The Report notes that “[w]hen [Spain] introduced the [presumed consent] law in 1979 the number of transplantations was 100. But by 1984, the figure had shot up to 1000.” \textit{Id.} See also Tan L. Khoon, \textit{Organ-Donation Law: A Necessary Transplant?}, 7 SING. L. REV. 1 (1986); Iyer, supra note 29.
and property rights put upon the legislature. Some procurement strategies have ulterior motives, such as promoting a sense of community and volunteerism or creating a profit. Other states have not acted at all, creating a legal vacuum and a potential of extreme abuses. Though a state’s legislative body may evince a desire to procure as many organs as possible, while avoiding any restraints upon the procurement rate, legislative action typically occurs only in response to a particular factual situation requiring immediate action. In the United States, the National Organ Transplant Act was enacted in 1984 for the dual purposes of countering a proposal by Dr. H. Barry Jacobs M.D. to establish a brokerage in human kidneys from healthy, live donors, as well as to firmly establish that voluntary donations were the method of choice in the United States. This enactment made the sale of human organs a federal crime. In England, the Human Organ Transplant Act was enacted in 1989 after the revelation of the story of a destitute Turkish citizen who

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79 See generally Hansmann, supra note 7 (discussing restraints placed on organ procurement); Silver, supra note 16, at 694 (discussing the competing interests balanced by the authors of the 1968 Uniform Anatomical Gift Act).
80 Blumstein, supra note 12, at 466.
81 In China, “circumstantial evidence is accumulating that ... the transplant business [is being turned into] a source of hard currency.” Ronald Bailey, Should I Be Allowed to Buy Your Kidney, FORBES, May 28, 1990, at 365. In the past decade, eleven thousand people have reportedly been executed with a shot in the head, a method that is preferred because it maximizes a doctor’s chances of harvesting viable organs from the prisoner’s body so they can be transplanted into foreigners. Id. See also Peking Offers Organ-Transplant Service by Shooting Prisoners, CENT. NEWS AGENCY, July 5, 1990, available in LEXIS, News Library, Cenews File; O’Donnell, supra note 38. Cuba has also expressed the desire to profit from organ transplantation to foreigners. Bernd Debusmann, Cuba Hopes to Become International Medical Centre, REUTER N. EUR. SERV., July 4, 1986, available in LEXIS, News Library, Reuwld File.
82 Fox & SWAZEY, supra note 25, at 68.
83 Butler, supra note 41, at 201 (noting that a flurry of legislation in the United States was prompted by the “mere possibility” that organs would be traded).
85 Fox & SWAZEY, supra note 25, at 65. Dr. Jacobs was the founder and director of International Kidney Exchange, Inc. This brokerage company wrote to 7500 hospitals in the hopes of starting an international market using the purchased kidneys of the disadvantaged to sell to Americans. In addition to stirring the United States Congress, Jacobs’ plan also was denounced by The National Kidney Foundation, The Transplantation Society, the American Society of Transplant Physicians, and the American Society of Transplant Surgeons. Id. See also Note, supra note 14, at 1021-22.
87 Human Organ Transplants Act, 1989, ch. 31, §1 (Eng.).
had traveled to London in order to sell his kidney.88 This act like the others, also prohibits organ sales. The hasty consideration and passage of each of these laws has recently been criticized by various commentators who are urging reconsideration of these laws as well as calling for a lifting of the ban on organ sales.89 If these, and other countries, decide to reconsider their laws, they must remember that while organ procurement can be an emotional issue, emotion should not be the controlling factor; rather, analysis of the best method for reasonably increasing the number of organs procured must be the guiding principle.

Currently, four types of procurement systems are employed, or have been given serious consideration, by various countries. While no system has yet proven itself perfect, each possesses certain advantages and disadvantages that make it possible to consider one superior to all others. This section attempts to explore each of these systems and enumerates their differing characteristics.

A. No Domestic Organ Procurement: Importation of Organs and Traveling to Other States to Obtain Organs

There are only a few nations that have no organ procurement strategy, usually because of certain cultural taboos that are so strong that organ procurement cannot be justified. Japan and Iran are examples of these countries.90 Although Japan has had a donor card system in place since 1977,91 its Health and Welfare Ministry has only recently proposed setting up an organ procurement information network.92 Strong Buddhist

90 The Iranian Parliament recently rejected a bill that would have allowed family members to voluntarily donate the organs of brain dead donors. See Iran Rejects Transplant Bill, THE INDEPENDENT, Sept. 27, 1993, at 12 [hereinafter Iran Rejects]. Although the Ayatollah Khomeini issued a decree in 1986 permitting organ transplantation, and Iran's present spiritual leader, Ayatollah Ali Khamenei, as well as Iran's president, Ali Akbar Hashemi Rafsanjani, also endorsed organ transplantation, the bill was apparently rejected on religious grounds. See Iran Rejects, supra at 12; Rafsanjani Encourages Donation of Organs of Dead, AGENCE FRANCE PRESSE, Aug. 14, 1993, available in LEXIS Nexis Library, AFP File.
91 Brannigan, supra note 62, at 182. Subsequently, Japan also stipulated that family consent had to be obtained, and that no particular recipient was needed at the time of removal. Id.
92 Organ Transplant Info and Liaison Network Launched, REP. FROM JAPAN, Feb.
and cultural traditions that forbid removal of organs because of a belief that the corpse must be buried intact,\textsuperscript{93} coupled with transplant physician mistrust,\textsuperscript{94} and a refusal to legislatively define death as brain death instead of cardio-pulmonary death,\textsuperscript{95} have resulted in a virtual absence of donor organs in Japan.\textsuperscript{96} Japan satisfied kidney demands through American imports through the mid-1980's,\textsuperscript{97} and continues to import eyes, corneas, serum, and blood.\textsuperscript{98} Demand for kidneys and other organs today is substantially met through travel abroad to reportedly buy or otherwise obtain organs from donors in India,\textsuperscript{99} Sri Lanka,\textsuperscript{100} the Philippines,\textsuperscript{101} China,\textsuperscript{102} Australia,\textsuperscript{103} and elsewhere.\textsuperscript{104}

Recent concern over Japan's "international reputation as a consumer of body parts that can't be obtained at home,"\textsuperscript{105} and the fear of "transplant friction" joining "trade friction" is adding to international anger toward the Japanese over perceived unfairness.\textsuperscript{106} These factors have helped prompt probable reform of this system of procurement, by resulting in proposals for the establishment of a brain-death law.\textsuperscript{107} transplant

\textsuperscript{93} Yutaka Sato, \textit{A Buddhist Perspective on Transplants}, \textit{Nikkei Weekly}, May 16, 1992, at 24, \textit{available in LEXIS}, Nexis Library, Nikkei File. According to Buddhist tradition, "even the nails or hair of the dead retain connection to the soul . . . ." \textit{Id.}

\textit{See also} Brannigan, \textit{supra} note 62, at 182, 183.

\textsuperscript{94} Brannigan, \textit{supra} note 62, at 182.


\textsuperscript{96} Brannigan, \textit{supra} note 62, at 182 ("In 1988, 11,895 of the 88,534 chronic dialysis patients were on the waiting list for kidneys from cadavers. Yet the average number of cadaver kidney transplants in Japan remained under 200 per year.").

\textsuperscript{97} Sam Jameson, \textit{Japan in Search of its Heart}, \textit{L.A. Times}, Feb. 22, 1992, at A1 (showing that the importation ended when American suppliers balked).

\textsuperscript{98} \textit{Id.}

\textsuperscript{99} \textit{Id.}

\textsuperscript{100} \textit{Id.}

\textsuperscript{101} \textit{Id.}

\textsuperscript{102} \textit{Id.}


\textsuperscript{104} Brannigan, \textit{supra} note 62, at 185. Forty children with biliary atresia, a liver disease, have sought transplants overseas. There has also been media attention given to Japanese transplants in Canada and London. \textit{Id.}

\textsuperscript{105} \textit{Id.}

\textsuperscript{106} Jameson, \textit{supra} note 97, at A1.

\textsuperscript{107} Brannigan, \textit{supra} note 62, at 185 (noting that by the end of 1990, 47% of the Japanese generally, and 65% of the professionals, favored brain-death criteria; addition-
hospitals, and a national transplant network center. In a world market that suffers from a lack of a safe and reliable supply, importation of organs is perhaps the least reliable method of organ procurement.

B. Voluntary, Non-Pecuniary Donation of Human Organs

Though the precise form may differ across jurisdictions, the principle behind voluntary donation is that the donor freely gives prior consent to a medical team to remove the needed organs. By law, no financial remuneration is allowed for the organ donor, beyond any expenses incurred in connection with the harvesting of the organ from the donor. The voluntary donor can be living or dead, though most often it is a cadaveric donor. The motivation behind donation in such a system varies: altruism, coercion, and moral duty have all been cited as incentives. The voluntary donor allocation system seeks to avoid

ally, numerous government task forces and commissions are looking into the feasibility of a brain-death law. See also Diet Panel Urges Organ Transplant Bill, YOMURI NEWS SERV., May 20, 1993, available in LEXIS, News Library, Nonus File (noting that a Diet panel urged early passage of laws allowing organ transplantation, including a brain-death law); Japan Moves Toward Allowing Heart Transplants, REUTER LIBRARY REPORT, Dec. 3, 1993, available in LEXIS, News Library, Reuwl File (Japan currently is considering a bill that, while not officially defining brain death as the legal definition of death, would allow brain-death criteria to be used when considering the removal of an organ for transplant.).


Another country that has practiced importation as an organ procurement technique is India, which imports eyes from Sri Lanka. M. Zakaria Siddiqi, Legal Issues in Human-Organ Transplant: Indian Perspective, 7 ISLAMIC & COMP. L. Q. 144, 159 (1987). India, however, is not alone. As of 1987, Sri Lanka had exported 19,664 pairs of eyes to 133 cities in 53 countries. Id.

111 Cohen, supra note 6, at 12.


114 Kleinman & Lowy, supra note 112, at 1485 (noting that if a close relative's life is in the balance, donation is probably not "voluntary," but rather, coerced). See also Note, supra note 14, at 1034.

the commercialization of organs on the premise that such an act is contrary to societal values. However, numerous commentators, bolstered by public opinion polls, have argued that the public is willing to accept financial incentives to increase organ procurement. Additionally, other programs, such as required request, mandated choice, and family consent are used to further bolster voluntary donations. Such programs have been implemented in nations that have found the altruistic incentive that a voluntary system offers is insufficient to meet the demand for transplantable organs.

1. Voluntary, Inter-Vivos Donations

Donation of a paired organ, such as a kidney, and the donation of other replenishable bodily products such as blood, plasma, skin, and bone marrow are all possible by living donors. Other more unconventional, albeit possible, donations by living donors are feasible, including eyes, testicles, and parts of livers. States that allow voluntary donation by living donors generally limit the potential donors to family members, on the belief that a non-family member has no real incentive to donate, and therefore, could actually be selling the organ. States that have not enacted a brain-death law, yet want to avoid commercialization of organs, find themselves in the odd position of allowing only voluntary, inter-vivos donations. Such a procurement strategy results in few organs and, in effect, encourages human rights violations through organ procurement practices.

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116 Note, supra note 14, at 1034.
117 Warren, supra note 1. In a recent poll, 56% of the United States public stated they would be willing to purchase an organ for a loved one if necessary. Id. Another poll found that 52% favored some sort of financial compensation for human organs, while only 22% opposed any compensation. Id.
118 Siddiqi, supra note 110, at 144-45.
119 Id. at 150 (noting that this practice is generally considered morally and ethically wrong).
120 Chris Wood et al., The Transplant Revolution, MACLEAN'S, Nov. 23, 1987, at 34, 36. Doctors at the Hubei Medical College in Wuhan, China, transplanted a functioning testicle from father to son. The recipient has since had a child, who according to geneticists, is the father's half-brother. Id.
122 Price & MacKay, supra note 89, at 1307 (commenting on the British Human Organ Transplant Act). Such an attitude, however, ignores the incentives one would have in donating to a friend.
123 Genasci, supra note 36. In Brazil, which has no brain-death law, 80% of the
2. Voluntary, Cadaveric Organ Donations

The cadaveric organ donor can donate at least twenty-five different body parts and fluids. Most, though not all, of the organs and tissues that are collected from such an individual must be harvested while the heart and lungs are still oxygenating the body, despite the fact that the person is brain dead. Therefore, in order for such a program to work the country must have a brain-death law, because once the heart dies, the other organs die as well, and are useless for transplantation. There must also be some system through which the donor can indicate a willingness to donate, whether it is through a computer registry, the carrying of an organ donor card, executed through a will, or is indicated on a driver's license.

Altruism has been cited as the primary incentive for citizens during their lives to volunteer to donate their organs after death. Proponents of an altruistic system of organ recovery identify social benefits of the process of donation. Organ donation affirms socially valued human interactions. The donor's experience in enhancing or saving another's life brings the social community together. Altruism was the guiding principle used by lawmakers in the United States in formulating the National Organ Transplant Act. It was believed that commercial sales might lead to the collapse of the voluntary organ donor system, and result in an overall decrease in available organs.

kidneys for transplant come from relatives. The result is that out of 50,000 potential kidney transplant candidates in Brazil (determined by the World Health Organization), only 500 received kidney transplants. Id. Additionally, Brazil has been cited numerous times as a nation where human rights violations occur in connection with organ procurement.

Cohen, supra note 6, at 3. This list of organs available from a cadaveric donor includes parts of the inner ear, a variety of glands — pancreas, pituitary, thyroid, parathyroid, and adrenal — blood vessels, tendons, cartilage, muscles — including the heart — testicles, ovaries, fallopian tubes, nerves, skin, fat, bone marrow, blood, livers, kidneys, corneas. Id. Lungs, fetal brain tissue, plasma, semen, ova, stomachs, small intestines, and eyes can also be added to this list.

McIntosh, supra note 113, at 178.

Id.

Note, supra note 14, at 1034.

Id. at 1033. This actually has occurred in Oman, where voluntary organ donations are virtually non-existent, since those needing an organ — specifically a kidney — travel to India to purchase one. Organ Bazaar, supra note 13. One Omani transplant surgeon reported that he had not performed organ transplant surgery in eight months,
It seems, however, as if "altruism" is a procurement method preferred by medical professionals and the government, but not the market. Generally, the effectiveness of voluntary donation in producing maximum organ procurement is poor, though exceptions do exist. There has been such a consistent lack of organs procured by such a system that various laws have been introduced to increase voluntary donation. One of these laws is the required request law that mandates that the attendant doctor or nurse ask the next of kin of a viable organ donor if the patient’s organs may be donated. The problem with such a system is that often the physician does not ask the family if they wish to donate the deceased’s organs. Additionally, many doctors still ask for familial consent even though the deceased carried an organ donor card which unequivocally gave prior consent. While such a system has had

since there were no organs to transplant. He attributed the organ shortage directly to the organ sales occurring in India. Id. Relatives of one Omani with end-stage renal failure refused to donate one of their own kidneys, knowing that there are those in India who will sell one kidney, and bear the risk of living with only one. Id.

Health Care Professionals Oppose Financial Incentives for Organ Donation, PR Newswire, Apr. 14, 1992, available in LEXIS, News Library, Prnews File. "[O]rgan donation will be better off if we keep commercialism out of what should be an act of good will," according to Dr. Russel H. Patterson, Jr., chief of neurosurgery at the New York Hospital-Cornell Medical Center. Id.; see also Warren, supra note 1 (noting that "[a] number of polls of health care professionals have found a significant majority — 60% to 80% — firmly oppose offering payment for donation . . . . "). It is important to note, however, that the transplant doctors and nurses, the hospitals, the organ transport teams, the organ registries, and the drug companies, all receive payment or government funding.

Ireland, which relies on an informal principle of informed consent of donors and their next of kin, has the one of the highest number of organ donors in Europe. Magee, supra note 2, at 2. Although Ireland currently enjoys a procurement rate of 20 donors per million — as compared with the 18 per million in the United States and 15.1 per million in Britain, Trish Hegarty, Reduction in Kidney Transplants Worries Medical Authorities, IR. TIMES, Aug. 27, 1993, at p. 2, and Austria's 60 per million, Changes Needed to Get More Kidneys, STRAITS TIMES, May 27, 1992, at L2 — Ireland's donation rates are leveling off, or possibly even declining. Hegarty, supra note 130, at 2.

Cohen, supra note 6, at 21.

John George, Up for Debate: Improving Odds for Those Awaiting Transplants, PHILA. BUS. J., Dec. 2, 1991, at 1. A recent study has found that routine request laws were typically being ignored. Among participating hospitals in the Delaware Valley Transplant Program, it was found that "nearly half of potential organ donors were overlooked." Id.

Wood et al., supra note 120, at 35. One Canadian source noted that "most doctors honor surviving relatives' decision not to donate their loved one's organs —
the effect of increasing organ donation in the United States, there is still a vast organ deficit that voluntary donation has not solved.134

The resulting lack of procured organs has led some commentators to suggest that an incentive would increase organ donations. The only proposal which does not involve some sort of financial compensation is one that would give avowed organ donors priority in receiving organs should the situation arises in which the subject donor needed transplant surgery.135 One objection to such a proposal is that it discriminates against those who refuse to donate for "valid" religious reasons.136 Another is that it discriminates against the procrastinating donor.137 Still another is that it may erode the incentive of pure altruism.138 Priority may not be an effective market incentive in the voluntary donation scheme because of the public's general lack of willingness to consider their own mortality.139

There has even been the unique argument made in the United States that the government's exclusive control over the procurement and distribution of transplantable organs is a violation of anti-trust laws.140 Since the government has empowered, through statute, only one agency to procure and distribute organs, this agency has a monopoly that can stifle any competition that could result in more efficient operations.141 The fact that organ procurement and distribution is an admittedly "special" market should not matter, "since the Supreme Court has rejected arguments that the special characteristics of a particular industry justify anti-competitive arrangements on the ground that they 'will better promote trade and

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134 See Cohen, supra note 6, at 21-24. Currently, as many as six Americans die each day waiting for a donor organ. Organ Bazaar, supra note 13.
135 Kleinman & Lowy, supra note 112, at 1485.
136 Peters, supra note 115, at 180-81. Note that many religions, however, have expressly declared that organ donation is acceptable. William Montalbano, New Vatican Catechism Updates 1566 Version, L.A. TIMES, Nov. 17, 1992, at A1 (according to the new catechism, "transplanting of organs is acceptable only when the donor consents").
137 Peters, supra note 115, at 180.
138 Kleinman & Lowy, supra note 112, at 1487.
139 Cohen, supra note 6, at 11 (observing "[t]hat eighty percent of Americans die without a will is suggestive that, even where there are compensating personal benefits, we are reluctant to come to grips with our own mortality["").
140 See Hawley, supra note 4, at 1111-24.
141 Id. at 1112 (noting that "[b]y virtue of NOTA, the OPTN [Organ Procurement Transplantation Network] has a monopoly over national computerized organ procurement networks, and each OPO [Organ Procurement Organization] has a monopoly over its individual service area["").
commerce than competition." Other arguments that have been made against voluntary donation address the property rights of a donor and privacy rights a donor may have in his organs and tissues. The common law tradition in the United States, however, has been that the donor may have, at best, a quasi-property interest in the disposition of his body once he has died. All of these arguments are equally applicable in the next system of organ procurement — presumed consent.

C. Presumed Consent or Opting-Out

Presumed consent is one of the more frequently employed methods of organ procurement in Europe, among other places in the world. This system has even enjoyed limited success in the United States with respect to procuring cornea transplants. Under a presumed consent system, the state adopts the presumption that the donor wishes to donate organs, unless it was indicated otherwise during life. France, for example, enacted an organ procurement statute employing presumed consent in 1976. Known as the Caillavaet Law, a person may “opt-

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142 Blumstein, supra note 12, at 491 (quoting National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 688 (1978)). However, Blumstein notes that “[i]t is possible to argue . . . that the antitrust laws should not apply to the conduct of UNOS and the OPTN. Any claim of immunity . . . must come from either an express statutory exemption or an implied or inferred immunity.” Id. at 493.

143 Cohen, supra note 6, at 19.

144 Karen L. Johnson, The Sale of Human Organs: Implicating a Privacy Right, 21 VAL. U. L. REV. 741, 754 (1987) (noting that “an individual’s right to choose to sell an organ . . . should be accorded constitutional protection, and the government should not unnecessarily interfere with the individual’s exercise of that right[.]”). See also Note, supra note 14, at 1025.

145 Silver, supra note 16, at 690-91.


147 See State v. Powell, 497 So. 2d 1188 (Fla. 1986); Georgia Lions Eye Bank, Inc. v. Lavant, 335 S.E.2d 127 (Ga. 1985) (holding that a statute giving the coroner the presumed consent of the donor to remove the deceased’s corneas without family inquiry is constitutional); Gerson, supra note 146, at 1019-20. But see Brotherton v. Cleveland, 923 F.2d 477 (6th Cir. 1991) (holding that a coroner violated due process by taking the deceased’s corneas during an autopsy without family consent and deprived the plaintiff, the deceased’s wife, of property rights in her dead husband’s body).

148 Cohen, supra note 6, at 15.

149 Loi No. 76-1181, 1976 J. OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE 7365, art. 2,
out" from donating organs simply by signing a writing to that effect.\textsuperscript{150} Singapore recently passed a variation of the standard opt-out law.\textsuperscript{151} The Singapore law includes a specific religious exemption for Muslims,\textsuperscript{152} who must "opt-in" to the organ donation program in order to have the same priority in receiving an organ as those who are presumed to consent to organ donation.\textsuperscript{153} Muslims were forbidden by Islamic law to donate organs when the law passed in 1987,\textsuperscript{154} but a subsequent Fatwa, or religious decree, has found organ donation — though not organ sales — to be acceptable, as long as the organ is used for transplantation purposes.\textsuperscript{155} An educational drive was recently mounted in Singapore which

\textsuperscript{150} See generally Gerson, supra note 146, at 1022.

\textsuperscript{151} Sixth Parliament Report, supra note 66, pt. II, § 5.

\textsuperscript{152} Sixth Parliament Report, supra note 66, pt. III, § 12.

\textsuperscript{153} See generally Iyer, supra note 29, at 135. Previously, however, non-consenting Muslims were given the same priority as other consenting Singaporeans for receipt of dialysis treatment. The Singapore National Kidney Foundation, however, changed their policy, giving non-consenting Muslims the same priority on dialysis machines as others who have opted-out of the donor system, since the Muslims were unfairly benefiting from the law at the expense of non-consenting non-Muslims, as well as consenting non-Muslims. Mardiana Abu Bakar, \textit{NKF: "Our Resources Are Being Drained."}, STRAITS TIMES, Sept. 23, 1993, at 5. This policy was passed in hopes of inspiring Singapore's Muslims to opt-in to the donation system. Mardiana Abu Bakar, \textit{NKF's New Move "Tough But Fair"}, STRAITS TIMES, Sept. 23, 1993, at 5.

\textsuperscript{154} See generally Iyer, supra note 29, at 135 (discussing the proposed law).

\textsuperscript{155} Id.; Iyer, supra note 29, at 135. Previously, however, non-consenting Muslims were given the same priority as other consenting Singaporeans for receipt of dialysis treatment. The Singapore National Kidney Foundation, however, changed their policy, giving non-consenting Muslims the same priority on dialysis machines as others who have opted-out of the donor system, since the Muslims were unfairly benefiting from the law at the expense of non-consenting non-Muslims, as well as consenting non-Muslims. Mardiana Abu Bakar, \textit{NKF: "Our Resources Are Being Drained."}, STRAITS TIMES, Sept. 23, 1993, at 5. This policy was passed in hopes of inspiring Singapore's Muslims to opt-in to the donation system. Mardiana Abu Bakar, \textit{NKF's New Move "Tough But Fair"}, STRAITS TIMES, Sept. 23, 1993, at 5.
resulted in Muslim kidney pledges (kidney donations increased by sixty-seven percent).\textsuperscript{156}

Presumed consent, when strictly followed by the state, has proven to be the best practiced method of maximizing organ procurement.\textsuperscript{157} For example, in Austria, sixty cadaveric kidneys are retrieved for every one million persons, a rate that is twice that of the United States and most other European countries.\textsuperscript{158} Some commentators have actually suggested that this system is working too well, and that some surgeons have lost their sense of discrimination as to who should and should not receive kidney transplants.\textsuperscript{159} While some may believe this is a valid objection, it is currently without merit given the dearth of procured organs worldwide. Even among presumed consent states, there remains a deficit of procured organs, though often it is because the procurement system is being improperly administered by health care professionals.\textsuperscript{160} Despite a

The object of transplanting a kidney from the body of a deceased Muslim to that of a donee is primarily and exclusively to save life. On no account can a kidney be allowed to be removed from the body of a Muslim for other purposes such as carrying out medical research, advancement of medical science, etc.


\textit{Id.} Muslims "Now More Aware of Kidney Plight," \textit{STRAITS TIMES}, Sept. 8, 1992, at 25. Out of 1000 Muslims that pledged kidneys, 400 pledged during a month-long awareness program. However, this number is inconsequential when compared to the 250,000 Muslims that live in Singapore. \textit{Id.} As of September, 1993, 1300 Muslims had opted into the donation system. Bakar, \textit{supra} note 155.

\textit{Id.} LAMB, \textit{supra} note 21, at 147 ("If the sole criterion is a policy that will maximize the number of organs under the most efficient methods, then contracting out is the most satisfactory strategy . . . ."); MEYERS, \textit{supra} note 16, at 192. It has been argued that legislation to date has not been adequate to provide the organs needed for transplantation. A statute creating a presumption of intent to donate organs after death, that would control in the absence of direct evidence to the contrary, would undoubtedly be more effective in producing a supply of organs. \textit{Id.}

\textit{Id.} Changes Needed to Get More Kidneys, \textit{STRAITS TIMES}, May 27, 1992, at 2. This number is also three times better than the procurement rate in Singapore, \textit{id.}, though this may be because Muslims are automatically exempt by law from having their organs procured. \textit{See} Sixth Parliament Report, \textit{supra} note 66, pt. II, § 5.


\textit{Id.} Ontario Ministry of Health, \textit{supra} note 146, at 40.
presumed consent law, there is still a waiting list for organs in France. One reason is that French doctors, in an effort to avoid administrative problems, ask for familial consent to harvest the organs, even though, legally, the family has no interest in the disposition of the deceased's organs. Poland has also encountered similar problems of non-consenting families accusing surgeons of illegally appropriating organs, even though Polish law presumes consent. However, some countries which have laws based on presumed consent such as Finland, Greece, Italy, Norway, Spain, and Sweden, also insist that physicians consult with the deceased's relatives.

Still, presumed consent countries such as France, Belgium, and Austria have higher procurement rates than altruistic systems such as the one existing in the United States. Therefore, it is not surprising that seventy-eight percent of transplant surgeons in the United States were in favor of adopting a presumed consent system. Other countries, like Israel, are finding that their poor organ retrieval numbers are not only

Presumed consent has been initiated in at least 17 countries (largely in Europe) but without evidence of increased organ retrieval. This should not be taken as proof that presumed consent is an ineffective method ... [T]he most significant block may be professional and, until it is removed, one will not know what impact presumed consent may have.

Id.

Gerson, supra note 146, at 1024-25 (noting that "[i]n 1984 there were nearly a thousand kidney transplants performed in France, but almost three thousand people remained on the waiting list["").

Id. at 1025-27 (stating that physicians "are dissuaded by bureaucratic requirements and are unsure of their legal footing[""); Greg Del Bigio, Recorded Consideration: A Policy for Organ Procurement, 9 HEALTH L. CAN. 67, 70 (1989) ("[D]espite legislation enabling them to do so, French physicians were not willing to remove organs from a cadaver without the consent of family members.").

Krzysztof Grzegzolka, Organ Transplants: Moral Dilemma, WARSAW VOICE, Nov. 24, 1991, available in LEXIS, Nexis Library, Wrsaww File. Organ procurement in Poland is done under a 1929 ordinance that was last reviewed in 1949. Id. "The surgeons' work is made even more difficult because Polish society is not familiar with this method of treatment and does not fully accept it." Id.

A Polish law is currently under consideration that would re-affirm Poland's use of presumed consent, as well as outlawing organ sales. The Transplant People, WARSAW VOICE, June 20, 1993, available in LEXIS, Nexis Library, Wrsaww File.

LAMB, supra note 21, at 141. Compare this, however, to Austria, the Czech Republic, Denmark, France, Israel, Poland, and Switzerland, where "physicians may proceed without asking the next of kin, unless a prior objection has been raised by the family of the deceased." Id.

Warren, supra note 1.

Id.
lowering transplantation domestically, but are resulting in their exclusion from international procurement agencies. Such countries are being urged to adopt a law of presumed consent. In addition, transnational bodies like the Council of Europe have recommended that Member States adopt a system of presumed consent, recognizing the "invaluable importance of substances for transplantation, the shortage of substances available, and the interests of sick persons." To date, thirteen of the twenty-one Member States of the Council of Europe have enacted presumed consent legislation.

Even though, when properly applied, presumed consent has proven to be a highly efficient means of procuring organs, many jurisdictions have rejected presumed consent in favor of other procurement methods preserving the legal right of the individual to make decisions concerning the disposition of the body. Specifically, such critics argue

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167 Siegel, supra note 27. "French health authorities recently barred all their hospitals from performing organ transplants on Israelis. Britain is expected to be the next to establish such a ban, and all the rest of the European Community will follow suit within two years." Id. This is due to Israel's lack of organ contribution in the Eurotransplant organ network agency. Id.; see also Judy Siegel, Israel, Cyprus Sign Accord on Transplants, JERUSALEM POST, Nov. 17, 1993, at 3. Israelis join Italians in being banned from receiving organ transplants in France. Siegel, supra note 27. See also, Siegel, supra note 167 (noting that under the terms of a medical accord between Cyprus and Israel, Cyprus will send organs to Israel, while Israel will reciprocate by teaching Cypriot surgeons how to perform organ transplants).

168 Siegel, supra note 27. One Hadassah doctor urges that Israel adopt a law that proclaims cadaveric organs to be a national resource, removable by the state absent an opting-out during the donor's life. Id.

169 Res. of the Comm. of Ministers, supra note 77, art. 9.

170 Council of Europe, Removal, Grafting and Transplantation of Human Substances, 1 INT'L J. MED. & L. 385, 400 (1979). The Council also stressed the article 10 be considered a "long term aim." Id.

171 LAMB, supra note 21, at 141.


There is no doubt that the approach favoured [sic] by these European countries, [presumed consent], is the most suitable one for the purposes of health care in general, because it is the solution which provides the largest number of organs for transplantations in societies where voluntary donation is wholly inadequate to provide sufficient numbers to satisfy demand.

Id.


174 Cohen, supra note 6, at 16 (suggesting that "escheatage seeks to diminish a
that presumed consent will "lead to a situation where the poor, the uneducated, and the legally disenfranchised might bear a disadvantageous burden, and only the more advantaged groups would exercise autonomy," since only the more advantaged groups would be aware of their right to opt-out. Other critics fault presumed consent with eliminating the societal benefits inherent in the charitable act of actively donating an organ. Another concern centers on the legal objections family members may try to raise, as they have in France, Poland, and the United States. Presumed consent is also disfavored because the procrastinating or reluctant dissenter may not be able to properly exercise his right to opt-out. There is also a concern that an individual who has properly opted-out may accidentally have his organs removed. Some are even concerned that physicians would become less attentive to es-

person's property rights in his own body["); Johnson, supra note 144, at 755 (emphasizing that "[t]he decision to have an organ removed for transplant . . . involves a fundamental right since it concerns one's personal health and the integrity of one's body["]).

LAMB, supra note 21, at 142.

Del Bigio, supra note 162, at 70 ("Unless it could be ensured that all persons would be appropriately educated with respect to organ donation, the system of opting-out cannot meet the condition of autonomy." (emphasis in original)).

LAMB, supra note 21, at 141 ("If organ donation is one of the supreme gifts that one individual can bestow on another, it is argued, society cannot afford to lose such altruistic practices, the benefits of which spread further than the demand for more transplantable organs.").

Warren, supra note 1 ("Many experts fear that adopting presumed consent will lead to a plethora of lawsuits challenging the system's right to remove organs and tissues without family consent.").

See Brotherton v. Cleveland, 923 F.2d 477 (6th Cir. 1991) (holding that the removal of a cornea by the coroner without actual consent is unconstitutional). Note that many states in the United States do have a presumed consent law for the procurement of corneas, and other states are considering limited presumed consent laws for other organs. See Legislature Briefs, HOUSTON CHRON., May 25, 1993, at 14 (stating that Texas has proposed a law that allows for removal of a cadaver's organs if the body is unclaimed for four hours); Ed Davis & Sandy Hamm, Legislators Ponder Law to Claim Body Organs, NEW PITTSBURGH COURIER, July 14, 1993, at A1 (relating a proposed Pennsylvania law allowing for presumed consent to donation unless the deceased had opted-out).

Silver, supra note 16, at 706 (arguing that "[p]resumed consent, however, insidiously exploits the citizen's regrettable reluctance to dissent, even though dissent is her right . . . [and that] [e]xploitation of one's reluctance to assert her rights is not a sound basis for social policy["].)
tablishing that a donor was truly brain dead prior to removal.\textsuperscript{181} These concerns will be addressed and countered in Section VI.

A final variation on presumed consent is one that does not allow any opting-out at all. This has also been called an organ draft or conscription — similar to a military draft.\textsuperscript{182} Such a law would most easily be accomplished by nationalizing cadavers,\textsuperscript{183} similar to the way many other potentially commercial goods and industries are nationalized. Such an approach, however, would present serious legal problems in many Western countries, as well as potential ethical and political problems in most other countries worldwide.

D. Organ Trade and Sales

Legal organ sales are perhaps the most controversial of all the proposed organ procurement systems. As with presumed consent, there are numerous variations of the legalized organ sale, from live organ brokerage\textsuperscript{184} and organ futures markets\textsuperscript{185} to an income tax deduction\textsuperscript{186} or health insurance reduction incentive.\textsuperscript{187} Organ sales are premised on the legal assumption that an individual has a property right in the body, both during life and after death.\textsuperscript{188} Because this private property right exists, it is illegal for the government to limit this right by prohibiting organ sales either through a presumed consent system or a voluntary donation system.\textsuperscript{189} Commentators who support organ sales as a method of organ procurement further bolster their argument by claiming that financial remuneration would provide the needed incentive to donate organs and reduce the organ deficit in the domestic market.\textsuperscript{190} Hypothetically, a well-regulated commercial market provides the incentive for the procrastinating donor, the donor who does not wish to contemplate death,\textsuperscript{191} and

\begin{footnotes}
\item[181] Butler, \textit{supra} note 41, at 204.
\item[182] For further discussion see \textit{id}.
\item[184] Note, \textit{supra} note 14, at 1020-22; Edlund, \textit{supra} note 35.
\item[185] Cohen, \textit{supra} note 6, at 32-36.
\item[187] Hansmann, \textit{supra} note 7, at 63-65.
\item[188] Cohen, \textit{supra} note 6, at 19.
\item[189] \textit{See} Hansmann, \textit{supra} note 7. \textit{See also} Johnson, \textit{supra} note 144.
\item[190] Cohen, \textit{supra} note 6, at 34; Hawley, \textit{supra} note 4, at 1127 (stating that "[t]he sale of organs potentially could increase the number of donor organs procured because the profit motive is generally regarded as stronger than altruism[""]).
\item[191] Cohen, \textit{supra} note 6, at 10-11.
\end{footnotes}
gives hospital personnel an incentive to determine if a possible candidate for organ donation is in fact an organ donor.\textsuperscript{192}

Unfortunately, no well-regulated commercial market for human organs currently exists; those countries where organ sales are legal\textsuperscript{193} are among the worst violators of human rights and the exploitation of the poor. This should not be seen as a problem with the particular commercial system, but as a problem endemic to the nations which procure organs in such a manner. In fact, some proponents of a commercial organ market argue that such a system would eliminate the black market.\textsuperscript{194}

The reasons most often cited for the prohibition of organ sales are ethical, moral, and are not based on empirical evidence.\textsuperscript{195} For instance, there is a significant concern that the sale of organs will cheapen life, analogizing such a practice to selling one's self into slavery.\textsuperscript{196} Others argue that potential sellers have no right to sell what does not belong to them.\textsuperscript{197} A few even believe that human organs fall into the category of something that cannot be sold.\textsuperscript{198} However, many commentators argue that "ethical"

\begin{itemize}
  \item \textsuperscript{192} \textit{Id.} at 34 (suggesting that "a cause of action for negligence should be established on behalf of the estate and/or the organ purchasing agency against the hospital for the financial value . . . " of not procuring the organs of someone who has already signed a contract to sell them).
  \item \textsuperscript{193} Or, more appropriately, where organ sales are not considered illegal due to the absence of any legal regulations.
  \item \textsuperscript{194} Richard M. Boyce, \textit{Organ Transplantation Crisis: Should the Deficit be Eliminated Through Inter-Vivos Sales?}, 17 AKRON L. REV. 283, 300 (1983) ("By making organ sales legal the state would prevent a black market from developing.").
  \item \textsuperscript{195} Some commentators try to analogize the failure of a commercialized blood bank to the proposal for commercialized organ sales. \textit{But see} Hansmann, \textit{supra} note 7, at 68 (arguing that most prohibitions on organ sales are non-empirical).
  \item \textsuperscript{196} Cohen, \textit{supra} note 6, at 26-29. Cohen argues that it is perfectly legal for people to participate in other degrading, dangerous, and unpleasant, yet perfectly legal things, like boxing, coal mining, cleaning toilets, etc. \textit{Id.} at 29. However, he makes a better argument that certain organ sales, like cadaveric organ sales, are distinguishable from indentured servitude since (1) they occur after natural death, and (2) they are an expression of personal autonomy, rather than desperate poverty. \textit{Id.} at 28 n.90.
  \item \textsuperscript{197} Accepting that a person has a private property interest in his/her body rather than a collective or communal one, this argument fails due to the donor's inalienable right to dispose of his/her property as he/she pleases. The deceased is already legally empowered to dispose of his/her other property through a will, as well as designate the manner in which he/she wishes to be buried. The only situation where this argument succeeds is in addressing the right of the next of kin to sell the deceased's organs. \textit{See id.} at 26-27.
  \item \textsuperscript{198} This theory seems to attach a mystical or spiritual importance to human organs. Organs are already exchanged everyday without any financial compensation for the donor, although it is expected that the donor receives a psychic benefit. \textit{Id.} at 27.
objections such as these must be viewed as anachronistic and damaging to the goal of maximizing organ procurement.\textsuperscript{199}

1. Inter-Vivos Sales

Inter-vivos sales are relied upon primarily in countries where there is no brain-death law,\textsuperscript{200} or where there are insufficient preservation techniques to maintain the organ after it has been removed from the cadaveric donor.\textsuperscript{201} However, there are only a few organs that can be removed from a living donor without committing murder.\textsuperscript{202} There are few countries that admit to participating in the legal trade of living donors' organs,\textsuperscript{203} though those that do generally enjoy an increasingly brisk business\textsuperscript{204} through sales to state citizens, as well as to foreigners. Aside from the obvious potential for human rights violations, such as illegal trading and murdering for organs, the overwhelming fault of these systems is that they exploit the poor.\textsuperscript{205} In fact, most of the states that
have banned commercial organ sales have done so due to the potential abuses resulting from organ sales by the poor. These states assume, and probably correctly so, that the only person who would respond to a financial incentive to sell an organ during their life would be destitute. Why else would an otherwise rational person part with a kidney, unless the person was in a desperate situation?

Proponents of inter-vivos sales, however, claim that these are Western attitudes that do not always apply in other countries. These commentators believe that a ban on inter-vivos sales would only drive the sale underground, and subject it to many more abuses than already occur. The answer, they say, is regulation and explicit legalization of living donor sales is necessary to avoid any more potential human rights abuses.

2. Cadaveric Organ Sales

donors are often poor, sometimes sick and invariably in need of the money. The patients are predominantly affluent, with many coming from the Middle East and Europe. Sanjoy Hazarika, India Debates Ethics of Buying Transplant Kidneys, N.Y. TIMES, Aug. 17, 1992, at A20. But see Michelle Tan, Kidneys: Buy or Die, STRAITS TIMES, May 13, 1992, at L3 (giving testimony of a patient whose purchase of a kidney in India not only saved his life, but substantially bettered the life of the man from whom he purchased the kidney).

German Minister of Justice Klaus Kinkel rejected legalizing organ sales, stating that "unscrupulous profiteers are increasingly attempting to use poor people, especially from the Third World, as living warehouses for the wealthy in the western industrial nations." Stronger Laws, supra note 173 (quoting Minister of Justice Klaus Kinkel).

As noted by Leon Schwartzberger, a Socialist French Surgeon who recently convinced the European Parliament to outlaw organ trading:

Under such a system, a rich and healthy person would not sell one of his kidneys. There would be a tendency for the pool of donors to be confined to under-privileged sections of society. It is reasonable to forecast that those who will be prepared to sell one of their kidneys will be precisely those whose health is most likely to suffer as a result.

Magee, supra note 2, at 2 (quoting Dr. Leon Schwartzberger).

Poor Indians, supra note 200. "India, which possesses a proud, non-Western culture, should not be tailoring its national medical policy to U.S. or European standards." Id. In fact, this same commentator believes that India might be trailblazing for the West in this area. Id.

Hazarika, supra note 205 ("Doctors in New Delhi and Bombay said a ban on transplants from living donors would not work, driving the practice underground and leaving patients at the mercy of agents."). See also Organ Bazaar, supra note 13.

Organ Bazaar, supra note 13.
Officially, this method of organ procurement is not practiced by any nation, though certain aspects of it have been surreptitiously employed in the past,\footnote{See Kidney Team Found Favoring Foreigners, CHI. TRIB., May 16, 1985, at 9 (noting that foreigners were allowed to purchase a better position on the waiting list).} as well as openly attempted quite recently.\footnote{See also Don Colburn, Gov. Casey's Quick Double Transplant: How Did He Jump to the Top of the Waiting List?, WASH. POST, June 22, 1993, at 28 (examining Pennsylvania Governor Robert Casey's ability to procure a heart and liver for transplant in less than 24 hours, while the average wait is 198 days for a heart, and 67 days for a liver).} The premise behind such a system is a contract, made between the organ procurement agency\footnote{See Scott Shepard, Diamond Aims to Spark National Debate on Organ Procurement Issue, MEMPHIS BUS. J., Aug. 16, 1993, at 14. Two Memphis men have entered a contract for sale of one of the men's organs upon his death, in the hopes of challenging the U.S. law prohibiting organ sales. The two men hope to establish a market for cadaveric organs as commodities to be sold by honest brokers, and claim to have a list of 50 members so far. The founder, David Diamond, claims that such a system is preferable for many reasons: it encourages quality; it avoids making difficult decisions at difficult times; it will increase the number of procured organs; it will discourage a black market in organs; and it will give the donor personal control over the decision to donate. Id. See also Monique Beaudin, Quebec Puts Up Cash to Encourage Organ Donations, THE GAZETTE (Montreal), Dec. 10, 1992, at A6. A provincial organ donation agency is using a $1.75 million provincial grant to increase organ donations by paying hospitals $500 for identifying potential donors, and $4500 for harvested organs that are suitable for transplant. Id.} and the potential organ donor during the donor's life. The contract includes some sort of financial consideration for the right to remove the organ if the donor dies in such circumstances so as to make donation possible.\footnote{For the sake of argument, we will assume the procurement agency to be the state, even though this is not necessary, and for certain reasons, may not be preferred. See generally Hawley, supra note 4.} The agency then sells the organ to a desperate patient. In order to create a true incentive to enter such a program, it is best if the organ procurement agency rewards the donor financially for merely signing up, and not make remuneration contingent upon actual organ harvesting.\footnote{Cohen, supra note 6, at 33.} The reasons for this are two-fold: first, it helps create a binding contract that hospital officials must honor or, if they do not, they can find themselves subject to a law suit by the procurement agency; second, it produces a true incentive to the donor to enlist.\footnote{For an argument against this type of contract and for one that only offers payment for actual organs harvested, see id. at 33-34.}
The other commonly proposed alternative is a system that pays money to the donor's estate or pays for burial costs. While these are both strong incentives, they do not directly benefit the donor, but rather his next of kin. Since the donor receives no direct benefit, such incentives may prove insufficient and ineffective as an organ procurement maximizer. However, all one needs to do is look at the millions of dollars spent annually on life insurance to see that people do not need an immediate personal benefit to inspire them to prepare for their death.

Whatever form payment takes, there are a number of advantages that cadaveric organ sales have over others. The first two have been previously mentioned — the respect for personal autonomy and privacy rights, and the increased incentive to donate created by compensation. Cadaveric organ sales have additional advantages over inter-vivos organ sales in that they do not exploit the poor, and can be entered into solely by the donor, thereby avoiding the possible human rights abuses committed by third parties.

However, in countries where no brain-death law exists, cadaveric organ sales are virtually impossible because organs must be retrieved while the blood is still oxygenating them. Otherwise, the organs would deteriorate and be of no use. In countries where the hospital facilities are not as numerous or advanced as in the United States, there is less of a chance that the organ can be procured from the cadaver, preserved, and sent to the recipient before the organ dies. Even in the United States and other developed countries, there are logistical problems posed by such a contract. One commentator asks if organ sellers, in order to meet their organ contracts, will:

be required to keep the organ buyers on notice as to their whereabouts, or will the contract specifically restrict the seller's freedom of movement to a designated geographical area? If the performance of the contract is blocked by a logistical problem, will the seller's estate be liable in damages, or will the defenses of impossibility and frustration be available?

Other problems have been pointed out, such as the quality or merchantability of the organs. A products liability suit may lie against a seller whose organ is defective . . . . [D]oes the contract imply that the seller will maintain the organ in merchantable condition by abstaining

may give rise to the same problem from which [voluntary donation systems] suffers - apathy.

217 See generally Peters, supra note 5.

218 A wealthy person would have almost as much incentive to receive compensation for cadaveric organ donations due to the lack of substantial sacrifice on his or her part.
from alcohol, drugs, and other harmful substances? Will the contract expressly set out a lifestyle for the seller, deviation from which could give rise to an action in partial breach?\textsuperscript{219}

Further, critics of cadaveric organ sales are concerned that a market in human organs would lead to a decrease in the number of organs donated, and an overall increase in the cost of organ transplantation operations and research.\textsuperscript{220} There is also a worry that such a system would bring lower-quality organs.\textsuperscript{221} The biggest problem confronting any type of organ sale is deciding if the seller has any legally recognizable property interest in the organ. At common law, there is no true property interest in a cadaver; rather, the next of kin have a quasi-property interest which allows them to have custody and possession of the body for the purposes of burial or disposal.\textsuperscript{222} The body is considered held in trust by those with an interest, subject to the protection of the public.\textsuperscript{223} This principle was recently reaffirmed in \textit{Georgia Lions Eye Bank, Inc. v. Lavant,}\textsuperscript{224} \textit{State v. Powell,}\textsuperscript{225} and \textit{Brotherton v. Cleveland,}\textsuperscript{226} noting that traditional English and American common law gives a quasi-property interest to the surviving kin in the decedent's body, limited to the burial or other lawful disposition of the cadaver.\textsuperscript{227}

Other organ market proposals which on their face appear to be excellent ideas, are in fact, also subject to certain problems. For instance, one commentator proposed that a health insurance deduction be made available to those who pledge their organs.\textsuperscript{228} One problem with this

\textsuperscript{219} Boyce, \textit{supra} note 194, at 296-97.
\textsuperscript{220} Randy W. Marusyk & Margaret S. Swain, \textit{A Question of Property Rights in the Human Body}, 21 \textit{OTTAWA L. REV.} 351, 373 (1989) ("The advancement of scientific medical research absolutely depends on the availability and free exchange of experimental tissue, especially in the non-profit university research community.").
\textsuperscript{221} \textit{Id.} at 373 ("Furthermore, the pressure of demand will often result in a drop in the quality of the substance available. Persons wanting to sell tissue for financial gain may cover up facts regarding their lifestyle in order to qualify."). \textit{But see} Blair & Kaserman, \textit{supra} note 17, at 442-43.
\textsuperscript{222} Marusyk & Swain, \textit{supra} note 220, at 360-61.
\textsuperscript{223} MEYERS, \textit{supra} note 16, at 183.
\textsuperscript{224} 355 S.E.2d 127 (Ga. 1985).
\textsuperscript{225} 497 So.2d 1188 (Fla. 1986).
\textsuperscript{226} 923 F.2d 477 (6th Cir. 1991).
\textsuperscript{227} \textit{Id.} at 481. However, the court did go on to find a "substantial interest," amounting to a "legitimate claim of entitlement," existed under the due process clause of the 14th Amendment, seemingly due to the body's increased pecuniary value as a result of biotechnology advances. \textit{Id.} at 481-82.
\textsuperscript{228} Hansmann, \textit{supra} note 7, at 63-65. Hansmann proposes a plan where insurers would offer a reduction in health insurance premiums to those who pledged their
plan is that not every nation has a strong private health insurance system like the ones in the United States. This severely limits the number of potential donors to those who have insurance. Second, nations that have a public health insurance plan, like Canada, offer no financial incentive for donation, since there can be no reduction in health insurance premiums. Thus, a regulated cadaver organ sale program could work in some Western industrialized countries, but may not be as practical in other parts of the world.

The biggest problem with cadaveric organ sales, as evidenced by all the nations that have outlawed organ sales, is that organ sales are not palatable to the general public, government, or health professionals. Still, this practice continues, virtually unchecked in some countries. If these countries are unable, or unwilling, to halt the organ trade flowing through their country and into others, then states need a way that they can legally prosecute, and hopefully eliminate, such a crime. Section V explores how international principles of extraterritorial jurisdiction may offer a solution.

V. EXTRATERRITORIAL JURISDICTION

Extraterritorial legislative jurisdiction is the application of one state’s laws within another state. Normally, such actions are a violation of organs for donation. The reduction, albeit a nominal one of roughly $10 per year, is believed to be enough of an incentive to increase donations. Additionally, Hansmann says that the option would automatically renew itself yearly unless the donor changed his/her mind and decided not to be a donor, an option he/she would be free to exercise. Id. at 63.

229 See supra notes 56-77 and accompanying text.
230 Butler, supra note 41, at 200-01 (noting that, "[a]lthough logically appealing . . . as a means for increasing the availability of organs without significant government intrusion . . . the bottom line is that our society is simply not comfortable with the concept [of organ sales]").

Note the difference between prescriptive and enforcement jurisdiction: prescriptive jurisdiction allows one state to enact a law that may apply to a person who is not a national nor within the territory of the promulgating state. Enforcement jurisdiction is the ability to enforce that law within a territory. While a state may have prescriptive jurisdiction, it may not have enforcement jurisdiction since the person the state wishes to prosecute is within another state’s territory. Since it would be a violation of the foreign state’s sovereignty for the prosecuting state to attempt to enforce its laws in the other state’s territory, the prosecuting state must either ask the foreign state’s permission to enter and apprehend the suspect, ask the foreign state to extradite the suspect, or hope that the suspect enters the prosecuting state’s territory. But see United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992) (holding that the abduction by the United States of a suspect in the murder of a United States DEA agent from Mexico
state sovereignty, since it is recognized as international law that only the domestic state has the right to promulgate and enforce laws within its territory. There are, however, five different principles by which one state can exercise prescriptive jurisdiction within another state: the territorial principle, nationality principle, passive personality principle, universal principle, and protective principle. Briefly explained, the territorial principle requires that some part of the action occurs within the territory of the prosecuting state. The nationality principle gives the prosecuting state jurisdiction to apply a domestic law to a national in a foreign state. The passive personality principle requires that one of the prosecuting state’s nationals is injured by the national of another state. The state applying the protective principle seeks to prosecute a foreign national for actions that are injurious to the sovereignty of the prosecuting state, though not to any one national in particular. Finally, the universal was not a violation of the U.S.-Mexico Extradition Treaty or of Mexico’s sovereignty).

232 For purposes of this Note, “action” will refer to any criminal or tortious act.

233 Mali v. Keeper of the Common Jail (Wildenhus’ Case), 120 U.S. 1 (1887). The United States was held to have legislative jurisdiction over the murder of one Belgian by another Belgian aboard a Belgian ship docked in Jersey City, New Jersey. The Court stated that

if crimes are committed on board [a foreign ship] of a character to disturb the peace and tranquillity of the country to which the vessel has been brought, the offenders have never, by comity or usage, been entitled to any exemption from the operation of the local laws for their punishment.

Id. at 8.

234 Blackmer v. United States, 284 U.S. 421, 443 (1932). The U.S. Supreme Court held Blackmer, a United States national living in France, in contempt of court for refusing to appear after being issued a subpoena. The Court felt that it cannot “be doubted that the United States possesses the power inherent in sovereignty to require the return to this country of a citizen, resident elsewhere, whenever the public interest requires it, and to penalize him in case of refusal.” Id. at 437.

235 United States v. Yunis, 681 F. Supp. 896 (D.D.C. 1988). The United States was deemed to have jurisdiction over Yunis, a Lebanese national accused of hijacking a Jordanian aircraft carrying three American nationals. The court used the alternative grounds of both passive personality jurisdiction — based on the three Americans that were taken hostage — and universal jurisdiction — based on piracy — to justify legislative jurisdiction by the United States. The court noted that only “serious and universally condemned crimes” should be used as the basis for pursuing passive personality legislative jurisdiction, so as to avoid “unlimited and unexpected criminal liability.” Id. at 902.

236 United States v. Noriega, 746 F. Supp. 1506 (S.D. Fla. 1990). Manuel Noriega, former head of State of Panama, was found to be under the legislative jurisdiction of the United States under the protective, or objective extraterritoriality principle, for various narcotics offenses. The Court noted that “international law principles have expanded to permit jurisdiction upon a mere showing to produce effects in this country,
principle applies to those crimes deemed so heinous as to be crimes against all states, and prosecutable by any state. Determining whether a state may exercise legislative jurisdiction over the nationals of another state for possible human rights violations or other crimes related to the illegal transplantation of an organ is crucial; for without the legislative jurisdiction to prosecute, there can be no further cause of action.

In determining whether a statute can be affected extraterritorially, it is necessary to ask three questions: (1) does the statute purport to reach the particular conduct? (2) will the extraterritorial application of the statute raise serious issues about its constitutionality, or be a violation of customary or conventional international law? and (3) will expansive interpretation of the statute’s reach pose a risk of serious conflict with other countries? It is important to avoid statutory overreach, and to keep within the general interests of the international community as a whole. For a country to try to do otherwise may be seen as an attempt to violate the sovereignty of another country, and may constitute a violation of international law. Consequently, there are not as many difficulties in applying extraterritorial jurisdiction using the nationality principle or the territorial principle, as there are in establishing a passive personality, protectionist, or universal theory of jurisdiction. Since most states that seek to legislate organ procurement and transplantation already explicitly include their national’s activities within their own territory, this section will focus on the other three theories of jurisdiction, passive personality, protective principle, and universal principle. It will also focus on how a state can justify prescriptive jurisdiction under each theory. Section VI will recommend what type of laws would best create extraterritorial jurisdiction.

without requiring proof of an overt act or effect within the United States.” Id. at 1513. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). The United States was ruled to have legislative jurisdiction under the universal principle in a case where one Paraguayan was suing another Paraguayan for acts of torture that occurred in Paraguay. Id. The Court noted that “[a]mong the rights universally proclaimed by all nations . . . is the right to be free of physical torture. Indeed, for the purposes of civil liability, the torturer has become - like the pirate and slave trader before him - hostis humani generis - an enemy of all mankind.” Id. at 890.


Id. at 814.

A national of a state is considered property of the state under international law. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) (1987).

Id. § 402(1).

See supra notes 56-77 and accompanying text.
A. Passive Personality

The passive personality principle seeks to protect a state’s nationals from serious and universally recognized crimes when they travel abroad. In order for this theory to apply, a harm needs to have been suffered on the part of the national. Possible harms that a national could suffer by obtaining an organ transplant extraterritorially include a doctor’s negligence, failure to obtain informed consent, and assault and battery. Additionally, a national who travels abroad to donate an organ can suffer not only these same harms, but in the case of cadaveric donations, death can be falsely ascertained, the corpse can be mutilated, or the national can be murdered for the organ.

Physicians conducting organ transplantation are, like any other physician, subject to the duty of care established by the “general principles of the legal system to which the surgeon is subject.” Such a standard has been interpreted to require that the physician be qualified to perform the transplantation, the operation must be absolutely essential, and all other more conventional methods of treatment have failed. Additionally, the physician has the duty to insure that the organ is fresh and does not harbor any infectious diseases that can be passed to the recipient. The problem with trying to prosecute a physician from another jurisdiction, however, is that the physician owes the patient a standard of care as proscribed by his legal system, not the patient’s; to hold otherwise would not put the physician on notice that he was at risk for liability. On the other hand, prosecuting a physician under his own country’s duty of care standard might at best be considered a difficult choice of law question, and at worst, a breach of that country’s sover-

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243 Id. at 902.
245 Norrie, supra note 172, at 443-48.
246 Id. at 449-56.
248 Id. at 292.
249 See supra notes 31-77 and accompanying text.
250 Norrie, supra note 172, at 443.
251 Id. at 444.

Thus, if a patient’s kidney failure would possibly have been susceptible to drug treatment, but a doctor recommends and carries out a renal transplantation, then the patient may have a good ground of action if the operation leaves him worse off than he would have been had the drug treatment been provided.

Id. at 445.
eignty. The best possibility for establishing negligence, then, is if the doctor and the patient are subject to the same jurisdictional definition of negligence and if the doctor is on notice of the duty of care owed to the patient owed.\textsuperscript{253} Absent some universal standard of care for a transplantation operation, however, it is unlikely that such circumstances would arise.

Physician liability for failing to obtain the informed consent of the patient also suffers from the lack of an international standard; rather, "the development of informed consent is strongly based on traditional American moral and legal concepts of basic human rights."\textsuperscript{254} Failure to obtain informed consent is a tort,\textsuperscript{255} as well as an element in an action for assault and battery.\textsuperscript{256} There are two elements to informed consent: the physician's duty of disclosure and the patient's consent for the proposed treatment.\textsuperscript{257} To constitute disclosure, the physician must tell the patient (1) the type of treatment proposed; (2) the complications of that procedure or treatment; (3) any alternatives to the treatment; (4) the benefits that the physician hopes to derive; and (5) the probable outcome if the procedure is not carried out.\textsuperscript{258} In the case of organ transplantation, this would include, in particular, the risks of organ rejection by the body, the consequences if nothing is done, and the alternatives, such as drug therapies.\textsuperscript{259} For the donor-patient, not only do these same elements apply, but there is also a concern that the donor potentially does not have the capacity to consent because of infancy or incompetence.\textsuperscript{260} There are also fears that the donor's consent could be coerced, through either familial pressure,\textsuperscript{261} economic strife,\textsuperscript{262} or some other method.

\begin{thebibliography}{10}
\item\textsuperscript{253} This would be the case, for example, if the doctor received schooling in the patient's jurisdiction.
\item\textsuperscript{255} \textit{Id.} at 122. \textit{See} Canterbury \textit{v.} Spence, 464 F.2d 772 (D. C. Cir. 1972).
\item\textsuperscript{256} Norton et al., \textit{supra} note 247, at 292.
\item\textsuperscript{257} Morton, \textit{supra} note 254, at 118.
\item\textsuperscript{258} \textit{Id.} at 119. Canterbury, 464 F.2d at 786-88.
\item\textsuperscript{259} Norrie, \textit{supra} note 172, at 451. Even the consequences of success need disclosure, such as the necessity to take anti-rejection drugs for the rest of the recipient's life. \textit{Id.}
\item\textsuperscript{260} \textit{Id.} at 453-54.
\item\textsuperscript{261} Norton et al. \textit{supra} note 247, at 294.
\item\textsuperscript{262} MEYERS, \textit{supra} note 16, at 201. In India, Dr. K.C. Reddy tests potential organ sellers. He gives them intelligence tests and has them interviewed by a psychologist to be certain that he has their informed consent. However, it is questionable if the consent truly is informed. One interview with a mother whose husband had already sold one of his kidneys went like this:
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Again, absent some universal standard requiring informed consent, it would be difficult to gain extraterritorial jurisdiction.

Finally, there are the crimes of mutilation of the corpse, death falsely ascertained, and murder of a national for his organs. The latter two fit under the more generalized crime of murder, for which passive personality jurisdiction may be obtained. However, even though it is possible to attain jurisdiction in this manner, there remains the question of whether a foreign state's sovereignty would be violated by prosecuting that state's national for the murder, especially since there would probably be concurrent jurisdiction over the crime. The crime of mutilation or desecration of a corpse suffers from the same defect that negligence and informed consent do; varying legal standards from jurisdiction to jurisdiction make it impossible to establish an internationally recognized legal standard from which to prosecute.

B. Protective Principle

The protective principle of extraterritorial jurisdiction allows a state's laws to apply to actions occurring within other states, or within international space, due to those actions' deleterious effect upon the first state. The law to be applied needs to be examined to determine whether it was intended to apply extraterritorially. If the failure to recognize extraterritorial application would frustrate the aims of the statute, then the protective principle probably applies. This principle

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Interviewer: Why are you selling your kidney?
Woman: Because they don’t have a kidney.
Interviewer: Do you know where the kidney is?
Woman: In the side.
Interviewer: How many are there?
Woman: They say there are two.
Interviewer: What work do they do?
Woman: I don’t know.
Interviewer: We hold things with our hands. So what do the kidneys do?
Woman: I don’t know. I haven’t been to school; if I’d been, I’d know.

Organ Bazaar, supra note 13.

263 United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945). The Court noted that “it is settled law that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends.” Id. at 443.

264 Mortensen v. Peters, 5 Sess. Ca.(J) 121, 141 (Edwin Adam ed., 1906). The court allowed the extraterritorial application of a prohibition on trawling within a body of water that was mostly outside of British jurisdiction, for the reason that the object of the statute would be frustrated “by a construction of the enactment which, while it restrained British subjects from trawling within any part of the protected area . . .
has been expanded even further to include "a mere showing of intent to produce effects within [another] country, without requiring proof of an overt act or effect . . . ." Applying this principle to organ transplantation, either a deleterious effect, or the intent to create such an effect by a person within another state, would merit use of the state's domestic law. In addition, a state would need to have a law directly prohibiting the activity, and this law would have to be deemed to apply extraterritorially; too indirect or tangential an effect would not be actionable. As the U.S. Second Circuit Court of Appeals stated concerning the application of U.S. antitrust law abroad:

Almost any limitation of the supply of goods in Europe, for example . . . may have repercussions if there is trade between the two. Yet when one considers the international complications likely to arise from an effort in this country to treat such agreements as unlawful, it is safe to assume that Congress did not intend the [Sherman] Act to cover them.

In order to apply the protective principle to organ sales, it is necessary to examine some of the statutes nations have passed in making organ sales illegal. For example, a statute like Singapore's most likely would not be found to have extraterritorial effect, since it neither explicitly states that sales abroad are illegal, nor does its language imply that the failure to construe an extraterritorial meaning frustrate the statute's purpose. However, a statute like Great Britain's, which states:

(1) A person is guilty of an offence if in Great Britain he (a) makes or receives any payment for the supply of, or for an offer to supply, an organ which has been or is to be removed from a dead or living person and is intended to be transplanted into another person whether in Great

permitted foreigners to trawl as they pleased over the greater part of it." Id. 265 United States v. Noriega, 746 F. Supp. 1506, 1513 (S.D. Fla. 1990).

266 For example, trafficking an organ to another state, or transplanting diseased organs into nationals of other states who have traveled abroad to receive the organ and then return to their domestic state with the diseased organ.

267 148 F.2d at 443.


(1) Subject to this section, a contract or arrangement under which a person agrees, for valuable consideration . . . to the sale or supply of any organ or blood from his body or the body of another person . . . shall be void. (2) A person who enters into a contract or arrangement of this kind . . . shall be guilty of an offense.

Id.
Britain or elsewhere, explicitly intends extraterritorial effect. Another example would be the U.S. statute prohibiting organ sales from entering interstate commerce, which defines interstate commerce as "commerce between any State or Territory and any place outside thereof."

Applying the protective principle to the transplantation of a diseased organ, however, is more difficult because none of the statutes on organ transplantation specifically prohibit such an act; rather, most countries appear to rely on standard tort remedies for negligence to regulate this act. This does not mean that there is no harm occurring. It was reported that from 1986 to May, 1991, 150 Singaporeans had gone to India or China for transplants and returned with infections or diseases such as tuberculosis, malaria, chicken pox, hepatitis, or AIDS. Not only do such transplants severely endanger the patient, but they also harm the patient's domestic state, for when that patient returns home immediate treatment is needed for both the diseased organ which must be removed — and if possible, replaced — and for the illness contracted. One possible way to prosecute such occurrences is through the prosecution of organ sales abroad, since these diseased organs are typically purchased. However, it may also be possible to prosecute extraterritorially solely for the implanting of diseased organs into a state's nationals, since this does inflict a harm upon the domestic state.

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269 Human Organ Transplants Act, 1989, ch. 31, § 1 (Eng.) (emphasis added).
272 See Norrie, supra note 172, at 443-48.
C. Universal Principle

It is highly unlikely that any cause of action could be maintained through the universal principle of jurisdiction, since this principle applies to an extremely limited type of crimes. The universal principle is used to prosecute crimes against states themselves, and has been restricted to piracy, genocide, and most recently, torture. Only the person who has violated the "law of nations," a code governing the relationships between states, can be prosecuted under this principle. There is no currently recognized custom or practice of international law under which some action relating to organ transplantation could give rise to universal jurisdiction.

VI. SOLUTIONS TO THE INTERNATIONAL MARKET FAILURE

Relying on the present international market to provide a sufficient number of transplantable organs is clearly unacceptable. The practice of problematic inter-vivos organ sales, coupled with generally inefficient and unfollowed voluntary procurement systems, has proven ineffective at meeting the goal of obtaining the maximum number of organs while violating the fewest number of rights possible. What is needed is a general system that can be adapted to fit an individual state's cultural, ethical, and religious standards or constraints. Presumed consent of the individual, coupled with an option to withdraw consent and a priority incentive for those who do not withdraw consent, will provide the best, safest, and least violative method of increasing organ supply. Additionally, these factors provide a working model for uniform legislation regarding extraterritorial jurisdiction, and also help decrease human rights transgressions.

However, before an argument recommending presumed consent can be made, it must be established that a state should have an organ procurement system. Aside from the abuses that occur as a result of ineffective or nonexistent legislation outlined in Section III, there is also the argument that people have a right to health care. Although the right to health care does not fall within the traditional notions of human rights, it does fall under a generalized notion of a right to life. The right to health care will always be constrained by practical considerations, such as

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274 Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).
275 Id.
276 Amnon Carmi, Human Rights in Medicine and Law, 7 MED. & L. 409, 410 (1987) ("Good health is considered by many to be so important that it should become regarded as the human right of every person.").
the strength of a country's health care system and the frailties of the human body.\textsuperscript{278} This does not mean that a country cannot; at a minimum, insure safe, sanitary organ transplantation; and, at most, insure that a sufficient number of organs are procured so that most people can obtain a life-saving organ for transplantation.\textsuperscript{279} Harmonizing organ procurement legislation around the most effective and ethical means acceptable, while simultaneously prohibiting activities such as organ commerce, will best attain this right to a safe transplant.

The law that Singapore has enacted is an excellent example to consider. Singapore's law is based upon the presumed consent of all citizens to have their organs removed for transplantation in the event of accidental death, except those who have opted-out; those who are below the age of twenty-one, those who are above the age of sixty, those who are incompetent, or who are Muslim.\textsuperscript{280} For those whose consent is not presumed, it may either be given by a legal guardian — in the case of minors and incompetents — or by opting-in — for Muslims and those who had previously opted-out.\textsuperscript{281} One lesson Singapore's legislature has learned from the sale of organs, and which is incorporated into this law, is that the lack of incentive to donate generates fewer donations. Therefore, this Act gives priority to those who do not withdraw their consent to posthumously donate their organs over those that do withdraw their consent to donate organs in the event that two such people were in need of the same organ.\textsuperscript{282}

As discussed previously, presumed consent, when strictly adhered to, is the most efficient method of procuring organs.\textsuperscript{283} Not only does such a system provide more organs for transplantation, thereby saving more lives, but it also eliminates other problems. For instance, an increase in the supply of cadaveric organs would lead to improvements in tissue matching between donor organs and recipients, as well as allowing

\textsuperscript{278} Carmi, \textit{supra} note 276, at 411.

\textsuperscript{279} Del Bigio, \textit{supra} note 162, at 69.

Because many transplant operations may now properly be regarded as being a part of ordinary health care . . . it is in accordance with a person's right to health care that a reasonable effort will be made to ensure that a person will be able to receive a transplant when needed. This means that . . . there exists a system that will provide a sufficient number of organs . . . for purposes of transplantation.

\textit{Id.}


\textsuperscript{281} \textit{Id.} §§ 5, 12.

\textsuperscript{282} \textit{Id.} § 12. The law also provides that for those who opt-out, then opt back in, there is a two-year waiting period before they obtain the same priority as a presumed consenter. \textit{Id.}

\textsuperscript{283} See \textit{supra} note 157 and accompanying text.
surgeons to be more selective about which organs are procured.284 Contrary to some criticisms, presumed consent allows for more careful application of brain-death criteria, since the increased supply of donor organs eliminates any temptation to obtain organs through "inappropriate" methods.285 In countries like the United States, which has a federally funded dialysis program286 which has climbed in cost to taxpayers from $228.5 million in 1974 to almost $2 billion in 1982287 to close to $4 billion a year as of 1992,288 a presumed consent system would result in lower costs to the government. It currently costs $32,000 per year for dialysis for one patient, as compared to $56,000 for the first year of a kidney transplant, and $6,000 per year thereafter.289 Additionally, as kidney transplantation becomes a more practiced therapy, one can expect costs to fall even further.290 Increased cadaveric procurement numbers would also reduce the current reliance on the living donor.291

There are other advantages to a presumed consent system that proponents of procurement systems—such as altruism and organ sales—try to obscure by criticizing as unethical. For example, many critics charge the presumed consent system takes advantage of "reluctant" or "procrastinating" dissenters, in that those who delay opting-out for whatever reason end up not truly expressing their desire to opt-out. This, however, is not an ethical problem that should concern the state any more than the state should be concerned about someone who, after having federal taxes withheld by the government, does not actively pursue their right to a refund of any overpayment.

Others are more concerned that the presumption itself is a problem, in that it restricts or in some way takes away an individual's freedom, and could somehow lead to a cheapening of human life.292 It would

284 Blair & Kaserman, supra note 17, at 429.
285 Butler, supra note 41, at 204.
287 Blair & Kaserman, supra note 17, at 409.
288 FOX & SWAZEY, supra note 25, at 76.
289 Id. at 75. See also Organ Prices Quadrupling, U.S. Study Says, TORONTO STAR, June 23, 1993, at A32. According to a U.S. study, "[r]oughly $1.5 billion was spent last year on the 16,475 U.S. organ transplant operations and the after-care of patients . . . . The study found that the median hospital charges for organ [procurement] in 1988 [was] $12,290 for a kidney, $12,578 for a heart, $16,281 for a liver, and $15,400 for a pancreas." The study found that these charges were often four times the actual cost, due to the fact that insurance companies and Medicare leave unspecified as to what is an allowable expenditure for an organ. Id.
290 Blair & Kaserman, supra note 17, at 430.
291 Id.
292 LAMB, supra note 21, at 140.
seem that this can be true only if society in general was opposed to the idea of organ transplantation donation. However, polls in Singapore, Canada, Great Britain, and the United States, as well as other countries, have shown that as a society we do not oppose organ donation, but support it as a therapy for organ failure. General support for organ donation, coupled with the fact that presumed consent allows for an individual to opt-out, would seem to counter such an argument. If anything, presumed consent with the ability to opt-out affirms an individual’s freedom by expressly ensuring that a donor’s wishes are respected, instead of allowing the next of kin to either donate, or forbid donation, of an individual’s organs after death.

Other critics claim that eliminating altruistic feelings that the positive act of donation provides would be a loss that even increased organ numbers could not justify. Such a belief indicates that (1) a person cannot experience any sort of altruistic feelings by simply remaining within the donation system, and (2) the state has no right to enact a law that will reflect the altruistic nature of society. Many countries, in times of war, enact civilian draft laws to increase military enlistment. These individuals, though drafted, often experience altruistic feelings of patriotism, as does the rest of society. Assuming society is in favor of organ donation, why would similar patriotic feelings not develop? An even more basic argument for supporting the altruistic nature of a presumed consent system is that it would be consistent with traditional humanist values on the presumption that one favors life and life-saving; putting the burden on

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293 Sixth Parliament Report, supra note 66, at A8 (noting that 85% are in favor of organ donation).
294 ONTARIO MINISTRY OF HEALTH, supra note 146, at 41 (noting that “62% of individuals would [donate their own organs] . . . [and] approximately 20-30% in any population surveyed is opposed to giving consent for their own organ donation, and presumably they would record “no’”)
295 MEYERS, supra note 16, at 191 (noting that “75% of the surveyed British public express a willingness to donate their organs after death to aid others . . . ”).
296 Cohen, supra note 6, at 9 (noting that “[a] 1985 Gallup poll estimated that 75% of all American adults approved of the concept of organ donation and transplantation”)
297 Sixth Parliament Report, supra note 66, at A8-A9 (“[Presumed consent] is not against individual freedom. Instead it reaffirms the individual Singaporean’s ownership of and responsibility for his own body. People are therefore better able to ensure that their wishes are followed because their and not their next of kin’s acceptance or objection has to be respected.”)
298 Del Bigio, supra note 162, at 69 (“Thus, concerns of efficacy will always be constrained by the moral considerations of donation as a gift, sensitivity and compassion, and autonomy.”).
the individual who would deny someone life by withdrawing consent for organ removal.  

Another benefit of a presumed consent system is that it would be an easier system to manage than the traditional voluntary consent. If there was no registered objection to organ removal, the physician removing the organ could proceed without contacting the deceased's next of kin for consent. If doctors were assured they were on solid legal ground, they could proceed with the organ removal without the hesitation that plagues French doctors. Shortening the time between death and determination of consent also insures that the organ is as fresh as possible, increasing the transplant's chance for success. But, perhaps the biggest advantage to doctors is that they would not feel inhibited in initiating the donor process, since they would not have to "bother" a grieving family when the family is arguably not prepared to make decisions concerning organ donation. While it is not hard to envision a family perhaps becoming upset because they did not get to participate in this critical choice, this problem can be overcome by (1) educating the public about the presumed consent law; (2) telling the family that if the deceased had wished to give or withdraw consent for organ removal, the deceased would have done so during life; and (3) assuring the family that the organ will be used to save another person's life. Complete public education is not only imperative in gaining the support of the next of kin, but also in insuring that each individual is aware of their own right to opt-out if they choose.

While harmonizing legislation around a presumed consent model would help to insure that each nation's procurement system was working effectively, it is also imperative that effective prohibitions on organ sales, especially those that sink to the level of human rights violations, are passed and enforced. While many nations have passed prohibitions on organ sales, few have written their statutes such that extraterritorial jurisdiction can be obtained. Illegal organ sales directly harm nations operating under a presumed consent system because such sales only serve to undermine the low-cost, safe, equitable, and efficient alternative offered by presumed consent. Using the protective principle of extraterritorial jurisdiction, it would not be difficult for nations with statutes prohibiting organ sales to prosecute those that engage in such commerce extraterritorially.

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299 Butler, supra note 41, at 204-05.
300 See Gerson, supra note 146.
301 M.A. Robinette et al., Donation Process, in ONTARIO MINISTRY OF HEALTH, ORGAN DONATION IN THE EIGHTIES: THE MINISTER'S TASK FORCE ON KIDNEY DONATION 91, 97 (1986) (noting that 50% of doctors and nurses felt inhibited by initiating the donation process).
VII. CONCLUSION

An international system as complex and interactive as the one proposed can not occur immediately. States must act domestically to enact legislation that aims to maximize organ procurement while minimizing rights violations. States acting to strengthen domestic markets will in effect strengthen the international market by limiting the incentive for abuse to their organ supply through sloppy, illegal sales to foreigners. Presumed consent is the most efficient and least violative of the procurement methods currently in existence, and should be adopted by nations worldwide in conjunction with a ban on all organ sales.