

ORGAN PROCUREMENT: VARIOUS LEGAL SYSTEMS AND THEIR EFFECTIVENESS

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I. INTRODUCTION

Throughout the world, organ transplantation has emerged as an important medical advancement in solving the problem of end-stage organ failure. Over the years, the success rates of these transplants have significantly improved, providing the critically ill with a chance for a new life.¹ For example, medical science has developed immunosuppressant drugs which greatly increase compatibility between donated organs and their recipients.² Other advancements include preservation techniques which extend organ life outside of the donor's body, more effective recipient registries, and increases in capable transplant teams.³ Some new technologies are raising ethical and legal concerns among commentators. For example, British transplant surgeon Dr. Hany Riad pioneered elective ventilation, a process by which dying patients are sustained by respirators for brief periods to keep their internal organs

1 See Amy L. Kazmin, *Transplants Force the Ill to Become Fund Raisers; Bone Marrow: The Expensive Search for a Donor is Often in Vain for the Seeker, Who Bears the Burden But May Save the Life of Someone Else*, L.A. TIMES, Mar. 18, 1990 at 3B, available in LEXIS, News Library, All News Grp. File; see also Tunya Sukpanich, *Organ Donations: The Most Precious Gift of All*, BANGKOK POST, June 5, 1994 at 24.

2 See Charles Hawley, *Antitrust Problems and Solutions to Meet the Demand for Transplantable Organs*, 1991 U. ILL. L. REV. 1101, 1106.

3 See *id.*; Kazmin, *supra* note 1; see generally Susan Duerksen, *Rare Lung Transplant at UCSD*, THE SAN DIEGO UNION-TRIBUNE, Aug. 17, 1993 at A1, available in LEXIS, News Library, All News Grp. File.

alive.⁴ Although the practice was made unlawful, causing scarcity in available organs, both the British Medical Association and the British Transplantation Society believe the practice is ethical so long as consent is given by the donor's relatives.⁵

Despite the advancements, the demand for organs significantly exceeds the available supply in countries around the world.⁶ This organ shortage is the most devastating obstacle that organ transplant patients face. As technology continues to expand, the number of patients diagnosed as potential organ transplant recipients increases.⁷ The disparity between supply and demand often leads to unethical and illegal methods of procuring needed organs. In many instances, the impoverished members of society supply organs for the privileged classes who can afford them.⁸ Poor people are often coerced to sell their kidneys through unethical and unsafe procedures for a meager fee.⁹ The organ deficit forces medical providers to decide which patients will receive life sustaining organs and which will not.¹⁰ Desperate patients purchase organs on the black market when they feel they can no longer afford to wait for an organ to be supplied through legal channels.¹¹

In recognition of the human rights abuses which are occurring to satisfy the demand of anxious organ recipients, many countries are passing laws to protect the exploited.¹² Recently, several European countries met in Spain to sign a

4 See Hany Riad, et al., *Elective Ventilation of Potential Organ Donors*, 310 BRIT. MED. J. 714 (Mar. 18, 1995), available in LEXIS, News Library, All News Grp. File.

5 See *id.*; see also Annabel Ferriman, *Healthfront Organ Transplants Anna Ferriman on a Controversial Solution to the Search for Donors*, THE DAILY TELEGRAPH (LONDON), May 4, 1996, 1996 WL 3946979.

6 See DAVID LAMB, ORGAN TRANSPLANTS AND ETHICS 126-27 (1990).

7 See Lloyd R. Cohen, *Increasing the Supply of Transplant Organs: The Virtues of a Futures Market*, 58 GEO. WASH. L. REV. 4-5 (1989).

8 See Christian Williams, *Combating the Problems of Human Rights Abuses and Inadequate Organ Supply Through Presumed Donative Consent*, 26 CASE W. RES. J. INT'L L. 315, 316 (1994).

9 See RENEE C. FOX & JUDITH P. SWAZEY, SPARE PARTS: ORGAN REPLACEMENT IN AMERICAN SOCIETY 66-68 (1992) ("By 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.").

10 See Henry Hansmann, *The Economics and Ethics of Markets for Human Organs*, 14 J. HEALTH POL. POL'Y & L. 57, 79 (1989).

11 See Williams, *supra* note 8, at 315.

12 See Jason Altman, *Organ Transplantations: The Need for an International Open Organ Market*, 5 TOURO INT'L L. REV. 161, 173 (1994).

treaty to protect living donors.¹³ The council agreed that donor consent was necessary for any organ procurement law and that financial gain in the organ market was highly unethical.¹⁴ The World Health Organization has also condemned the trade of human organs, asking member nations to fight against organ trafficking.¹⁵ Reports of underground organ brokers preying on children has spurred the United Nations to investigate allegations of an international kidnapping ring in Latin America.¹⁶

Fortunately, a sufficient quantity of potentially transplantable organs does exist to satisfy the demand for nearly every type of transplant.¹⁷ The challenge is implementing an organ procurement policy that will maximize the supply to its greatest potential while at the same time safeguarding human rights. Part II of this comment explores a controversial law that was passed in Brazil to increase the supply of transplantable human organs. The advantages and disadvantages of the law will be presented as will the reaction from lawmakers, scholars, the medical community, and the public. Part III describes several different approaches to organ procurement in use throughout the world. Part IV examines the strengths and weaknesses of various organ procurement policies. Part V examines the market system of organ procurement in more detail and describes various proposals that have been advanced in favor of adopting such a system. Part VI concludes that a market system may well be a viable solution to the desperate shortage of organs.

II. BRAZIL'S SOLUTION

The demand overwhelmingly exceeds supply in the Brazilian organ market.¹⁸ In 1996, a mere 2.7% of Brazilians in need of transplanted organs received them.¹⁹ The low level of organ procurement in Brazil can be traced to both cultural and geographical factors.²⁰ The human corpse is treated with

¹³ See Council of Europe: Convention on Human Rights and Biomedicine and Explanatory Report, 36 I.L.M. 817 (1997).

¹⁴ See *id.* at 838.

¹⁵ See FOX & SWAZEY, *supra* note 9, at 68.

¹⁶ See Williams, *supra* note 8, at 323.

¹⁷ See *id.* at 319.

¹⁸ See *Washington Report on the Hemisphere 18.1, Brazil to Increase Organ Donations* (last modified Feb. 4, 1998) <<http://www.coha.org/nletter/18-01.html>> [hereinafter *Washington Report*].

¹⁹ See *id.*

²⁰ See *id.* (outlining reasons for low rates of organ procurement in Brazil).

particular reverence in Brazil and cremations are very rare.²¹ Many Brazilians are reluctant to consent to organ donation and many families are concerned with "desecrating" the remains of a loved one by allowing the harvest of organs. Furthermore, the long distances between remote rural towns and the rugged terrain in-between impedes the successful transportation of organs.²² Only ten percent of the organs arriving at hospitals are in suitable condition to be transplanted.²³ Rural hospitals lack the modern health care facilities and equipment necessary to perform transplants. Most transplants in Brazil are performed in Sao Paulo, where they average twenty-four transplants per month. In contrast, transplants in the United States average fifty-five per day.²⁴

In response to this problematic organ deficit, Brazil decided to take legislative action to increase the supply of human organs for transplants. On January 1, 1998, Brazil enacted a law declaring all adults potential organ donors unless they file for an exemption.²⁵ The law allowed organ removal from the deceased without any notification or family consent.²⁶ It was based on the theory of presumed consent. Upon death, if a person had not registered their intent not to be an organ donor with a special government agency, it was immediately presumed that they had consented to donate their organs.²⁷ The family of a deceased from whom organs are removed had no remedy under the law unless they could show that the deceased had filed for non-donor status.²⁸ Furthermore, if family members tried to interfere with organ removal they could have been sued.²⁹ According to Federal Attorney Geraldo Brindeiro, the law allowed doctors to remove organs against the wishes of the family, but did not legally obligate them to do so, therefore a doctor could have

21 See Geoff Dyer, *Donor Law Prompts Fears of Organ Seizure in Brazil*, FIN. TIMES (London), Jan. 24, 1998, at 3 [hereinafter *Donor Law Prompts Fear*].

22 See Docs, *Donors Question Brazil's Readiness for Organ Harvest*, MED. INDUSTRY TODAY, Jan. 7, 1998, available in LEXIS, News Library, All News Grp. File [hereinafter *Docs, Donors Question*].

23 See *id.*

24 See *Washington Report*, *supra* note 17.

25 See *Law Makes all Brazilians Organ Donors: Measure Splits Church and Medical Groups*, DETROIT NEWS, Feb. 5, 1997, at A10; see also Diana Jean Schemo, *Death's New Sting in Brazil: Removal of Organs*, N.Y. TIMES, Jan. 15, 1998, at A4 (explaining provisions of the new law).

26 See *Law Makes all Brazilians Organ Donors: Measure Splits Church and Medical Groups*, *supra* note 24; see also Schemo, *supra* note 24.

27 See Williams, *supra* note 8, at 338.

28 See *Washington Report*, *supra* note 17.

refused to remove organs if the family had objected.³⁰ In contrast, the legal coordinator for the health ministry warned that doctors who refused to extract organs, regardless of the family's wishes, could be prosecuted for failing to assist a person in need.³¹

Despite the desperate need for human organs, there was widespread opposition to the new law from scholars, the medical community and the lay public as well. Some critics fear the new law will unfairly target the rural and uneducated who may not realize that this new law makes them potential organ donors.³² Others are concerned that the law might lead to the removal of organs from a non-donor even before their actual death due to conspiracy or mishandling of documents.³³ A recent poll in Sao Paulo reveals that the law might actually have been counterproductive. While seventy-five percent of residents indicated a willingness to be an organ donor in 1995, this number fell to sixty-three percent in 1997 while the new law was being debated.³⁴ The poll also found a significant drop in the willingness of residents to consent to donating the organs of deceased relatives.³⁵

The Brazilian Federal Medical Council, an independent association which monitors medical practices in the country, claims that Brazil's infrastructure is incapable of administering such a complex plan. Some critics maintain that the problem is not a lack of voluntary donors, but rather a lack of structure capable of distributing organs safely and rapidly to hospitals across the country.³⁶ Waldir Mesquita, president of the Federal Council of Medicine, believes the law violated "independence and freedom of belief," noting that millions of illiterate people cannot afford to miss a day of work in order to pursue a non-organ donor identity card.³⁷ Even groups of patients awaiting transplants openly oppose mandatory donations.³⁸

29 See *id.*

30 See *Organ Donor Law in Brazil is Upheld*, ORLANDO SENTINEL, Jan. 11, 1998, at A18.

31 See Schemo, *supra* note 24.

32 See *Washington Report*, *supra* note 17.

33 See *id.*; see also *Brazil Medical Council to Fight Organ Donor Law in Top Court*, MED. INDUSTRY TODAY, Jan. 15, 1998, available in LEXIS, News Library, All News Grp. File.

34 See *Washington Report*, *supra* note 17.

35 See *id.*; see also *Brazil Council to Challenge Organ Donor Law*, AAP NEWSFEED, Jan. 8, 1998, available in LEXIS, News Library, All News Grp. File.

36 See Mario Osava, *Brazil: Public Opposes Compulsory Organ Donation*, INTER PRESS SERVICE, Jan. 12, 1998.

37 See *id.*.

38 See *Washington Report*, *supra* note 17.

The first patient to benefit from the new law was Jose Morais Reis, a 55-year-old heart transplant recipient. Reis received the heart of an unidentified donor who was declared brain-dead minutes before the operation took place.³⁹ According to Dr. Herbert Alves, Reis had been waiting four months for a donor heart and the transplant was a success.⁴⁰ Despite this success story, hospitals worried that the new law would prompt a permanent backlash against organ donation by the people of Brazil who treat the human corpse with special reverence.⁴¹ The Federal Council of Medicine finds fault with the requirement that two doctors, one being a neurologist, must determine whether a patient is legally dead. Council officials claim this approach is unsophisticated, adding that it would be impossible to find a neurologist to make that determination.⁴² However, some aspects of the new law have been embraced by medical professionals. One important, positive aspect of the law is the creation of one single waiting list for organ recipients.⁴³ Before the law was passed, patients were placed on waiting lists at individual hospitals and as organs became available they were distributed to both private and public hospitals via rotation. However, the lists at private hospitals where patients had more money were considerably shorter than the lists at public hospitals which served the underprivileged.⁴⁴ Doctors “admit to cases when patients have died in overstretched emergency facilities at public hospitals, only for the body to be whisked away for a transplant operation to a well staffed private hospital, full of the modern machinery which might just have saved the patient’s life.”⁴⁵

Many Brazilians, fearing corruption and human rights violations, including the extraction of organs while the donor is still alive, are rushing to register their non-donor status with the government. In Porto Alegre, eighty-three percent of the residents registered their refusal before the law officially took effect.⁴⁶ Although it might appear that the people of Brazil overreacted to the new legislation, recent history suggests that their fears are not unfounded. Some residents,

39 See *Brazilian Man First to Receive New Heart Under New Organ Donor Law*, THE ASSOCIATED PRESS, Jan 21, 1998, 1998 WL 6638103.

40 See *id.*

41 See *Donor Law Prompts Fear*, *supra* note 20.

42 See *Docs, Donors Question*, *supra* note 21.

43 See *Donor Law Prompts Fear*, *supra* note 20.

44 See *id.*

45 See *id.*

46 See Schemo, *supra* note 24.

complaining of the disparity in health care between the rich and the poor, maintain their distrust in the government's ability to successfully run the program in a fair and just manner.⁴⁷ In 1997, a well publicized report from rural Brazil informed citizens about a worker who awoke from a drunken stupor in the middle of a desolate field without his eyes. According to newspaper reports, his eyes had been removed surgically, yet the man was unable to remember anything about the experience.⁴⁸ In July of 1997, Lucimaria Feitosa Santos went to the hospital due to chronic fatigue and high blood pressure. During the examination it was discovered that her right kidney was missing. Apparently, a Sao Paulo hospital had removed the kidney nine years earlier when Santos underwent investigative surgery for stomach pains. The Santos family is now suing the hospital for removing her kidney without consent in 1988.⁴⁹

The law has also been attacked on the constitutional front with many critics claiming that it violates personal autonomy. When the law was first passed, the Federal Medical Council challenged the constitutionality of the law arguing that many people will not have the opportunity to oppose donation before their death.⁵⁰ Federal Attorney Geraldo Brindeiro claims that the law is constitutional but admits that relatives of the deceased should have a right to prevent the removal of organs for transplant.⁵¹ The Federal Medical Council appealed that decision to the Supreme Federal Tribunal in January of 1998.⁵² According to its Federal Constitution, Brazil is a legal democratic state founded on the dignity of the human person.⁵³ Article three of the document states that a fundamental objective of the Republic is to build a free, just, and solidary society and to reduce social and regional inequalities.⁵⁴ Article four asserts support for the prevalence of human rights.⁵⁵ The right to health is a social right guaranteed by the constitution.⁵⁶

47 *See id.*

48 *See id.*

49 *See* Geoff Dyer, *New Organ Donor Law Under Fire*, DAYTON DAILY NEWS, Feb. 1, 1998, at 1A.

50 *See Organ Donor Law in Brazil is Upheld*, ORLANDO SENTINEL, Jan. 11, 1998, at A18.

51 *See id.*

52 *See Brazil Medical Council to Fight Organ Donor Law in Top Court*, MED. INDUSTRY TODAY, Jan. 15, 1998.

53 *See* Braz. Const. tit. I, art. 1 (1988).

54 *See id.* art. 3.

55 *See id.* art. 4

56 *See id.* tit. II, ch. II, art. 6.

Perhaps the legislature is promoting this social right to health by ensuring that organs are more readily available to those in need. Many argue however, that this right is met at the expense of the human dignity and personal autonomy of others. One argument that could be made in support of the law is that a corpse is not a human person whose dignity needs to be safeguarded, especially when balanced against the dire health need of a living human awaiting organs needed to sustain life.

Brazil is not the only country to adopt presumed consent laws. Until recently, most European countries were operating under presumed consent laws.⁵⁷ Although in theory the law is very strict, enforcement of the law has been flexible. Most doctors choose to follow the wishes of family members even when the law would allow them to harvest organs without the consent of living relatives.⁵⁸ European countries are beginning to turn to voluntary systems. For example, a treaty signed at Oviedo, Spain in 1994 provides that the express and specific consent of a donor must be given before an organ is removed. The treaty prohibits the removal of organs from those unable to give consent.⁵⁹ Presumed consent laws do not necessarily result in larger organ supplies. Although countries such as Austria, Belgium, France, and Spain have produced more organs than many countries that have voluntary donation systems, other countries such as Switzerland, Greece, and Italy actually have lower transplant rates than countries where organ donation is voluntary.⁶⁰ Hong Kong legislators have consistently rejected presumed consent legislation and maintained a policy of requiring express consent since 1990.⁶¹ Although Hong Kong physicians originally agreed with the legislature,⁶² the Hong Kong Medical Association recently supported the adoption of a presumed consent system to address the urgent need for

57 See Gabriele Wolfslast, *Legal Aspects of Organ Transplantation: An Overview of European Law*, 11 (4 part 2) J. HEART & LUNG TRANSPLANTATION S160 (1992).

58 See *Multi Organ Transplant Program, Legal Aspects* (visited Oct. 20, 1998) <<http://www.lhsc.on.ca/transplant/legal.htm>> [hereinafter *Multi Organ Transplant Program*].

59 See Council of Europe, *supra* note 12, at 838.

60 See *Multi Organ Transplant Program, supra* note 57.

61 See Sanna So, *Debate on Organ Offer Gets a Boost*, HONG KONG STANDARD, Jan. 2, 1999, available in LEXIS World News File; *Follow Transplant Education with Legislation*, S. CHINA MORNING POST, Nov. 21, 1993, at 15, available in LEXIS World News File (reporting Hong Kong government descriptions of the opt-in system as “near perfect”).

62 See Karin Bishop, *Wanted: Change of Heart*, S. CHINA MORNING POST, Mar. 22, 1995, at 15, available in LEXIS All News Grp. File.

transplantable organs.⁶³ With European countries abandoning the practice of presumed consent in favor of voluntary donation programs, it becomes more controversial for Brazil to adopt the new law. On the other hand, Singapore has administered a presumed consent system since 1987,⁶⁴ and it has been successful in increasing the numbers of transplantable organs.⁶⁵

Advocates of presumed consent statutes claim they provide the most efficient method of maximizing organ procurement.⁶⁶ In Austria, for example, the rate of cadaveric kidney procurement is double that of the United States and most European countries.⁶⁷ Despite this success, the demand for organs significantly exceeds the supply in countries with presumed consent laws. The problem in Brazil and other countries stems from incompetent administration and a lack of infrastructure rather than a defect in the law itself.⁶⁸ Still, presumed consent countries are more successful at augmenting organ supplies than countries relying on altruism.⁶⁹ According to one study, the success of presumed consent laws in other countries led seventy-eight percent of transplant surgeons polled in the United States to favor the adoption of a presumed consent system.⁷⁰

Critics argue that despite success rates, presumed consent laws are constitutionally questionable because they violate personal autonomy. Specifically, opponents argue that presumed consent laws violate the principle that a person has a legal right to make decisions concerning invasions of

⁶³ See Patsy Moy, *Doctors Stir New Row on Organ Rights*, HONG KONG STANDARD, Nov. 20, 1998, available in LEXIS All News Grp. File.

⁶⁴ See *Reacting to Indian Organ Black Market Malaysia Considering Presumed Consent*, TRANSPLANT NEWS, March 31, 1995 at ISSN:0709-8871, available in LEXIS All News Grp. File.

⁶⁵ See Moy, *supra* note 62.

⁶⁶ See LAMB, *supra* note 6 (“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. . .”).

⁶⁷ See *Changes Needed to Get More Kidneys*, STRAITS TIMES, May 27, 1992, at 2.

⁶⁸ See Claudio Csillag, *Brazil Abolishes “Presumed Consent” in Organ Donation*, THE LANCET, Oct. 24, 1998

⁶⁹ See James Warren, *A Literal Gift of Life, Organ Donations are Saving Lives, but a Shrinking Donor Pool has Caused Many to Re-evaluate the System for Transplants*, L. A. TIMES, Oct. 18, 1992 at 14 (implying that presumed consent countries have higher rates of organ supply than countries that have not enacted presumed consent laws).

⁷⁰ See *id.*

their bodies.⁷¹ Critics also cite the potential disparity between the rich and the poor. Many fear that the underprivileged will be less likely to exercise autonomy especially since many are illiterate and legally disenfranchised.⁷² Others are concerned that such laws will deteriorate altruism and charity in society.⁷³ Critics also worry that organs will be harvested from people who have registered as non-donors due to administrative deficiencies. Others worry that anxious physicians will extract organs before a donor is truly brain dead.⁷⁴

Many arguments have been advanced to counter these criticisms. Those in favor of presumed consent argue that because organ donation is generally supported and potential donors are given the opportunity to opt-out, individual liberty is not significantly hampered.⁷⁵ Proponents further argue that the slight inconvenience of registering refusal actually promotes individual freedom by expressly ensuring that a donor's desires are carried out, rather than leaving the decision to the family.⁷⁶ Supporters of presumed consent also contend that altruism can be experienced by a person by simply deciding not to opt-out of the donation system. Another advantage of a presumed consent system is that it is easier to manage than voluntary consent.⁷⁷ For example, if there is no registered objection to organ donation, a transplant surgeon can remove organs without contacting the next of kin for consent. By reducing the lapse of time between death and organ extraction, there is a better chance that the transplant will be successful because the organ

71 See Karen L. Johnson, *The Sale of Human Organs: Implicating a Privacy Right*, 21 VAL. U. L. REV. 741, 755 (stating that "the 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").

72 See LAMB, *supra* note 6, at 142.

73 See Theodore Silver, *The Case for a Post-Mortem Organ Draft Act and A Proposed Model Draft Act*, 68 B.U. L. REV. 681, 706 (1988) (stating presumed consent laws may force families and individuals to choose not to donate organs, which could amplify anguish at the time of death).

74 See Michael J. Butler, *The Law of Human Organ Procurement: A Modest Proposal*, 1 J. CONTEMP. HEALTH L. & POL'Y 195, 204 (1985) (discussing the potential problems of over anxious medical personnel).

75 See LAMB, *supra* note 6 at 141; see also Note, Melissa N. Kurnit, *Organ Donation in the United States: Can we Learn from Successes Abroad?*, 17 B.C. INT'L COMP. L. REV. 405, 435 (1994).

76 See Kurnit, *supra* note 74, at 429 (noting that families may be reluctant to donate organs due to the trauma of a sudden death).

77 See Williams, *supra* note 8, at 363.

would be fresher.⁷⁸ However, logic would suggest that a database indicating consent to organ removal would be as equally timesaving as a database indicating non-consent. Proponents of presumed consent point out that a properly functioning presumed consent system provides important spill-over benefits. Not only will the transplant rate increase, but the success rate will increase as well. As the pool of available organs increases, a physician will be better able to implant an organ with tissue matching that of the donee.⁷⁹ An increased supply also eliminates the temptation to obtain organs through unethical means such as through the black market. This in turn will diminish underground kidnapping rings which currently affect countries across Latin America.⁸⁰ A presumed consent system would positively affect taxpayers by reducing the amount of government spending on dialysis treatment for patients awaiting kidney transplants.⁸¹

III. ALTERNATIVE SOLUTIONS

Many lessons can be learned from the implementation of presumed consent in Brazil and other countries. Although persuasive arguments have been made for and against the policy, other alternatives must also be examined in the quest for a stable and efficient organ procurement system. The sections below briefly analyze the pros and cons of the following organ procurement policies: conscription, importation, voluntary donation, required request, and a market system.

A. *Conscription.*

One variation on presumed consent is an organ draft that does not permit opting-out at all. Conscription is accomplished by the nationalization of cadavers.⁸² This

78 See William N. Gerson, *Refining the Law of Organ Donation: Lessons from the French Law of Presumed Consent*, 19 N.Y.U. J. INT'L L. & POL. 1013, 1019, & n.35 (1987).

79 See Roger D. Blair & David Kaserman, *The Economics and Ethics of Alternative Cadaveric Organ Procurement Policies*, 8 YALE J. ON REG. 403, 409-411(1991) (implying that a larger number of kidneys would lead to more efficient transplant surgeries).

80 See Butler, *supra* note 73, at 204 (stating that inappropriate retrieval of organs would be reduced); see also Maria N. Morelli, *Organ Trafficking: Legislative Proposals to Protect Minors*, 10 AM. U. J. INT'L L. & POL'Y 917, 918 (1995).

81 See FOX & SWAZEY, *supra* note 9, at 76 (showing how reduced Medicare costs may translate into tax savings).

82 See David E. Jeffries, *The Body as Commodity: The Use of Markets to Cure the Organ Deficit*, 5 IND. J. GLOBAL LEGAL STUD. 621, 642 (1998).

alternative is seldom initiated and results in serious violations of human rights.⁸³ A study issued by the Bush administration found that a Serbian doctor serving in an interment camp allegedly killed prisoners of war to obtain their organs for transplantation.⁸⁴

Chinese law has permitted organ harvesting from executed prisoners since 1984. In China, harvest is allowed when the prisoner's body is not claimed, the prisoner consents, or if the prisoner's family has consented.⁸⁵ Despite the law, many prisoner executions are conveniently scheduled to meet transplant needs and, in some cases, are purposefully blundered in an effort to keep the prisoner alive until their organs are removed.⁸⁶ According to Chinese policy, the harvest of organs from executed criminals must be discreet. Although a surgical vehicle from the health department is allowed to enter the execution grounds to remove the organs, it must not bear the official insignia of the health department. Furthermore, workers from the health department are not allowed to wear white clothing. The transplant takes place at the execution facility with guards watching until the procedure is finished.⁸⁷

B. No Organ Procurement Policy

Some countries such as Japan and Iran have not instituted an organ harvesting policy due to cultural and religious taboos.⁸⁸ In Japan, a strong Buddhist belief that a corpse should be buried intact prohibits the removal of organs.⁸⁹ In addition, physician mistrust and a refusal to legislatively define death as brain death rather than cardiopulmonary death, have resulted in an extreme shortage of organ donations in Japan.⁹⁰ However, despite the lack of

83 *See id.*

84 *See Williams, supra note 8, at 323.*

85 *See Laura-Hill M. Patton, A Call for Common Sense: Organ Donation and the Executed Prisoner, 3 VA. J. SOC. POL'Y & L. 387, 425 (1996).*

86 *See Allison Owen, Death Row Inmates or Organ Donors: China's Source of Body Organs for Medical Transplantation, 5 IND. INT'L & COMP. L. REV. 495 (1995).*

87 *See id.* at 496-97.

88 *See Williams, supra note 8, at 331.*

89 *See Yutaka Sato, A Buddhist Perspective on Transplants, NIKKEI WKLY, May 16, 1992, at 24, available in LEXIS, World Library, ALLNWS File.*

90 *See id.; see also Itaru Oishi, Brain-Death Debate Keeps Organ Donor Controversy Alive, NIKKEI WKLY., July 27, 1991, at 2, available in LEXIS, World Library, ALLNWS File.*

organ donors, Japan has satisfied most of its transplant needs by importing organs from other countries.⁹¹

C. *Voluntary Donation*

Under a voluntary, non-pecuniary system of organ donation, a donor freely gives prior consent for doctors to remove needed organs.⁹² In most circumstances the volunteer donor is dead, although live donations also occur.⁹³ Some supporters of the voluntary donor allocation system argue that the commercialization of organ donation contradicts the values of society. The precise motivation behind these laws however, vary from one jurisdiction to another; altruism,⁹⁴ coercion,⁹⁵ and moral duty⁹⁶ have all been argued as incentives.

In 1984, the United States established the policy of voluntary donations by passing the National Organ Transplant Act which made the sale of human organs a federal crime.⁹⁷ The United States cited the encouragement of altruism as the overriding principle pushing Congress to promulgate the act.⁹⁸ Many lawmakers felt that commercial sales would cause the voluntary organ donor system to collapse, causing a net decrease in organs.⁹⁹

Although the altruistic characteristic of voluntary donation laws is appealing, such laws have failed to reduce the organ deficit and are much less efficient than presumed consent in providing needed organs.¹⁰⁰ Despite this failure, proponents of a voluntary system maintain that it is unethical to force people to donate organs upon their death despite the desperate need.¹⁰¹ Supporters of a voluntary system point out that education campaigns¹⁰² and non-

91 See Williams, *supra* note 8, at 332.

92 See Cohen, *supra* note 7, at 12.

93 See Irwin Kleinman & Frederick H. Lowy, *Ethical Considerations in Living Organ Donation and a New Approach: An Advance-Directive Organ Registry*, 152 ARCHIVES INTERN. MED. 1484, 1484 (1992).

94 See Ann McIntosh, *Regulating the "Gift of Life"—The 1987 Uniform Anatomical Gift Act*, 65 WASH. L. REV. 171, 178 (1990).

95 See Cohen, *supra* note 7, at 22.

96 See David Peters, *A Unified Approach to Organ Donor Recruitment, Organ Procurement, and Distribution*, 3 J. L. & HEALTH 157 (1990).

97 See 42 U.S.C. § 274e (1995).

98 See Susan Hankin Denise, *Regulating the Sale of Human Organs*, 71 VA. L. REV. 1015, 1035 (1985).

99 See *id.* at 1033.

100 See Williams, *supra* note 8, at 336.

101 See Cohen, *supra* note 7, at 15.

102 See *Allaying Fears About Organ Donations*, BANGKOK POST, June 5, 1994 at 24.

pecuniary incentives¹⁰³ rather than compulsion should be implemented to increase the organ supply.

D. *Required Request*

Responding to criticism that the voluntary system is ineffective, some jurisdictions have adopted required request laws to increase voluntary donation. These laws mandate that medical providers ask the next of kin of a viable organ donor if the patient's organs may be harvested for use in transplants.¹⁰⁴ Required request laws avoid the unfortunate and ironic loss of organs from potential donors whose families are willing to consent to organ donation. In the United States, hospitals and doctors are obligated to inform patients or the patients' families about the possibility of organ donation.¹⁰⁵ This system has resulted in an increased organ supply in the United States, yet a significant organ deficit still exists.¹⁰⁶

E. *Market System*

The most controversial policy of organ procurement is legal organ sales on the open market.¹⁰⁷ The sale of human organs includes live organ brokerage,¹⁰⁸ an organ futures market,¹⁰⁹ tax deductions,¹¹⁰ and health insurance reductions.¹¹¹ The legal theory behind a market procurement system is that an individual has a property right in his or her body,¹¹² and therefore the ban on organ sales is an

“We do not believe in forcing people to donate organs when they die even though we need them desperately,” said Dr. Visist Dhitavat of Chulalongkorn University Hospital’s Department of Surgery and director of the Organ Donation Centre of the Thai Red Cross Society. “I stand for donations on volunteer basis,” he said, adding that a major effort is needed to help the public understand how they can help others who are suffering, even after death.

Id.

103 See Williams, *supra* note 8, at 337.

104 See Cohen, *supra* note 7, at 21.

105 See *Multi Organ Transplant Service*, *supra* note 57.

106 See Cohen, *supra* note 7, at 21–24.

107 See Blair & Kaserman, *supra* note 78, at 420 n.69 (discussing British political opposition to the sale of organs).

108 See Denise, *supra* note 97, at 1021.

109 See Cohen, *supra* note 7, at 32–36.

110 See Lindsey Gruson, *Signs of Traffic in Cadavers Seen, Raising Ethical Issues*, N.Y. TIMES, Sept. 25, 1986, at A14.

111 See Hansmann, *supra* note 10, at 63–65.

112 See Paul A. Gerike, *Human Biological Material: A Proprietary Interest or Part of the Monistic Being?*, 17 OHIO N.U. L. REV. 805, 812 (1991); See Gregory S.

infringement by the government on a fundamental right.¹¹³ Supporters of the market system claim that the financial incentive provides a much needed incentive to augment the supply of available transplantable organs.¹¹⁴ A well-regulated commercial market provides the motivation for donors who simply do not want to contemplate their own death.¹¹⁵ Although some countries currently permit the marketing of organs, a well-regulated commercial market does not exist.¹¹⁶ Indeed, “those countries where organ sales are legal are among the worst violators of human rights and exploitation of the poor.”¹¹⁷

Those who oppose the market system argue that it is unethical and immoral to profit from the sale of human organs.¹¹⁸ They claim that the existence of a market in human body parts cheapens life.¹¹⁹ The practice of selling organs has been compared by some opponents to selling one's self into slavery.¹²⁰ Others argue that human organs simply fall into a category of something that cannot be sold.¹²¹

IV. WHICH SYSTEM IS BEST?

The remaining issue is which organ procurement system will result in the largest pool of organs to meet demand without violating human rights.

A. *Presumed Consent Short Lived in Brazil*

In mid October of 1998, the Brazilian government abolished its presumed consent law.¹²² With opposition from

Crespi, *Overcoming the Legal Obstacles to the Creation of a Futures Market in Bodily Organs*, 55 OHIO ST. L. J. 1, 27 (1994).

¹¹³ See Johnson, *supra* note 70, at 751 (reasoning that the constitutionally protected right to decide what happens to one's body is infringed by a flat ban on organ sales).

¹¹⁴ See Cohen, *supra* note 7, at 34.

¹¹⁵ See *id.* at 10–11.

¹¹⁶ See Jeffries, *supra* note 81, at 654.

¹¹⁷ *Id.*

¹¹⁸ See *id.*; Denise, *supra* note 97, at 1035 (discussing a medical transplant association's resolution condemning the commercial organ market scheme as “completely morally and ethically irresponsible”).

¹¹⁹ See Crespi, *supra* note 111, at 22 (stating that to some, organ sales “constitutes a ‘commodification’ of an object that should be held sacred and above market bartering . . . [something] incommensurable with the normal articles of commerce”).

¹²⁰ See Cohen, *supra* note 7, at 26.

¹²¹ See *id.*

¹²² See Csillag, *supra* note 67.

the Brazilian Medical Association and the Federal Council of Medicine as well as the general public, the law was destined to fail.¹²³ Furthermore the law was ineffective since most doctors were unwilling to harvest organs against the wishes of family members, even though the law required them to do so.¹²⁴ The reaction of panicked citizens who rushed to public offices to register themselves as non-donors also weakened the effectiveness of the law.¹²⁵ Not only did the law fail due to opposition, it was also impractical. The lack of infrastructure needed to maintain the intended register of recipients as well as the inability to transport organs efficiently further led to the law's demise.¹²⁶

Presumed consent, which has been replaced by voluntary systems in most European countries and lasted less than one year in Brazil is a quickly dissipating method of organ procurement.¹²⁷ Compulsory donation is indeed an oxymoron. Although the organ supply might be augmented by such a system, particularly when education programs or conscription are instituted, the system is undesirable due to its infringement on personal autonomy and liberty.¹²⁸

B. The Problematic System of Conscription

Similar to presumed consent, all cadavers are presumed to be donors under conscription.¹²⁹ The only difference between the two is that a system of conscription does not permit withdrawal from a donor register.¹³⁰ If the only goal of organ procurement was to increase the supply of donors organs at any cost, then this system would be laudable.

¹²³ See *id.*

¹²⁴ See *id.*

¹²⁵ See *id.*

¹²⁶ See *id.*

¹²⁷ See Monique C. Gorsline & Rachelle L. Johnson, *The United States System of Organ Donation, The International Solution, and the Cadaveric Organ Donor Act: "And the Winner Is . . ."*, 20 J. CORP. L. 5, 35 (1995) (noting "[t]he trend in Europe is away from presumed consent and towards the opting principle"); Csillag, *supra* note 67 (chronicling the demise of the presumed consent law in Brazil). *But cf.* Andrew C. McDonald, *Organ Donation: The Time Has Come to Refocus the Ethical Spotlight*, 8 STAN. L. & POL'Y REV. 177, 181 (1997) (stating that 16 countries, including 11 European countries, currently have presumed consent systems and 21 U.S. states have presumed consent statutes for corneal removal for transplant purposes); Jeffries, *supra* note 81, at 634 (stating that many European Union countries have adopted presumed consent laws).

¹²³ See Jeffries, *supra* note 81, at 640.

¹²⁹ See *id.* at 642

¹³⁰ See Williams, *supra* note 8, at 344.

However, conscription laws conflict with concepts of human rights and personal liberty.¹³¹

Conscription is highly objectionable as it would present potential ethical and political problems in nearly every country as well as grave legal problems in most Western countries.¹³² Conscription transfers ownership and autonomy of one's own body from the individual to the state. The experience in China and Serbia¹³³ demonstrate that nationalization is an unacceptable organ procurement plan despite its effect of reducing the organ deficit.¹³⁴

C. *No Organ Procurement is not an Option*

Because Japan made no active effort to procure organs yet consumed them on the world market, resentment and anger grew towards the country.¹³⁵ This has caused Japan to change its attitude towards organ procurement. On October 16, 1997, Japan enacted legislation allowing transplant operations using organs from brain-dead donors.¹³⁶ Within two months of implementing the new law, the number of hospitals capable of transplanting organs doubled from thirty-four to seventy of the nations ninety-six hospitals.¹³⁷ On November 13, 1997, less than one month after the law was passed, the first transplant based on donor cards was performed.¹³⁸ The positive results which have occurred in Japan in such a short period indicate the importance of implementing an organ procurement policy. Although it is debatable which of the existing or proposed policies is most efficient, it is clear that any policy is better than no policy at all.

¹³¹ See Jeffries, *supra* note 81, at 642.

¹³² See Williams, *supra* note 8, at 344.

¹³³ See Williams, *supra* note 8, at 323–326; Patton, *supra* note 84, at 425; Owen, *supra* note 85, at 495.

¹³⁴ See Jeffries, *supra* note 77 at 644.

¹³⁵ See Sam Jameson, *Japan in Search of its Heart*, L.A. TIMES, Feb. 22, 1992, at A1.

¹³⁶ See *Organs Taken for Transplant in 1st Donor Card Case*, Kyodo News Int'l Inc., JAPAN SCIENCE SCAN, Nov. 17, 1997 1997 WL 8662560 [hereinafter *1st Donor Card Case*].

¹³⁷ See *70 Hospitals Ready to Provide Organs from Brain-Dead*, JAPAN SCIENCE SCAN, Jan. 19, 1998.

¹³⁸ See *1st Donor Card Case*, *supra* note 135 (reporting that “the eyes and portions of the skin of a man who died of heart failure at a Tokyo hospital. . . were taken for transplant in accordance with the wishes expressed on the man’s donor card”).

D. The Reluctance to Donate

Proponents of a voluntary system cite altruism, personal liberty, ethics and morality as reasons to support the practice of voluntary donation.¹³⁹ Although such a system may avoid the violation of personal liberty, it does not end the suffering and needless deaths of patients awaiting transplants.¹⁴⁰

Under U.S. criminal law, there is no duty to aid a person in need.¹⁴¹ A person who sees a small child drowning in a swimming pool has no legal duty to rescue them even if he is an expert swimmer. Although a criminal can be punished for his or her actions, the failure to act is generally not a crime.¹⁴² Thus, it would follow that the law cannot force a citizen to donate organs even though this might save the life of a terminally ill patient. The patient in need of a transplant is similar to the drowning child. He must rely on the goodness and altruism of others to come to his aid. Most people, upon seeing a small child drowning in a swimming pool, would exercise their moral duty to save the child even though no legal duty exists. Unfortunately, the fact that voluntary organ donation is ineffective in meeting the demand for organs despite the potential, suggests that most people do not feel a similar moral duty to become an organ donor.

There are several reasons that people do not donate organs: denial of mortality, fear that medical providers will not use every effort to save the donor patient's life in order to harvest the patient's organs, religious or cultural beliefs, and revulsion of the thought of having one's own organs removed.¹⁴³ Family members who may be emotionally and psychologically traumatized by the sudden death of a loved one are sometimes unable to consent to organ removal.¹⁴⁴ The family may feel that authorizing an organ harvest is

139 See McIntosh *supra* note 92, at 178; Kleinman & Lowy *supra* note 92, at 1485; Peters *supra* note 95, at 167-177.

140 See Williams, *supra* note 10, at 336 (discussing the ineffectiveness of the voluntary donation system); Cohen, *supra* note 7, at 4 (stating that "[t]ens of thousands of individuals are suffering and dying while the organs that could restore them to health are disposed of like carrion"); Jeffries, *supra* note 81, at 651 (declaring that voluntary donation preserves personal autonomy but fails to procure an adequate number of organs).

141 See *People v. Oliver*, 258 Cal.Rptr. 138, 142 (Ct. App. 1989); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW, § 9.06A (2d ed. 1995) ("A person has no criminal law duty to rescue or render aid to another person in peril, even if the person imperiled may lose her life in the absence of assistance.").

142 See *id.*

143 See Kurnit, *supra* note 74, at 428-9.

144 See *id.* at 429.

symbolic of giving up hope of recovery if the patient is still alive. Denial that a brain dead patient with a still-functioning heart has passed away might also cause family members to withhold consent.¹⁴⁵

In addition to a reluctance to donate, the voluntary system often fails even when a donor candidate intended to donate his organs. Although donors must carry donor cards to show intent, only three percent of organ donors are actually in possession of their donor cards when they die.¹⁴⁶ And even if a donor was carrying a donor card, physicians generally will not harvest organs if the family of the deceased withholds authorization.¹⁴⁷ In Australia, which has laws similar to those of the United States, many patients are dying despite the availability of donors simply because the next of kin decides to withhold consent.¹⁴⁸ A final problem is caused by medical providers themselves. Many doctors fail to ask the family of a dying person if their organs can be used for transplants.¹⁴⁹ Even though thousands of people do carry donor cards, the final decision is made by the next of kin, and many organs are lost because doctors do not want to breach the subject at such an emotionally devastating time.¹⁵⁰

V. PROPOSED SOLUTION

An increase in legal organ procurement is desperately needed to meet the needs of the terminally ill. However, this must be done without exploiting the poor. Many human rights violations could be prevented if human organs were made available legally and inexpensively.¹⁵¹ Many medical experts believe that current law is to blame for both the inadequate supply of legally donated organs and the existence of the underground market with its many human rights violations.¹⁵² Although the experts can logically assert that the law needs to change, some of their proposals are less than desirable. In Australia, for example, successful drunk

145 See *id.*

146 See *Developments in the Law—Medical Technology and the Law: Organ Transplantation*, 103 Harv. L. Rev. 1614, 1619 (1990) [hereinafter *Developments in the Law*].

147 See *id.*

148 See Robert L. Geltzer, et al., *National Conference on Birth, Death & Law*, 29 *Jurimetrics J.* 403, 421 (1989).

149 See *Developments in the Law*, *supra* note 145, at 1619.

150 See *id.*

151 See Williams, *supra* note 8, at 316.

152 See *id.* at 315–16 & n.3.

driving and speeding laws have reduced highway fatalities which in turn has reduced the supply of viable organs.¹⁵³ This led some experts to oppose the introduction of mandatory seat-belt laws due to the detrimental effect it would have on the transplant front.¹⁵⁴ In addition to being inefficient this justification for opposing traffic laws seems to value the lives of motorists less than those of transplant patients. Reducing vehicular fatalities and increasing donor organs are both laudable objectives, however one goal should not be furthered at the expense of the other. What is needed are laws that encourage organ donation through legitimate and ethical channels while reducing the atrocities that are currently being committed by organ traders on the black market.

It is probably impossible to implement an organ procurement policy that is perfect. Even a system that completely satisfies current demand is likely to have some negative impacts on society. For example, a strictly enforced conscription policy would probably meet the demand for transplantable organs but such a policy would violate individual liberty.

A market system for organ procurement may be the right solution to overcome the organ deficit for end stage organ failure patients. Many critics, considering it to be a taboo alternative, refuse to even consider the possibility of a market system even if it is safeguarded against exploitation of the poor. Although there are legitimate concerns regarding a market in transplant organs, the feasibility of a market system should not be ignored or dismissed without consideration of its virtues. Instead, a market system should be carefully studied with an emphasis on creating a system that will resolve or substantially decrease the problems and concerns cited by critics.

The greatest advantage of a market system is its ability to increase the availability of organs for transplants.¹⁵⁵ Recognizing that a futures market would likely increase the organ supply, the AMA called for the implementation of a pilot futures market program that would use economic incentives to encourage organ donation.¹⁵⁶ A market system

153 See Jo Chandler, *Call for New Approach to Donor Organs*, THE AGE, Dec. 5, 1992 1992 WL 11726280 at 18.

154 See *id.*

155 See Jeffries, *supra* note 81, at 16.

156 See Financial Incentives for Organ Procurement: Ethical Aspects of Future Contracts for Cadaveric Donors, Report 1-93-6 of the Council on Ethical and

with just enough incentive to override the prevailing concerns that deter people from becoming donors may very well eradicate the organ deficit.¹⁵⁷ Furthermore, the payment will provide consideration that converts a donor card into a binding legal contract.¹⁵⁸ The compensation given in exchange for organs may include an allowance for a decedent's burial costs,¹⁵⁹ a health insurance reduction,¹⁶⁰ or direct payments to a donor either upon signing a contract or upon extraction of the organ.¹⁶¹

A market system may also have advantageous side effects such as reducing human rights violations by eliminating, or at least limiting, trade on the black market.¹⁶² Despite fears that a market system will exploit the poor and increase violations of human rights, the system may actually function to eliminate those problems.

Critics argue that the destitute will be exploited and may feel compelled to sell their organs for profit while alive.¹⁶³ This problem can be eliminated by only permitting market transactions in cadaveric donations.¹⁶⁴ Many alarmed opponents cite reports of trafficking in children's organs.¹⁶⁵ However, the overwhelming majority of the allegations of kidnappings and adoptions of children in order to dismember them for use in organ transplants have proven to be unfounded rumors.¹⁶⁶

Critics also charge that a market in human organs would actually cause a decrease in organ donations and an increase in the cost of transplant operations and research.¹⁶⁷ On the contrary, the organ supply will most likely increase allowing for more research which may lead to lower costs.¹⁶⁸ Furthermore, although organs may be too expensive for some

Judicial Affairs, American Medical Association (1993) (adopted by the AMA House of Delegates on December 7, 1993).

157 See Darryl Van Duch, *Is Ban on Pay to Donors Killing Urge to Give?*, Nat'l L. J., Oct. 9, 1995 at A11.

158 See *Developments in the Law*, *supra* note 145, at 1623.

159 See Van Duch, *supra* note 156.

160 See Hansmann, *supra* note 10, at 63–65.

161 See Williams, *supra* note 8, at 348.

162 See Richard M. Boyce, *Organ Transplantation Crisis: Should the Deficit be Eliminated Through Inter Vivos Sales?*, 17 AKRON L. REV. 283, 300 (1983).

163 See Hansmann, *supra* note 10, at 72.

164 See Williams, *supra* note 8, at 348.

165 See United States Information Agency (USIA), *The Baby Parts Myth: The Anatomy of a Rumor*, May 10, 1994, at 1.

166 See *id.* at 6–8.

167 See Randy W. Marusyk & Margaret S. Swain, *A Question of Property Rights in the Human Body*, 21 OTTAWA L. REV. 351, 373 (1989).

168 See Crespi, *supra* note 111, at 20–21.

to afford, the market can be regulated to reduce the impact of that problem.¹⁶⁹ Transplant recipients of limited resources may be able to rely on public assistance programs to obtain their organs just as they do other medical benefits. Indeed, as the supply of organs increases the market price for organs will fall accordingly.¹⁷⁰ Others predict that a market system would result in the donation of lower-quality organs.¹⁷¹ Their argument states that the persons who refuse to voluntarily donate their organs but respond to financial incentives to sell those organs would have lower quality organs than those currently donated.¹⁷² Proponents of this argument fail to cite any empirical evidence to support this illogical claim.¹⁷³ But, even if it were true, the augmented supply of organs that financial incentives would bring could be screened for quality, in the same manner that currently donated organs as well as both donated and purchased blood products are screened.¹⁷⁴ Thus, both low income and wealthy transplant patients would benefit from the increased organ supply that a market system would provide.¹⁷⁵

Arguments are also advanced that a market system may reduce altruism in society.¹⁷⁶ Although altruism is a desirable characteristic to encourage in society, it would be ludicrous to dismiss a system that increases the organ supply and saves lives on this argument alone. Food, water, shelter, and medical care which are all necessary for human survival are allocated on a market system. A farmer is not accused of lacking altruism simply because he charges for his harvest in the marketplace. It is not considered unethical for a medical provider to profit from the performance of health services. Why then should the harvest of organs which also provides life to those in need be especially different?

Perhaps the biggest flaw in the altruism argument is simply this: altruism has failed to supply a sufficient quantity of organs to meet the demand. The disturbing truth is that the altruistic system results in avoidable deaths as

¹⁶⁹ See Roger D. Blair & David L. Kaserman, *The Economics and Ethics of Alternative Cadaveric Organ Procurement Policies*, 8 YALE J. ON REG. 403, 447–48 (1991).

¹⁷⁰ See Cohen, *supra* note 7, at 36.

¹⁷¹ See Marusyk & Swain, *supra* note 166, at 373.

¹⁷² See Crespi, *supra* note 111, at 21.

¹⁷³ See *id.*

¹⁷⁴ See *Developments in the Law-Medical Technology and the Law*, 103 HARV. L. REV. 1519, 1625 (1990).

¹⁷⁵ See Crespi, *supra* note 111, at 19–20.

¹⁷⁶ See Jeffries, *supra* note 81, at 655.

needed organs are fed to the worms rather than donated to transplant patients.¹⁷⁷ The unpleasant anxiety of contemplating death and mortality overpowers the altruistic nature of many potential donors draining them of the resolve to donate their organs.¹⁷⁸

Society cannot depend exclusively on the charity of producers to provide necessary goods and services. We must fully utilize the powerful incentive of financial self-interest to ensure that dangerous, difficult, and unpleasant tasks are accomplished, including organ donations.¹⁷⁹

Critics also maintain that allowing individuals to sell their organs may diminish their respect for themselves.¹⁸⁰ This argument is speculative at best. Even if it were shown to be true in some cases, this argument is weak because people have a choice. No one is forced to sell their organs on the market, nor is anyone prohibited from donating their organs for free just as they donate other items or services that are normally sold on the market.

The voluntary donor system permits doctors, hospitals, and organ procurement organizations to profit from the lucrative industry of transplants while denying this privilege to the actual donor.¹⁸¹ Professor Lloyd R. Cohen, of George Mason University School of Law, asserts that the sale of human organs is neither reprehensible nor unethical.¹⁸² He supports a market system where people are given extensive property rights in their own bodies in order to establish an options market in body parts and tissue.¹⁸³ Cohen argues that an options market for the delivery of organs after a person's death would not exploit the poor since organs would

177 See generally Cohen, *supra* note 7, at 4 (stating that a vast number of individuals are unnecessarily suffering because potential life-supporting organs are being "disposed of like carrion."); James Childress, *Ethical Criteria for Procuring and Distributing Organs for Transplantation*, 14 J. HEALTH POL. POL'Y. & LAW 87 (1989); Hansmann, *supra* note 10.

178 See Cohen, *supra* note 7, at 10, 13 (claiming that an organ donor must confront his mortality "in the particularly vexing form of an invitation to assent to his own dismemberment").

179 See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 14 (Modern Library ed. 1937) ("It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages.").

180 See Gorsline & Johnson, *supra* note 126, at 36.

181 See Van Duch, *supra* note 156, at A11.

182 See Lloyd R. Cohen, *Organ Transplant Market Would Save Lives*, NAT'L L. J., Jan. 29, 1996 at A19.

183 See *id.*

not be harvested from a live donor.¹⁸⁴ He further contends that such a proposal deals only with the acquisition of organs and not to their allocation, thereby giving no advantage to the wealthy.¹⁸⁵ A futures market would also allow people to sell their own organs so the next of kin would not be required to make those decisions or traffic in the remains of a loved one.¹⁸⁶

Another proposal suggests a regulated market with a middleman entity who would acquire and distribute organs.¹⁸⁷ The middleman entity would be licensed to traffic in organs and would be carefully regulated.¹⁸⁸ In contrast to a futures market, consideration would be paid only upon the removal of the organ and not during the donor's lifetime.¹⁸⁹ The allocation of transplantable organs would be based on need and urgency to prevent rich patients from outbidding poor patients.¹⁹⁰

Gregory S. Crespi, Assistant Professor at Southern Methodist University School of Law, advocated the creation of a futures market in bodily organs.¹⁹¹ Crespi's proposal would allow organ buyers to enter into futures contracts with an option to harvest organs after the organ bearer's death.¹⁹² All payments would be made to the organ bearer's estate and would be nonassignable and exempt from estate creditor claims.¹⁹³

Other non-market alternatives have also been proposed. The death benefits system provides financial incentives to the family of a decedent including estate tax deductions, funeral expense allowances, and college education benefits.¹⁹⁴ Proponents of this system claim that it would augment the organ supply without interfering with the spirit of altruism.¹⁹⁵ Advocates also argue that a death benefits system can be implemented without violating existing laws or treaties because the system does not involve prohibited

¹⁸⁴ See *id.*

¹⁸⁵ See *id.*

¹⁸⁶ See *id.*

¹⁸⁷ See Jeffries, *supra* note 81, at 646–48.

¹⁸⁸ See *id.*

¹⁸⁹ See *id.*

¹⁹⁰ See *id.*

¹⁹¹ See Crespi, *supra* note 111, at 34–36.

¹⁹² See *id.* at 35.

¹⁹³ See *id.* at 37.

¹⁹⁴ See McDonald, *supra* note 126, at 182.

¹⁹⁵ See John A. Sten, *Rethinking the National Organ Transplant Program: When Push Comes to Shove*, 11 J. CONTEMP. HEALTH L. & POL'Y 197, 215–16 (1994).

compensation.¹⁹⁶ In addition, a mutual insurance pool has also been proposed as an alternative to the market system.¹⁹⁷ An insurance pool would increase the supply of organs utilizing a respectable, long accepted medium that will increase its social and political acceptability.¹⁹⁸ The insurance pool would operate by granting priority for any needed transplant to individuals that agree to donate organs to the pool upon their death.¹⁹⁹

VI. CONCLUSION

Although different systems will work better in different countries and cultures, several general conclusions can be reached. Since the organ deficit is at a disturbingly high rate around the world, it is desirable that every country institute some form of organ procurement policy. Since it is impossible to improve a policy that doesn't exist, it follows that even an inefficient system is better than no system at all. Nations with no policies or extremely weak policies should follow the lead of Japan and create programs that will meet the demands for organ transplants within their borders. It is extremely inefficient for nations with a scarce supply of organs to provide them for citizens of other nations which have the resources and ability to procure their own transplantable organs.

We also learn from the experience in Europe and Brazil that presumed consent is an undesirable system. Incentives whether based on altruism or financial gain are preferable to the compulsion of a mandatory system. A system which has repeatedly failed in several countries is unlikely to succeed anywhere. New programs and policies must be effectuated by all countries in order to increase supply and protect the personal autonomy and the liberty of their citizens.

More consideration and study should be given to market-driven alternatives. Although it is impossible to assert with certainty the exact guidelines by which such a system would best function, it is reasonable to suggest that the theories should be more vigorously debated and tested. Once implemented, the market system could be improved and fine-tuned until it operates efficiently without favoring the wealthy or encourage violations of human rights.

¹⁹⁶ See *id.* at 216.

¹⁹⁷ See Richard Schwindt and Aidan Vinig, *Proposal for a Mutual Insurance Pool for Transplant Organs*, 23 J. HEALTH POL. POL'Y & LAW 725, 727 (1998).

¹⁹⁸ See *id.* at 739.

¹⁹⁹ See *id.* at 727.

In addition, the intent of a donor should always be honored. Family members should not be able to override the competent decision made by an organ donor. If a person clearly and unequivocally intends their organs to be donated upon their death, that wish should be honored.

The arguments made by the critics of a market system are not strong enough to justify the failure to seriously consider a market system. Because a market system will potentially eradicate the gap between supply and demand, experimentation and further study are warranted. The fears and concerns of opponents can certainly be considered in creating such a system to ensure fairness, integrity, liberty, and the gift of life for patients on a seemingly endless waiting list.

Troy R. Jenson