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## SAY "NO" TO NOTA: MODIFYING FLORIDA'S ORGAN DONATION POLICY THROUGH GOVERNMENT REGULATION OF DONOR INCENTIVES

Rachel A. Mattie\*

In 1984, Congress passed the National Organ Transplant Act—commonly referred to as “NOTA”—which prohibits the “transfer [of] any human organ for valuable consideration for use in human transplantation.”<sup>1</sup> Under NOTA, a human organ is defined as any human “kidney, liver, heart, lung, pancreas, bone marrow, cornea, eye, bone, and skin or any subpart thereof and any other human organ . . . specified by the Secretary of Health and Human Services by regulation.”<sup>2</sup> Three years later, the National Conference of Commissioners on Uniform State Laws amended the Uniform Anatomical Gift Act (UAGA) encouraging all states to prohibit the sale of organs in their own individual state laws.<sup>3</sup> In 1999, the Florida Legislature enacted Florida Statutes section 873.01, criminalizing the act of knowingly “transfer[ing] any human organ or tissue for valuable consideration” by second degree felony.<sup>4</sup> The stated purpose of the legislation was to “address the nation’s critical organ donation shortage and improve the organ matching and placement process.”<sup>5</sup> However, the real result has been quite the contrary, as many scholars argue that NOTA has in fact *limited* access to life-saving organs in the United States by codifying a controversial and hotly debated position—that donating an organ for any purpose other than one of pure altruism is entirely unethical.<sup>6</sup>

In 2004, Dr. Sally Satel, resident scholar at the American Enterprise Institute, was thrown into the sea of Americans in need of an organ transplant when her doctor informed her that one of her own kidneys had “retired early.”<sup>7</sup> Being a seasoned physician herself, she did not panic at the initial diagnosis; however, the thought of being sentenced to painful kidney dialysis as a consequence of not being

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1. Nat’l Organ Transplant Act of 1984, Pub. L. No. 98-507, 98 Stat. 2339 (codified as amended at 42 U.S.C. §§ 273–274 (2006)); 42 U.S.C. § 274e(a).

2. 42 U.S.C. § 274e(c)(1).

3. Unif. Anatomical Gift Act § 10(a), 8A U.L.A. 62 (2003).

4. FLA. STAT. § 873.01 (2011).

5. *National Organ Transplant Act*, ORGAN PROCUREMENT & TRANSPLANTATION NETWORK, <http://optn.transplant.hrsa.gov/policiesAndBylaws/nota.asp> (last visited Dec. 27, 2013).

6. Joan Shipman, *Discerning Public Opinion: How Financial Incentives Could Improve Organ Donation, Reduce Donor-Recipient Gap*, SUPRASPINATUS (June 16, 2008, 7:28 PM), [http://nysbar.com/blogs/healthlaw/2008/06/discerning\\_public\\_opinion\\_how\\_1.html](http://nysbar.com/blogs/healthlaw/2008/06/discerning_public_opinion_how_1.html).

7. Sally Satel, *An Internet Lifeline, in Search of a Kidney*, N.Y. TIMES (Nov. 22, 2005), <http://www.nytimes.com/2005/11/22/health/22essa.html?pagewanted=all&r=0> [hereinafter Satel, *Internet Lifeline*].

able to find a donor was a devastating realization that even Dr. Satel could not escape.<sup>8</sup> She describes this procedure in one of her articles:

Imagine you are hooked up to a machine three times a week for hours at a time. The machine extracts deadly bodily toxins from your blood that your kidneys can no longer clear themselves. You come back from these dialysis sessions exhausted and depressed; meanwhile, dialysis itself takes a toll on your heart and generally shortens your lifespan.<sup>9</sup>

Dr. Satel continued to play the waiting game for an agonizing two years until finally, in May of 2006, she was fortunate enough to receive a kidney from a friend.<sup>10</sup>

Regrettably, not all patients are so lucky. Lisa Cunningham, a devoted mother residing just outside of Boston, developed Type 1 diabetes years before she was put on dialysis.<sup>11</sup> As of 2006, Cunningham was facing at least five more years on the organ waitlist, regulated by the Organ Procurement and Transplantation Network (OPTN).<sup>12</sup> In an effort to save her own life, she decided to take matters into her own hands and go public with her epic search for a kidney—a private solicitation by definition.<sup>13</sup> As a result, the Beth Israel Deaconess Medical Center refused to perform the transplant if she did find a kidney through private solicitation.<sup>14</sup> The center feared what would most certainly result in criminal penalty if they aided Cunningham in a violation of NOTA.<sup>15</sup> Tragically, in 2007, the wait proved too long and Cunningham died leaving behind a young son.<sup>16</sup> But she is not the only one left to face this impossible battle alone.

Hitting a little closer to home is the story of Florida native, Alex Crionas. In 2004, fearing he would never reach the top of the organ waitlist, Crionas took matters into his own hands and started a private website telling the story of his two-year search for a kidney.<sup>17</sup> He received harsh criticisms from medical ethicists nationwide, such as bioethicist Arthur Caplan and Dr. Douglas Hanto.<sup>18</sup> They classified this private search, and others like it, as an immoral attempt to “subvert

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8. *Id.*

9. Sally Satel, *The Kindness of Strangers and the Cruelty of Some Medical Ethicists*, THE WEEKLY STANDARD (May 29, 2006), available at <http://www.sallysatelmd.com/html/a-ws5.html> [hereinafter Satel, *Kindness*].

10. Sally Satel, *Organs for Sale*, THE AMERICAN (Oct. 14, 2006), <http://www.american.com/archive/2006/november/organs-for-sale>.

11. Satel, *Kindness*, *supra* note 9.

12. *Id.*

13. *Id.*

14. *Id.*

15. Rob Haneisen, *Wait for Donor Proved Too Long for Ashland Woman*, WICKEDLOCAL.COM (May 23, 2007, 6:52 PM), [http://webcache.googleusercontent.com/search?q=cache:ljA8upiwM\\_AJ:www.wickedlocal.com/ashland/news/x1325697428+&cd=6&hl=en&ct=clnk&gl=us](http://webcache.googleusercontent.com/search?q=cache:ljA8upiwM_AJ:www.wickedlocal.com/ashland/news/x1325697428+&cd=6&hl=en&ct=clnk&gl=us).

16. *Id.*

17. Satel, *Kindness*, *supra* note 9.

18. *Id.*

the waiting list."<sup>19</sup> Crionas finally found a donor, Patrick Garrity, but could not find anyone to perform the transplant for the same reasons Lisa Cunningham was given the cold shoulder by hospitals—he was guilty of private solicitation.<sup>20</sup> Despite the fact that Crionas and Garrity met at a party and not through the website, several hospitals were still reluctant to operate because of the existence of his website, in fear of the repercussions of NOTA.<sup>21</sup> The transplant was finally performed in 2005 by the brave transplant surgeons at Florida Hospital Orlando, but not before Crionas was rejected by several other transplant centers.<sup>22</sup>

The lack of available organs for those awaiting transplants is an alarming national statistic that continues to rise. In 2005, there were over 88,000 Americans on the organ transplant waitlist.<sup>23</sup> Today, there are currently over 121,000 people awaiting an organ<sup>24</sup>—106,000 of whom are awaiting kidneys<sup>25</sup>—yet less than one-fourth will receive an organ within the next year due to a substantial gap between the demand for organs and the supply of willing donors.<sup>26</sup> It is predicted that over 6500 people will die awaiting an organ transplant this year.<sup>27</sup> As the doctrine of supply and demand would have it, the only logical solution to this problem is an increase in organ supply.

The purpose of this comment is to examine the most effective solution to the nation's organ shortage—offering direct financial incentives to organ donors—and to increase the acceptance of such incentives through a practical analysis. Part I further identifies the problem with a variety of medical statistics and evaluates past attempts at solving the organ donor crisis through *indirect* financial incentives. Part II considers arguments both for and against allowing direct payment for organs, and also assesses the validity of both sides' contentions. Finally, Part III examines the legislative obstacle blocking this proposal—NOTA's current prohibition on donor incentives—and proposes a revision of the law followed by the establishment of a government-regulated market system for organ procurement and compensation.

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19. *Id.*

20. Terry O. Roen, "Kindred Spirit" Donates a Kidney, ORLANDOSENTINEL.COM (Aug. 13, 2005), [http://articles.orlandosentinel.com/2005-08-13/news/KIDNEY13\\_1\\_garrity-florida-hospital-orlando-kidney](http://articles.orlandosentinel.com/2005-08-13/news/KIDNEY13_1_garrity-florida-hospital-orlando-kidney).

21. *Id.*

22. *Id.*

23. Satel, *Internet Lifeline*, *supra* note 7.

24. *Transplant Trends*, UNITED NETWORK FOR ORGAN SHARING, <http://www.unos.org> (last visited Dec. 27, 2013).

25. *Overall Waitlist by Organ, Kidney*, UNITED NETWORK FOR ORGAN SHARING, <http://optn.transplant.hrsa.gov/latestData/rptData.asp> (last visited Dec. 27, 2013). As of December 2013, there were 106,563 people on a waitlist for a kidney (Now Updated to 106,977 as of March 2014), 16,555 for a liver (Now updated to 16,424 as of March 2014), 1192 for a pancreas (Now updated to 1194 as of March 2014), 3715 for a heart (Now updated to 3828 as of March 2014), 1658 for a lung (Now updated to 1668 as of March 2014), and 262 for an intestine (Now updated to 264 as of March 2014). *Id.* This list does not account for the people waiting for multiple organs. *Id.*

26. Satel, *Internet Lifeline*, *supra* note 7.

27. *The Need Is Real: Data*, ORGANDONOR.GOV, <http://www.organdonor.gov/about/data.html> (last visited Dec. 27, 2013). An average of eighteen Americans die each day because of the shortage of organ donations. *Id.*

## I. LOW SUPPLY VS. HIGH DEMAND: THE ORGAN SHORTAGE CRISIS

The demand for organ transplantation has skyrocketed in the last twenty years, due in part to an increase in the failure of vital organs caused by a myriad of biological factors.<sup>28</sup> However, this increase in demand has not been complemented by an increase in supply, leaving the United States in what can only be described as an organ shortage crisis.<sup>29</sup> In 1989, there were approximately 18,000 people on the OPTN waitlist and only 6000 donors (both living and deceased).<sup>30</sup> By 2009, the number on the waitlist had jumped from roughly 18,000 to 105,567, but the number of willing donors only increased from 6000 to 15,000.<sup>31</sup> The gap continues to widen today—as there are currently over 121,000 people awaiting organ transplantation and an estimated 11,000 registered donors.<sup>32</sup>

Every ten minutes someone is added to the OPTN waitlist, and there are enough people on the waiting list today to fill a large football stadium more than twice.<sup>33</sup> Each day, approximately eighteen American citizens die because they did not receive a transplant in time, totaling almost 7000 preventable deaths per year.<sup>34</sup> It is estimated that one organ donor can save up to eight lives.<sup>35</sup> In 2010, there were almost 2.5 million deaths in the United States<sup>36</sup>—what if every one of those people was willing to become organ donors? What if every one of those people was like thirteen-year-old Taylor Storch?<sup>37</sup>

Taylor Storch is remembered by her family as a “giving, wonderful person.”<sup>38</sup> In March 2010, Taylor set out for one last run during a family skiing trip in Colorado.<sup>39</sup> She slipped and fell backwards, hitting her head on a tree, resulting in irreversible brain damage.<sup>40</sup> In the midst of coping with the loss of their loving daughter, the Storchs were asked by doctors if Taylor’s organs would be available for donation.<sup>41</sup> Her mother immediately said that they would, later telling reporters, “that’s what Taylor would do . . . . She was so giving, and that choice was very, very easy.”<sup>42</sup> No one can appreciate Taylor’s gift, and the gift of her family, better than Patricia Winters of Arizona, who at the time of Taylor’s death was suffering

28. *Id.*

29. Charles C. Dunham IV, “Body Property”: *Challenging the Ethical Barriers in Organ Transplantation to Protect Individual Autonomy*, 17 ANNALS HEALTH L. 39, 42 (2008).

30. *The Gap Continues to Widen*, ORGANDONOR.GOV, <http://www.organdonor.gov/about/graphdescription.html> (last visited Dec. 27, 2013).

31. *Id.*

32. *Transplant Trends*, *supra* note 24 (updated to approximately 14,000 donors as of March, 2014).

33. *The Need Is Real: Data*, *supra* note 27.

34. *Id.*

35. *Why Donate?*, ORGANDONOR.GOV, <http://www.organdonor.gov/whydonate/index.html> (last visited Dec. 27, 2013).

36. *The Need Is Real: Data*, *supra* note 27.

37. Michael Inbar, *Mom Hears Late Daughter’s Heart Beat—Inside Donee*, TODAY HEALTH (Oct. 1, 2010, 9:49 AM), <http://www.today.com/id/39456266/#.UnraJCTz3ZL>.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

through acute cardiomyopathy.<sup>43</sup> Patricia's heart condition had reached such severity that she was no longer able to care for her two sons.<sup>44</sup> "I felt like I wasn't going to last too long," she told reporters in an October 2010 interview.<sup>45</sup> Soon after, in a hospital in Tucson, the heart of thirteen-year-old Taylor Storch was successfully transplanted to thirty-nine-year-old Patricia Winters.<sup>46</sup> That following September, the Storch family was finally able to meet the woman whose still beating heart once belonged to their daughter.<sup>47</sup> They gathered together and embraced Winters in remembrance of Taylor, eventually taking a moment to listen to Taylor's heart beat inside the woman whose life was forever changed by their selfless compassion.<sup>48</sup> While this story is heartwarming, and serves to restore our faith in humanity, the truth is that families like the Storchs—and spirits like Taylor—are few and far between.

In Florida alone, there are approximately 5454 men, women, and children waiting for a life-saving organ.<sup>49</sup> Most will wait approximately two years for a transplant, a waiting time that is often too late.<sup>50</sup> The Florida Legislature has recognized the need and since then, there have been several educational outreach programs implemented<sup>51</sup>—but are they enough? In 2009, the Florida Legislature established the Joshua Abbott Organ and Tissue Donor Registry after finding "that there is a shortage of organ and tissue donors in [the] state willing to provide the organs and tissue that could save lives or enhance the quality of life for many persons."<sup>52</sup> However, the registry failed to improve the organ donor crisis suffered by Floridians, as the gap between the number of people on the waitlist and the available organs has continued to widen.<sup>53</sup>

There have been several attempts at improving the organ donor crisis by increasing the rate of altruistic consent through public education but none have seen adequate results.<sup>54</sup> Between 1994 and 2004, the "altruistic approach" only

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43. Inbar, *supra* note 37.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Overall Waitlist by Age in Florida*, UNITED NETWORK FOR ORGAN SHARING, <http://optn.transplant.hrsa.gov/latestData/stateData.asp?type=state> (last visited Dec. 27, 2013). (To view a table with updated data, select "Florida," select "Waiting List," then select "Organ by Age.")

50. *Overall Waitlist by Waiting Time in Florida*, UNITED NETWORK FOR ORGAN SHARING, <http://optn.transplant.hrsa.gov/latestData/stateData.asp?type=state> (last visited Dec. 27, 2013). (To view a table with updated data, select "Florida," select "Waiting List," then select "Organ by Waiting Time.")

51. *See, e.g., About Donate Life Florida*, DONATE LIFE FLORIDA, <http://www.donateliflorida.org/content/about/?selected=3> (last visited Jan. 12, 2013).

52. FLA. STAT. § 765.5155(1)(a) (2009); *About Donate Life Florida*, *supra* note 51.

53. FLA. STAT. § 765.5155(1)(a) (2009); *About Donate Life Florida*, *supra* note 51.

54. Robert Arnold, *Financial Incentives for Cadaver Organ Donation: An Ethical Reappraisal*, MEDSCAPE EDUCATION, <http://www.medscape.org/viewarticle/465739> (last visited Jan. 12, 2013) (log-in required) (This article is also available for PDF download at <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CDQQFjAB&url=http%3A%2F%2Ffasts.org%2Fdocs%2Fdefault-source%2Feducation%2Ffinancial-incentives-for-deceased-organ-donation.pdf%3Fsfvrsn%3D0&ei=1Um-UoveNaSQ2gXOSYG4CA&usg=AFQjCNE0e4tYNtEUUsdiYKee6fB9bxUBSyA&bvm=bv.58187178,d.b2I>).

resulted in a mere fifteen percent (15%) increase in organ procurement.<sup>55</sup> This caused the majority of patients to seek live donors and turn to private solicitation despite the dangers of violating NOTA.<sup>56</sup> Opponents of direct financial incentives argue that there are other, more ethical, avenues for increasing organ procurement including income tax benefits and raising awareness through government funded programs.<sup>57</sup> However, this argument fails to consider the failed attempts at such alternatives.

Seventeen states (not including Florida) currently offer tax incentives to those who donate organs, but studies have shown that this is doing nothing to increase the donor supply.<sup>58</sup> Some attribute this lack of results to the insignificant amount of the tax benefit, which currently converts to less than \$1000 in reduced taxes for an average American family.<sup>59</sup> It is clear to see why this incentive is not exactly enticing anyone because the “financial burden” for a living organ donor can exceed \$3000 in travel expenses, hospitalization, and medical costs.<sup>60</sup> A study published by the *American Journal of Transplantation* shows that there is absolutely no significant effect on donation rates due to these tax benefit policies.<sup>61</sup>

There is a powerful devotion to the altruistic system<sup>62</sup> in the United States, especially in the realm of organ donation.<sup>63</sup> While this commitment to altruism has its moral advantages, the practical disadvantages to society are more significant. Philanthropists and bioethicists alike agree that organ donation, procurement, and transplantation exist to save lives; it has also been stated that allowing people to contract with one another for organs is “[a]n obvious and straightforward approach to solving the organ . . . shortage.”<sup>64</sup> However, the prohibition established by NOTA seems to treat saving lives as a secondary goal, placing it behind improving

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55. *Id.*

56. *Id.*

57. *Id.*

58. Richard Knox, *Tax Breaks for Organ Donors Aren't Boosting Transplant Supply*, NPR HEALTH BLOG (Aug. 31, 2012, 8:46 AM), <http://www.npr.org/blogs/health/2012/08/30/160338259/tax-breaks-for-organ-donors-arent-boosting-transplant-supply>. The following states offer donor tax breaks: Arkansas, Georgia, Idaho, Iowa, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, New Mexico, North Dakota, Ohio, Oklahoma, South Carolina, Utah, Virginia, and Wisconsin. *Id.*

59. *Id.*

60. *Id.*

61. Kay Bell, *Tax Breaks for Organ Donors*, BANKRATE.COM (Sept. 6, 2012, 1:00 PM), <http://www.bankrate.com/financing/taxes/tax-breaks-for-organ-donors/>. “Would an increase in both the types of tax breaks or the number of states that offer them help increase the live donor pool? Probably not, according to a new study published in the *American Journal of Transplantation*.” *Id.* See also Kelly Philips Erb, *A Kidney for a Tax Break?*, FORBES (Sept. 2, 2012, 3:06 PM), <http://www.forbes.com/sites/kellyphilipserb/2012/09/02/a-kidney-for-a-tax-break/>. Despite the tax breaks in various states, “there has been no increase in organ donation rates.” *Id.*

62. “Pure altruism is giving without regard to reward or the benefits.” Altruism—definition, SCIENCE DAILY, <http://www.sciencedaily.com/articles/a/altruism.htm> (last visited Dec. 29, 2013).

63. James F. Blumstein, *The Use of Financial Incentives in Medical Care: The Case of Commerce in Transplantable Organs*, 3 HEALTH MATRIX 1, 4 (1993). “[A] core value shaping organ transplantation policy was the goal of “[p]romoting a sense of community through acts of generosity.”” *Id.* See also U.S. Dep’t of Health & Human Servs., Report of the Task Force on Organ Transplantation, *Organ Transplantation: Issues and Recommendations* (1986).

64. Peter Aziz, *Establishing a Free Market in Human Organs: Economic Reasoning and the Perfectly Competitive Model*, 31 U. LA VERNE L. REV. 67, 68 (2009) (quoting David Kasperman, *Market for Organs: Myths and Misconceptions*, 18 J. CONTEMP. HEALTH L. & POL’Y 567, 568 (2002)).

the ideals of community and generosity. In 1986, the Department of Health and Human Services Task Force on Organ Transplantation reported that the central goal in establishing the current organ transplantation policy is to promote “a sense of community through acts of generosity.”<sup>65</sup> Congress is placing the crucial medical needs of patients in the shadows, while focusing on how to make sure donors “feel good” about their contribution.<sup>66</sup> While this is a worthy objective, it should not be the primary one, nor is it relevant to solving the organ shortage.

Other proposed solutions include instituting a policy of presumed consent to improve the matching system.<sup>67</sup> With presumed consent, doctors would be able to assume that the organs of deceased patients can be used for transplant unless the family of the patient, or the patient himself, has previously expressed refusal.<sup>68</sup> However, this would do nothing to encourage *living* donors, and it also has the potential to inspire costly litigation between families and transplant surgeons.<sup>69</sup> Furthermore, any improvement in the organ matching system will have no effect on the shortage of organs available—while it is a commendable goal, it does not address the problem.

## II. THE HUMAN ORGAN MARKET: A PRACTICAL SOLUTION

The only solution is more organs. In the U.S., we need a regulated system in which compensation is provided by a third party (government, a charity or insurance) to well-informed, healthy donors. Rewards such as contribution to retirement funds, tax breaks, loan repayments, tuition vouchers for children and so on would not attract people who might otherwise rush to donate on the promise of a large sum of instant cash in their pockets.<sup>70</sup>

In 1983, Dr. Barry Jacobs, founder of the International Kidney Exchange, asked that Congress create a fund to compensate families of organ donors, postulating that this would spike donor involvement.<sup>71</sup> Jacobs wanted to broker kidneys through a private company—an international kidney exchange.<sup>72</sup> In response, Congress enacted NOTA just a year later prohibiting the sale of human organs from either dead or living donors.<sup>73</sup> The penalty for violation is currently up

65. Blumstein, *supra* note 63, at 4.

66. *See id.*

67. *Presumed Consent Not Answer to Solving Organ Shortage in U.S., Researchers Say*, JOHNS HOPKINS MEDICINE (Nov. 29, 2011), [http://www.hopkinsmedicine.org/news/media/releases/presumed\\_consent\\_not\\_answer\\_to\\_solving\\_organ\\_shortage\\_in\\_us\\_researchers\\_say](http://www.hopkinsmedicine.org/news/media/releases/presumed_consent_not_answer_to_solving_organ_shortage_in_us_researchers_say).

68. *Id.*

69. *Id.*

70. Sally Satel, *The Market for Kidneys, Livers, and Lungs*, WALL ST. J. (Nov. 8, 2011), <http://online.wsj.com/article/SB10001424052970204554204577023623689583052.html>.

71. Alicia M. Markmann, Comment, *Organ Donation: Increasing Donations While Honoring Our Longstanding Values*, 24 TEMP. J. SCI. TECH. & ENVTL. L. 499, 505–06 (2005).

72. *Id.*

73. *Id.*



to \$50,000 in fines and a five-year prison sentence.<sup>74</sup> Since NOTA's enactment, there has been popular debate on the issue of whether the proposal of Dr. Jacobs was an ethical and legal one.<sup>75</sup> The debate centers around several key points including the rationality of NOTA as it exists and the morality of a human organ market.<sup>76</sup> Among the most commonly raised concerns are whether a market system for organs would uphold the principles of equity and whether such a market could be properly regulated.

Opponents of the organ market system contend that the law is rational as it currently exists because it was written without ambiguity and follows the ethical principles of society. However unambiguous the language may seem, there is still a somewhat contradictory nature to the effects of the statute. NOTA clearly states that "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."<sup>77</sup> However, NOTA allows human organ paired donations, whereby two individuals may trade organ for organ, but not organ for money.<sup>78</sup> For example, if *Donor A* wishes to donate a kidney to *Patient A* but he is biologically incompatible, and *Donor B* wishes to donate a kidney to *Patient B* but he is also biologically incompatible, then all parties may enter into a legally enforceable contract under which *Donor A* promises to deliver his kidney to *Patient B* and *Donor B* in turn promises his kidney to *Patient A*.<sup>79</sup>

Valuable consideration is commonly defined as "an equivalent or compensation having value that is given for something acquired or promised . . . that may consist either in a benefit accruing to one party or a loss falling upon another."<sup>80</sup> It has also been defined as the transfer of valuable property among donors and recipients in a sales transaction.<sup>81</sup> NOTA's prohibition on the exchange of money for organs is therefore incongruous with its permission of organ paired donations, because under contract law the organs in paired donations *are* valuable consideration—they represent a detriment to the initial owners and a benefit to all involved. Allowing the sale of an organ for an organ is effectively the same as allowing the trade of an organ for money because the organs still represent a value in the transaction—a bargained-for-exchange still exists. The Restatement (Second) of Contracts states: "[T]o constitute consideration, a performance or a return promise must be bargained for."<sup>82</sup> "A performance or return promise is *bargained for* if it is sought by the promisor in exchange for his promise and is

74. 42 U.S.C. § 274e(b) (2006); David I. Flamholz, *A Penny for Your Organs: Revising New York's Policy on Offering Financial Incentives for Organ Donation*, 14 J.L. & POL'Y 329 (2006).

75. Donald Joralemon, *Shifting Ethics: Debating the Incentive Question in Organ Transplantation*, 27 JOURNAL OF MEDICAL ETHICS (2001), available at <http://jme.bmj.com/content/27/1/30.full>.

76. *Id.*

77. 42 U.S.C. § 274e(a) (2006).

78. *Id.* The prohibition on selling organs "does not apply with respect to human organ paired donation." *Id.*

79. See *id.*

80. Markmann, *supra* note 72, at 500–01; *Valuable Consideration*, WEBSTER'S COLLEGIATE DICTIONARY 1382 (11th ed. 2003).

81. Ritsch M. E. Jr. Memorandum from the Gen. Couns. to United Network for Organ Sharing. Intended recipient exchanges, paired exchanges and NOTA § 301. (Mar. 7, 2003).

82. RESTATEMENT (SECOND) OF CONTRACTS § 71(1) (1981).

given by the promisee in exchange for that promise.”<sup>83</sup> Furthermore, “[t]he performance or return promise may be given to the promisor or to some other person.”<sup>84</sup>

Opponents fervently argue that lifting the ban on the sale of organs will create a black market, however the enactment of NOTA’s ban has actually contributed to the rise of the black market problem.<sup>85</sup> The black market for organs already exists—and is actually thriving—due to a lack of organ supply and an extensive waitlist.<sup>86</sup> People have attempted to use social media sites such as Facebook to buy and sell organs and the trend is spreading internationally.<sup>87</sup> In 2009, a man sold his kidney for \$20,000 and lied to the transplant hospital in order to get the procedure done.<sup>88</sup> Auctions for kidneys on eBay are consistently uncovered and the bids can range from thousands to millions of dollars.<sup>89</sup>

Another objection to allowing financial compensation is based on the notion that an organ marketplace will destroy the principles of equality by only benefitting the wealthy and ensuring that only the richest will be able to purchase organs.<sup>90</sup> It is estimated that one kidney has the black market price of \$30,000; however, that does not necessarily mean that this is the price the government will charge for the organ in a well-regulated system.<sup>91</sup> In fact, the exact opposite is likely to occur, because a government-regulated market system would eliminate the existence of bidding wars that tend to drive up the cost of any merchandise, establishing a new fair price to be determined by the government according to the scheme of supply and demand. Opponents also argue that the poor will feel coerced to sell their organs due to the high price paid by the government.<sup>92</sup> However, this concern is illogical, because it assumes that America’s poor are incapable of making rational decisions simply because of their financial situations. The argument stereotypes poor people as being irrationally desperate and incompetent.

It has also been debated that allowing the sale of organs will kill the notion of altruism, turning off the purely generous donor because of the existence of an

83. *Id.* § 71(2) (emphasis added).

84. *Id.* § 71(4).

85. Henry Ritter, *Dead on the Wait-List: The Case for Legalized Organ Sales*, POINT OF VIEW (Oct. 18, 2013, 6:00 AM), <http://www.bbnpov.com/?p=1214>.

86. *Id.* See also Drew Griffin & David Fitzpatrick, *Donor Says He Got Thousands for His Kidney*, CNN (Sept. 2, 2009, 2:45 PM), [http://articles.cnn.com/2009-09-01/world/blackmarket.organs\\_1\\_kidney-transplants-kidney-donor-kidney-specialist?\\_s=PM:WORLD](http://articles.cnn.com/2009-09-01/world/blackmarket.organs_1_kidney-transplants-kidney-donor-kidney-specialist?_s=PM:WORLD).

87. *Illegal Selling of Organs on Facebook Is a Problem in the U.K.*, NEWS.COM.AU (Mar. 10, 2014, 5:28 PM), <http://www.news.com.au/technology/online/illegal-selling-of-organs-on-facebook-is-a-problem-in-the-uk/story-fnjwnhzf-1226850612858>.

88. Griffin & Fitzpatrick, *supra* note 86.

89. Amy Harmon, *Auction for a Kidney Pops up on eBay’s Site*, N.Y. TIMES (Sept. 3, 1999), <http://www.nytimes.com/1999/09/03/us/auction-for-a-kidney-pops-up-on-ebay-s-site.html>.

90. Claire Andre & Manuel Velasquez, *Kidneys for Sale*, SANTA CLARA UNIVERSITY: ETHICS, Vol. 1, No. 2 (Winter 1988), available at <http://www.scu.edu/ethics/publications/ie/v1n2/kidneys.html>.

91. Tammy Leitner & Lisa Capitanini, *Market for Black Market Organs Expands* (May 21, 2014, 11:13 AM), <http://www.nbcchicago.com/investigations/Market-For-Black-Market-Organs-Expands-259889741.html>.

92. Tarif Backdash & Nancy Scheper-Hughes, *Is It Ethical for Patients with Renal Disease to Purchase Kidneys from the World’s Poor?*, PLOS MEDICINE (Oct. 24, 2006), <http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.0030349>.

organ market; the fear is that these donors will refuse to donate altogether.<sup>93</sup> This is highly unlikely and unsubstantiated. In fact, surveys have shown just the opposite. The NPR-Thomson Reuters Health Poll from 2012, found that sixty percent (60%) of people in the United States support allowing financial incentives to organ donors and do not find any connection between a market system and a decline in altruism.<sup>94</sup> Forty percent (40%) of those surveyed said they themselves would pay directly for a kidney.<sup>95</sup> Furthermore, the creation of a market system will have no effect on the existence of altruism in organ donation. People will be just as likely to donate to friends and family in need; altruism will continue to flourish within small communities because an incentive already exists—helping a loved one. The only impact will be the positive result stemming from stranger donations, a necessary component in organ transplantation. A well-regulated organ market will also reduce state costs by essentially eliminating the expense of palliative care.<sup>96</sup> The more patients able to receive organs immediately, the less patients in need of long-term treatment.<sup>97</sup>

Critics claim that organs should not be treated as commodities; one cannot legally sell a human being so why should one be able to sell human body parts?<sup>98</sup> These individuals fail to take into account that some body parts *are* legal to sell.<sup>99</sup> Blood, sperm, and eggs are considered “taxable commodities” under current law.<sup>100</sup> In fact, it is perfectly acceptable to make a living solely from selling one’s own blood. This opens up the discussion of whether one can legally possess property rights in one’s own body. Courts and legal scholars alike have said “yes.”<sup>101</sup>

According to Professor Radhika Rao, there are two types of interests one can possess in their body—the right of privacy or the right to property.<sup>102</sup> While both theories ultimately serve the notion that one has a bundle of rights in their body, they offer strikingly dissimilar views on the relationship between a person and his or her body parts.<sup>103</sup> The privacy concept supports the idea that a person and his or her body are “indivisible” and indistinct, while the property concept supports the conclusion that since body parts are separable from the person, one can be the legal

93. Dunham, *supra* note 29, at 64.

94. Knox, *supra* note 58.

95. Lindsay Abrams, *Study: 40% Are Okay with Paying Kidney Donors*, THE ATLANTIC (Oct. 1, 2013, 7:05 AM), <http://www.theatlantic.com/health/archive/2012/10/study-40-are-okay-with-paying-kidney-donors/263035/>.

96. Palliative care is the treatment of symptoms that accompany chronic illnesses such as fatigue, shortness of breath, and pain. It is provided by medical professionals and serves to increase the quality of life to those who are battling debilitating diseases. *What Is Palliative Care*, GETPALLIATIVECARE.ORG, <http://getpalliativecare.org/whatis/> (last visited June 10, 2014).

97. *Kidney Disease, Kidney Failure, and Palliative Care*, GETPALLIATIVECARE.ORG, <http://getpalliativecare.org/whatis/disease-types/kidney-disease-kidney-failure-palliative-care/> (last visited June 10, 2014).

98. Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 364 (2000).

99. See generally *Green v. Comm’r of Internal Revenue*, 74 T.C. 1229 (1980). (In *Green v. Comm’r of Internal Revenue*, the United States Tax Court held that body parts such as blood and plasma are “taxable commodities.”)

100. *Id.*

101. Rao, *supra* note 98, at 364.

102. *Id.*

103. *Id.*

owner of their body and essentially transfer those ownership rights to others.<sup>104</sup> Under this theory of property, an individual can be the legal owner of his or her harvested organs and that ownership comes with the freedom to extract profit.<sup>105</sup>

When applying Rao's research, it is clear that a human organ becomes open to ownership when it ceases to perform its function and is extracted from the human body.<sup>106</sup> Once harvested, an organ is either abandoned by its owner and free for capture, or the individual from whom it was removed retains a bundle of rights.<sup>107</sup> These rights include the right to possess, the right to use, the right to exclude others, and the right to transfer ownership by gift *or sale*.<sup>108</sup> However, the practical solution of allowing people to be paid for their organs is strictly prohibited by NOTA and therefore, legislative reform is necessary.<sup>109</sup> Still, opponents argue that selling organs for money is simply immoral; but morals walk a fine line in the legal realm.<sup>110</sup> Just because it is currently against the law to sell your organs does not make it inherently immoral.

Another argument against allowing financial incentives to organ donors is that it will lead to a slippery slope, inviting kidnapping and killing other people for their organs.<sup>111</sup> These opponents argue that the opportunity for people and the government to reap capital from organs will lead to an onslaught of violations in the realm of human rights.<sup>112</sup> This argument is without merit. First, it takes away from the true conflict—whether paying people for organs is immoral. Second, just because there is a possibility that abuse to the system will occur does not make it *likely* to occur.<sup>113</sup> If legislation were passed based on the existence of mere possibilities, we would not have a majority of the statutes we have today, including gun rights and the ability to purchase cough medicine. Further, just because we read of extreme situations happening in third-world countries, it does not necessarily mean that such an occurrence threatens American society. Americans represent a far more advanced civilization distinguished daily by technological developments and cultural improvements; to deny the implementation of a logical solution based on an irrational fear is absurd.

Supplementary, there are several ways through which the government can make sure system abuse does not occur. For example, in order to purchase a handgun in Florida, one must comply with what is known as a "waiting period."<sup>114</sup>

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104. *Id.*

105. *Id.* at 434.

106. *Id.* at 454–55.

107. Rao, *supra* note 101, at 454–55.

108. *Id.* at 369–71.

109. 42 U.S.C. § 274e(a) (2006).

110. See S.M. Rothman & D.J. Rothman, *The Hidden Cost of Organ Sale*, AMERICAN JOURNAL OF TRANSPLANTATION 1524–28 (2006), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1600-6143.2006.01325.x/full>.

111. *Issues, THE ALLIANCE FOR ORGAN DONOR INCENTIVES*, <http://organdonorincentives.org/wordpress/answers-to-common-objections-to-payment-for-organs/> (last visited Dec. 29, 2013).

112. *Id.*

113. *Id.*

114. FLA. STAT. § 790.0655(1)(a); *Florida, NRA-ILA*, <http://www.nra-ila.org/gun-laws/state-laws/florida.aspx> (last updated June 19, 2013).

Aside from weekends and holidays, the current waiting period is three days.<sup>115</sup> A well-regulated market system imposing a longer cooling-off period, perhaps one year, would eliminate the already unlikely risk that some donors may abuse the system. The system can also be equipped with restrictions on who can donate for payment, permitting only those donors who have taken an informative course or are made well aware of the risks and rules by waiver. Further, as it has already been stated, a market system would decrease the price of individual organs by eliminating bidding wars and setting a fixed, fair price.<sup>116</sup> Thus, the payment price would be well below the current black market average, making it unlikely that someone would go through the trouble to kidnap and murder someone to harvest and sell their organs when there are less risky, equally as rewarding crimes.<sup>117</sup>

One may question whether a market for human organs can be regulated by the government at all. Critics argue that the large opportunity for profit in such a system will only lead to a downfall in the market and therefore a new emergence of “organ-trafficking.”<sup>118</sup> “It is already apparent that the black market flows in one direction; from the Third World to the First. The relative absence of regulation and the comparative value of the rewards mean that healthy individuals in Asia and Africa are victim to scavenging organ merchants.”<sup>119</sup> The rebuttal to this concern has already been addressed in response to the slippery slope argument—these apprehensions, and others, can be put to rest by implementing a regulated system, tweaked to perfection over time.

Allowing a revision of NOTA will not lead to people selling kidneys to their neighbors by tomorrow—it will take time and effort to create a responsible marketplace. However, such a goal is more than realistic if families are trusted to act rationally according to the law and rules of the system.<sup>120</sup> The great thing about dealing with a market for organs is that even the most impoverished person would not choose to harvest their heart or lung in order to make money—such a decision would certainly lead to death and thus no donor benefit, making such a foolish decision highly unlikely.<sup>121</sup> In addition to trusting the rationality of society, we must also trust in the rationality of our medical personnel.<sup>122</sup> It is safe to assume that a reasonable, well-educated surgeon would most likely refuse to perform such an operation; however, it would be unreasonable for a surgeon to refuse to perform a kidney transplant on a young, dying boy simply because his family purchased the organ from someone who was otherwise unwilling to donate.<sup>123</sup>

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115. *Florida*, *supra* note 114.

116. *Sale of Human Organs*, DEBATEWISE.ORG, <http://debatewise.org/debates/2623-human-organs-sale-of/> (last visited June 10, 2014).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Sale of Human Organs*, *supra* note 116.

123. *Id.*

Perhaps the most interesting argument against direct donor incentives is that an organ market is inconsistent with the law and the accepted views of society.<sup>124</sup> This argument poses the same dispute as previously discussed—is selling a body part immoral? Does “putting a price on the human body” invite “exploitation by the unscrupulous?”<sup>125</sup> The evidence says “no.”<sup>126</sup> Current healthcare services and laws surrounding the sale of body parts welcome a market for organ sales.<sup>127</sup> In the United States, it is currently legal, and widely accepted, to receive payment for human eggs, blood, semen, and the wombs of the surrogate mothers.<sup>128</sup> In the scope of morality, what is the difference between a kidney and a human egg? Do advances in medical technology play a part in deciding how moral we view compensated organ transplantation?

For nearly three decades, the fight against NOTA went primarily unheard—until 2011. In December of 2011, the Ninth Circuit Court of Appeals issued a limited decision against NOTA. The Court held that NOTA does not prohibit compensating donors of blood and substances in it, including blood stem cells retrieved in “peripheral stem cell apheresis.”<sup>129</sup> It was also decided that it is now perfectly legal to directly compensate bone marrow donors—which is expressly forbidden in NOTA.<sup>130</sup> The government argued that hematopoietic cells flowing through the veins should be regarded as bone marrow under NOTA and therefore restricted from being purchased.<sup>131</sup> The reasoning was that bone marrow itself is a human organ under the statute and the statute expressly states that no compensation is allowed for any human organ or “any subpart thereof,” and it is uncontested that hematopoietic stem cells are formed in the bone marrow.<sup>132</sup> The government concluded that based on a logical reading of NOTA, even stem cells retrieved through apheresis (“from blood flowing through veins”) should be regarded as “subparts of bone marrow” because it formed there.<sup>133</sup> The Court rejected this argument, reasoning that if cells were regarded as bone marrow simply because they came from bone marrow, then the statute would forbid compensating blood donors—a common practice.<sup>134</sup>

The plaintiffs’ first argument was unsuccessful in Court but it expresses a rational position for proponents of a market-based system—what about substantive due process?<sup>135</sup> The Due Process Clause of the United States Constitution says that

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124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Sale of Human Organs*, *supra* note 116. *See also* *Green v. Comm’r of Internal Revenue*, 74 T.C. 1229 (1980).

129. *Flynn v. Holder*, 684 F.3d 852, 862 (9th Cir. 2011).

130. *Id.* at 864–65. *See also* 42 U.S.C. § 274e(c)(1) (2006) (“The term ‘human organ’ means the human (including fetal) kidney, liver, heart, lung, pancreas, bone marrow, cornea, eye, bone, and skin or any subpart thereof and any other human organ . . . specified by the Secretary of Health and Human Services by regulation.”).

131. *Flynn*, 684 F.3d at 863.

132. *Id.*

133. *Id.*

134. *Id.*

135. Nicholas J. Diamond, *Is It Time to Reconsider the National Organ Transplant Act?*, *SCI. PROGRESS* (July 16, 2012), <http://scienceprogress.org/2012/07/is-it-time-to-reconsider-the-national-organ-transplant-act/>.

no person shall be “deprived of *life*, liberty, or property without due process of law.”<sup>136</sup> A libertarian view of substantive due process protections raises an issue of whether the government should be permitted to interfere where a person is in need of a life-saving organ and he or she has found someone willing to sell it to them.<sup>137</sup> The government should not be allowed to restrict access to survival where an avenue for survival readily exists.

### III. REVISING NOTA: A PROPOSITION FOR A GOVERNMENT-REGULATED ORGAN MARKET

NOTA was created to increase organ donation but has resulted in the completely opposite outcome of sentencing thousands of people to a preventable death each year.<sup>138</sup> The prohibitory provisions in NOTA stem from a congressional fear that allowing “valuable consideration” for organs would lead to a detriment to the poor and inevitably resulting in the commodification of the human body.<sup>139</sup> These fears are unfounded and they divert the medical and legal communities’ attention away from the only practical solution.

University of Pennsylvania kidney transplant specialist Peter Reese, along with colleague Matthew Allen, recently proposed a trial test to evaluate the effects of financial kidney donor incentives.<sup>140</sup> “Current trends regarding the use of financial incentives in medicine suggest that the time is ripe for new consideration of payments for living kidney donation,” they wrote; “[r]eassurance about the ethical concerns, however, can come only through empirical evidence from actual experience.”<sup>141</sup>

A study published in the *Clinical Journal of the American Society of Nephrology* (CJASN) on October 24, 2013, suggests that paying living kidney donors \$10,000 would increase the availability of kidneys by about five percent (5%).<sup>142</sup> This is the equivalent of an additional 288 kidneys donations per year.<sup>143</sup> The study uses data such as average costs of dialysis, costs of “similar care, transplantation and survival rates, and time spent on transplant lists to compare a payment program with [the current] organ-donation system.”<sup>144</sup> While the figures used in the study are based on Canadian data, researchers say the results are just as accurate as applied to the United States economy.<sup>145</sup>

136. U.S. CONST. amend. V (emphasis added).

137. Diamond, *supra* note 135.

138. Steve P. Calandrillo, *Cash for Kidneys? Utilizing Incentives to End America’s Organ Shortage*, 13 GEO. MASON L. REV. 69, 78 (2004).

139. H.R. Rep. No. 98-575, at 8, 22–23 (1984).

140. Press Release, AM. SOC’Y OF NEPHROLOGY, *Study Finds That Paying People to Become Kidney Donors Could Be Cost-Effective* (Oct. 24, 2013), available at [http://www.eurekalert.org/pub\\_releases/2013-10/ason-sft102113.php](http://www.eurekalert.org/pub_releases/2013-10/ason-sft102113.php).

141. *Id.*

142. *Id.*

143. Marina Koren, *Would You Donate a Kidney for \$10,000?*, NAT’L J. (Oct. 28, 2013), <http://www.nationaljournal.com/health-care/would-you-donate-a-kidney-for-10-000-20131028>.

144. *Id.*

145. *Id.*

The hypothesis that was tested during the study was whether a government-regulated (or even third party) program that paid \$10,000 to living kidney donors would save money, increase the number of successful transplants, and improve the outcome of patients.<sup>146</sup> According to doctors Lianne Barnieh and Braden Manns, the answer is an overwhelming “yes.”<sup>147</sup> Dr. Barnieh postulates that:

Such a program could be cost saving because of the extra number of kidney transplants and, consequently, lower dialysis costs. Further, by increasing the number of people receiving a kidney transplant, this program could improve net health by increasing the quality and quantity of life for patients with end-stage renal disease.<sup>148</sup>

The study, published by the American Society of Nephrology,<sup>149</sup> projects that doing so would be “less costly and more effective than the current organ donation system.”<sup>150</sup> Researchers estimate that this program would

result in an incremental cost savings of \$340 and a gain of 0.11 quality-adjusted life years over a patient’s lifetime compared with the current organ donation system. Increasing the number of kidneys for transplantation by [ten percent (10%)] and [twenty percent (20%)] would translate into an incremental cost savings of \$1,640 and \$4,030 and a quality-adjusted life year gains of 0.21 and 0.39, respectively.<sup>151</sup>

All other proposed solutions have either failed, or are likely to fail. Tax benefits, which have never been offered in Florida, proved to be too low and otherwise ineffective in other states.<sup>152</sup> Public education campaigns have been implemented nationwide but have done little to improve donor turnout. Other proposals such as driver’s license discounts and minimal reimbursement for travel and subsistence expenses have likewise failed to encourage donor participation.<sup>153</sup> The time has come for this country to embrace the one and only practical solution to the organ shortage crisis—direct financial incentives.

The human body has already been commodified through the permittance of human paired donations. Whether an organ is traded for another organ or traded for paper, the organ still holds a value under the contract law principle of a bargained-

146. Press Release, AM. SOC’Y OF NEPHROLOGY, *supra* note 140.

147. *See id.*

148. *Id.*

149. The American Society of Nephrology (ASN) is the leading organization in the fight against kidney disease. ASN, <http://www.asn-online.org/> (last visited Feb. 27, 2014). ASN is committed to “educating health professionals, sharing new knowledge, advancing research, and advocating the highest quality care for patients.” *Id.*

150. Press Release, AM. SOC’Y OF NEPHROLOGY, *supra* note 140.

151. *Id.*

152. *See supra* notes 58–61 and accompanying text.

153. *See* Flamholz, *supra* note 74, at 364.



for exchange.<sup>154</sup> Furthermore, all parties currently involved in the organ transplantation process are compensated for the harvest and transplant except for the original donor—the most deserving participant, and the one suffering the detriment.<sup>155</sup>

Organ procurement organizations (OPOs) are paid to find organs needed by specific patients and obtain the consent of the donor or the consent of the donor's family in cases of cadaver donations.<sup>156</sup> The OPOs then charge acquisition fees to recover the organ and hospitals purchase the organ from them.<sup>157</sup> After the hospital purchases title to the organ from the OPOs, the patient in need pays the hospital for acquiring the organ, transplanting it into the patient's body, and for the hospitalization and treatment following the procedure.<sup>158</sup> All transplant surgeons, nurses, and hospital staff are compensated for their time and efforts spent during the transplant process.<sup>159</sup> There is “valuable consideration” exchanged between everyone involved except for the original donor.<sup>160</sup>

Many highly skilled scholars agree that the next step in improving the current situation is a market system in which the government is heavily involved and strictly regulates.<sup>161</sup> Living donors will be paid a fair market price for the organ or bone marrow they wish to donate and families of deceased donors will be paid as well, most likely in a reimbursement of funeral expenses.<sup>162</sup> The operation of the market will be simple and money will flow in several directions. The government will regulate the market through the establishment of a special agency (or OPO) controlled by the Organ Procurement and Transplantation Network (OPTN).<sup>163</sup> This OPO will find and purchase organs from living donors as well as the families of the deceased. Just like a typical contract, the agency will determine a fair market price, set by the current supply and demand scheme, and make an offer to the individual. This would not be a compulsory door-to-door sales pitch; people will be able to opt out of donating at all and only those who have failed to opt out will be contacted by offer.

Once the OPO has purchased the organ from the individual, the organ is sold from the OPO to various transplant centers nationwide. This price will also be determined by the supply and demand scheme while also considering a desired profit margin set forth by the economy of sale. The transplant centers then

154. See *supra* text accompanying notes 80–84. See also RESTATEMENT (SECOND) OF CONTRACTS § 71(1)–(2) (1981).

155. Sara Krieger Kahan, Note, *Incentivizing Organ Donation: A Proposal to End the Organ Shortage*, 38 HOFSTRA L. REV. 757, 783–84 (2009).

156. Kahan, *supra* note 155, at 784, 786 (2009).

157. *Id.* at 784.

158. *Id.*

159. See *id.*

160. See *id.*

161. See Kahan, *supra* note 155; Christy M. Watkins, *A Deadly Dilemma: The Failure of Nations' Organ Procurement Systems and Potential Reform Alternatives*, 5 CHI.-KENT J. INT'L & COMP. L. 1 (2005); Gregory S. Crespi, *Overcoming the Legal Obstacles to the Creation of a Futures Market in Bodily Organs*, 55 OHIO ST. L.J. 1 (1994); Marc S. Nadel & Carolina A. Nadel, *Using Reciprocity to Motivate Organ Donations*, 5 YALE J. HEALTH POL'Y L. & ETHICS 293 (2005).

162. See Kahan, *supra* note 155, at 786, 788.

163. *Id.* at 786.

essentially sell the organs to patients in need. This market system will also open up the availability of private sale. Anyone who wishes to privately sell an organ must go through the government agency to overlook the transaction and make sure it follows specific guidelines set forth by the United Network for Organ Sharing (UNOS).

In response to the question of who will be able to sell their organs, the answer is quite simple. Just like in the sale of human ovum, donors will be subjected to health checks ups, background checks, and a series of examinations to test for diseases such as AIDS, hepatitis, and so on.<sup>164</sup> Typically, with blood donations, blood is extracted and then tested and discarded if it is found to be infected.<sup>165</sup> However, with organ donations, under the market system, all testing will be concluded before the contract is completed and payment is issued. This will further ensure that no donor makes an irrational, impulse decision because these tests will take time to complete.

In cases of cadaveric organ donations, the government will enter into “futures contracts” with people who wish to donate their organs once they are deceased.<sup>166</sup> An adult that holds the capacity to enter into a contract will exchange a promise for a promise whereby the donor agrees to donate his organs after death in exchange for a promise from the state that his family (or his estate) will receive financial compensation agreed upon in the contract.<sup>167</sup> This compensation will be “of moderate value and should be the lowest amount that can reasonably be expected to encourage organ donation.”<sup>168</sup>

In 1995, Pennsylvania attempted something similar—a program called the Pennsylvania Organ Donor Awareness Fund which awarded the reimbursement of funeral expenses to families of donors up to \$3000.<sup>169</sup> The State repealed the program after being cautioned by the federal government that the program directly violated NOTA’s ban on the exchange of valuable consideration for organs.<sup>170</sup> However, in order to comply with the recommendations of government officials, Pennsylvania was not required to do away with the program completely, but merely was made to reduce the amount of the compensation from \$3000 to \$300.<sup>171</sup> Still, this was a loss as it did little to increase donor participation due to the low amount to be paid.<sup>172</sup>

Therefore, in order to implement the proposed solution, NOTA must be revised to repeal the prohibition on allowing compensation for human organs. This proposal is not new. In 1993, nine years after NOTA was enacted, the OPTN

164. See John Glasson et al., *Financial Incentives for Organ Procurement: Ethical Aspects of Future Contracts for Cadaveric Donors*, 155(6) ARCHIVES OF INTERNAL MED. 581, 584 (1995) available at [http://www.ama-assn.org/resources/doc/ethics/ceja\\_6i93.pdf](http://www.ama-assn.org/resources/doc/ethics/ceja_6i93.pdf).

165. *Id.*

166. See Flamholz, *supra* note 74, at 370.

167. *Id.*

168. Glasson et al., *supra* note 164, at 587.

169. *Should Organ Donors Be Compensated?*, WEILL CORNELL MED. C. (Feb. 9, 2009), <http://weill.cornell.edu/news/news/2009/02/should-organ-donors-be-compensated.html>.

170. *See id.*

171. *See id.*

172. *See id.*

published a report for informational purposes in order to arouse discussion within the medical and legal community and in order to observe a reaction to the controversial subject of donor incentives.<sup>173</sup> In this White Paper, the authors addressed opinions from experts in transplantation, ethics, law, and economics. For purposes of discussion, the authors define financial incentives as “any material gain or valuable consideration obtained by those directly consenting to the process of organ procurement, whether it be the organ donor himself (in advance of his demise), the donor’s estate, or the donor’s family.”<sup>174</sup> While the views were presented to the OPTN/UNOS’s Board of Directors, they were not adopted as policy due to the still present disagreement between those in favor and those opposed to financial incentives—primarily in the categories of morality and potential for exploitation.<sup>175</sup>

As previously argued, the likelihood for exploitation is slim. However, for those readers who fear exploitation of the poor as a result of this market system, a common ground exists. Instead of immediate cash for organs, other types of financial incentives could be offered by the government that translate into the same benefit and ultimately an equal enticement factor. Tax credits have shown to be ineffective, but the government agency could offer vouchers for tuition, Medicare, or a contribution to a donor’s 401k.<sup>176</sup> Following this model would ensure all the effects of a fair market value system while still protecting the country from the possibility that the impoverished would make hasty decisions to sell their organs.<sup>177</sup> Under such a system, purchases would not exist and all incentives given would be just that.

#### IV. CONCLUSION

In 1990, the number of people on the OPTN waitlist hovered around 20,000.<sup>178</sup> Today, the number exceeds 116,000.<sup>179</sup> This escalation has not been matched by an equal increase in donor participation, leaving the nation in a dismal organ shortage that is only getting worse. It is estimated that eighteen people die each day because of the organ donor crisis,<sup>180</sup> and current waiting times reflect a harsh reality—that a person on the waitlist is more likely to die on dialysis than to receive an organ transplant in time.<sup>181</sup> One of the central causes of this tragedy is NOTA’s ban on financial compensation for human organs, which limits organ donation to motivations of pure altruism. While this may seem like a worthy objective, it fails

173. EDWARD W. NELSON, ET. AL., OPTN/UNOS ETHICS COMM., U.S. DEP’T OF HEALTH & HUMAN RES., FINANCIAL INCENTIVES FOR ORGAN DONATION (1993) available at <http://optn.transplant.hrsa.gov/resources/bioethics.asp?index=4>.

174. *Id.*

175. *Id.*

176. *See Should Organ Donors Be Compensated?*, *supra* note 169.

177. *Id.*

178. *Id.*

179. *Transplant Trends*, *supra* note 24.

180. *The Need Is Real: Data*, *supra* note 27.

181. *Should Organ Donors Be Compensated?*, *supra* note 169.

to yield sufficient donations and thousands of people are dying each year because of irrational fears of exploitation and immorality.

The organ shortage has already reached a critical level—a graph published by the OPTN illustrates the supply and demand ratio over the last two decades and demonstrates a consistently widening gap between the number of organ donors per year and the additions to the waiting list per year.<sup>182</sup> The only probable solution is to lift NOTA's ban on payment for organs and allow direct financial incentives. Adversaries of the organ market system rely on several arguments as to why NOTA's prohibition should remain. However, none of these objections are convincing. Additionally, none of the objections raised in the last thirty years is partnered by a more promising alternative to improving the organ matching and placement process (which was the original intent of the Legislature in creating NOTA).<sup>183</sup> By rejecting the market system proposal, the Legislature contradicts the original purpose of the statute.

While unanimous acceptance is highly unlikely, a sufficient fraction of Americans already support the idea of allowing payment for organs. A study by the UNOS showed that fifty-two percent (52%) of Americans support allowing financial compensation for organ donations.<sup>184</sup> In the same study, only two percent (2%) were reported to think that allowing such compensation is morally wrong or unethical.<sup>185</sup> These results support the conclusion that society is at least sufficiently receptive enough for the government to implement a new system.

Current organ donation strategies are simply not working.<sup>186</sup> A government-regulated market system will increase awareness, improve supply, and eliminate transplant tourism. It will also offset the hesitancy behind donating due to time, expense, and risk involved—the fear of “big risk and little reward.” Although the Ninth Circuit has partially addressed this issue, it is uncharted territory in the Florida courts.<sup>187</sup> Individuals can expedite this process by writing to their local legislatures and raising awareness within the community. The Florida legislature needs to get behind those within the medical community that support a revision of NOTA in efforts to improve the organ placement process as well as the state and national economy.

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182. See *The Need Is Real: Data*, *supra* note 27.

183. *National Organ Transplant Act*, *supra* note 5.

184. *Watkins*, *supra* note 161, at 24.

185. *Id.*

186. See, e.g., *id.* at 41.

187. *Flynn v. Holder*, 684 F.3d 852 (9th Cir. 2012).