

“Dirty Pretty Things” and the Law: Curing the Organ Shortage & Health Care Crises in America*

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There is an organ shortage crisis in the world, especially for kidneys and livers, resulting in approximately 6,000 deaths annually in the United States alone. There is also a health care crisis in the United States, with roughly sixteen percent of the population uninsured, resulting in approximately 18,000 deaths annually. In 1984, the National Organ Transplant Act (“NOTA”) banned the acquisition of human organs in exchange for valuable consideration, primarily to prevent the exploitation of poor people—those who are most likely to sell their organs.

Transplant professionals are increasingly pushing to legalize the outright sale of human organs from living donors. This movement is gaining momentum and is likely to garner the necessary support of policymakers to amend NOTA to allow the exchange of human organs for valuable consideration. If such exchange is permitted, this Article posits that living organ donors should be able to receive only non-cash consideration in exchange for their organs—specifically, life-long, comprehensive health care. This would minimize the health care crisis in the United States and continue to prevent the exploitation of poor Americans. This proposal would also effectively reduce the number of deaths in the United States due to the organ shortage while simultaneously reducing the number of deaths caused by the lack of adequate health care. To advance such a proposal, NOTA must be amended to allow for an exchange of human organs for the valuable consideration of life-long, comprehensive health care.

* This title is taken from the 2002 film, DIRTY PRETTY THINGS (Miramax & BBC Films), which is about the black market in human organs. See BBC Films, Dirty Pretty Things, <http://www.bbc.co.uk/bbcfilms/catalogue/dirtyprettythings.shtml>.

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My real problem is poverty—I shouldn't have to sell my kidney to save my daughter's life.¹

INTRODUCTION

Recently, medical, legal, and economic scholars, as well as transplant physicians and policymakers, have been reviewing the wisdom of the passage of the 1984 National Organ Transplant Act (“NOTA”),² which makes it illegal to acquire human organs for valuable consideration.³ This is because there is an international human organ shortage that is significantly impacting Americans.⁴ In the quarter of a century since the enactment of NOTA, there has been a paradigm shift in how organ sales are viewed by Americans. The sale of human organs, once viewed as repugnant to most Americans,⁵ is becoming increasingly more acceptable.⁶ More scholars, physicians and policymakers are encouraging the development of a commercial market for human organs from living donors.⁷

At the same time, the United States has a health care crisis.⁸ A significant percentage of Americans are uninsured,⁹ which has a negative impact on the economy.¹⁰ In addition, the death rate of Americans

¹ Scott Carney, *Inside 'Kidneyville': Rani's Story*, WIRED, May 8, 2007, http://www.wired.com/print/medtech/health/news/2007/05/india_transplants_rani (quoting a poor woman living in a refugee camp in Chennai, India who sold her kidney for quick cash to pay for her daughter's necessary medical treatment).

² 42 U.S.C. §§ 273–274g (2000).

³ *Id.* § 274e.

⁴ See The International Association for Organ Donation, Understanding: Statistics/Facts, <http://iaod.org/understanding-organ-donation.htm> (last visited Oct. 23, 2008) [hereinafter IAOD].

⁵ See TASK FORCE ON ORGAN TRANSPLANTATION, ORGAN TRANSPLANTATION: ISSUES AND RECOMMENDATIONS 96 (1986) (concluding that “society's moral values militate against regarding the body as a commodity.”).

⁶ David H. Howard, *Producing Organ Donors*, 21 J. ECON PERSP. 25, 34 (2007) (noting that a change is on the horizon to pay donors and their families for organs).

⁷ See, e.g., BARRY R. SCHALLER, UNDERSTANDING BIOETHICS AND THE LAW: THE PROMISES AND PERILS OF THE BRAVE NEW WORLD OF BIOTECHNOLOGY 125–26 (2008); ROBERT M. VEATCH, TRANSPLANTATION ETHICS 151–58 (2000); Rupert Jarvis, *Join the Club: A Modest Proposal to Increase Availability of Donor Organs*, in THE ETHICS OF ORGAN TRANSPLANTS 183 (Arthur L. Caplan & Daniel H. Coelho eds., 1998); P.J. Morris & R.A. Sells, *Paying for Organs from Living Donors*, in THE ETHICS OF ORGAN TRANSPLANTS, *supra*, at 229–30; J. Radcliffe-Richards, et al., *The Case for Allowing Kidney Sales*, in THE ETHICS OF ORGAN TRANSPLANTS, *supra*, at 224–28; Julia D. Mahoney, *Should we Adopt a Market Strategy to Organ Donation?*, in 7 THE ETHICS OF ORGAN TRANSPLANTATION 65–88 (Wayne Shelton & John Balint eds., 2001); Gloria J. Banks, *Legal & Ethical Safeguards: Protection of Society's Most Vulnerable Participants in a Commercialized Organ Transplantation System*, 21 AM. J.L. & MED. 45, 79–81 (1995); EA Friedman & AL Friedman, *Payment for Donor Kidneys: Pros and Cons*, 69 KIDNEY INT'L 960, 962 (2006); Richard Schwindt & Aidan R. Vining, *Proposal for a Future Delivery Market for Transplant Organs*, 11 J. HEALTH POL. POL'Y & L. 483 (1987).

⁸ Maxwell J. Mehlman, “Medicover”: A Proposal for National Health Insurance, 17 HEALTH MATRIX 1, 2–6 (2007) (finding that the state of our health care system is one of the United States' gravest crises).

⁹ Ross D. Silverman, *Access to Care: Who Pays for Health Care for the Uninsured and Underinsured?*, 29 J. LEGAL MED. 1, 1–5 (2008).

¹⁰ *Id.* at 4 (quoting The Institute of Medicine report, estimating that the aggregate, annual cost to

resulting from inadequate medical care due to a lack of health insurance is about three times as great as the death rate due to an inadequate supply of available organs.¹¹

This Article proffers a solution that addresses both the organ shortage and the lack of adequate health care for millions of Americans. This Article does not propose that Americans should rush out and sell their body parts to receive health care. Instead, the proposed solution will protect those Americans who choose to participate in the transplantation system as organ donors in a manner that is beneficial to them, while addressing the larger issue of the lack of health care for those who are uninsured.

Part I of this Article discusses the background of organ transplantation. Part II provides the historical development of organ transplantation legislation in the United States and abroad. Part III sets out the current state of the health care system in the United States. Part IV proposes the necessary legislative changes to solve both the organ shortage and national health care crises.

Because numerous lives are at stake, Americans should not stop considering the possible solutions until we have exhausted all reasonable avenues to overcome both the organ shortage and the national health care crises. The challenge is to provide a legally regulated alternative to curtail abuse of our foreign neighbors,¹² whose laws regarding organ transplantation do not afford their citizens adequate protection from the international trafficking of their body parts.¹³ We must also avoid

the United States for diminished health and reduced life spans of Americans who do not have health insurance is between \$65 billion to \$130 billion); KAREN DAVIS ET AL., THE COMMONWEALTH FUND, HEALTH AND PRODUCTIVITY AMONG U.S. WORKERS 4 (Aug. 2005), available at http://www.commonwealthfund.org/usr_doc/856_Davis_hlt_productivity_USworkers.pdf (reporting an economic loss of \$260 billion in 2003); Mark Earnest & Dayna Bowen Matthew, *A Property Right to Medical Care*, 29 J. LEGAL MED. 65, 75 (2008) ("Individuals with access to health care . . . form a citizenry equipped to contribute to society's resources as laborers, consumers, creators, and managers, thereby benefiting the entire community.").

¹¹ Compare FAMILIES USA, PUB. NO. 07-108, WRONG DIRECTION: ONE OUT OF THREE AMERICANS ARE UNINSURED 17 (2007), available at <http://familiesusa.org/assets/pdfs/wrong-direction.pdf> [hereinafter FAMILIES USA] (reporting that 18,000 deaths can be attributed to a lack of health insurance), and *Health Care Affordability and the Uninsured: Hearing on the Instability of Health Coverage Before the Subcomm. on Health, H. Comm. on Ways & Means*, 110th Cong. 5 (2008) [hereinafter *Health Care Affordability and the Uninsured*] (testimony of Diane Rowland, Executive Vice President, The Henry J. Kaiser Family Foundation, reporting an estimated 22,000 deaths linked to a lack of health insurance), available at <http://www.kff.org/uninsured/upload/7767.pdf>, with Louis J. Sirico, Jr., *A Primer on Organ Donation*, 17 J.L. & HEALTH 1, 1 (2002-03) (stating that 5,644 people died while waiting for an organ in 2002), and IAOD, *supra* note 4 ("Because of the lack of available donors in this country, 4,066 kidney patients, 1,605 liver patients, 358 heart patients and 250 lung patients died in 2006 while waiting for life-saving organ transplants.").

¹² See AP Monaco, *Rewards for Organ Donation: The Time Has Come*, 69 KIDNEY INT'L 955-56 (2006) (finding that the number of Americans who have obtained organs from the international black market has grown).

¹³ See DAVID PRICE, LEGAL AND ETHICAL ASPECTS OF ORGAN TRANSPLANTATION 369 (Cambridge Univ. Press 2000) ("Patients will travel where they can to receive necessary treatment unavailable in their country of residence."); Sunny Woan, Comment, *Buy Me a Pound of Flesh: China's Sale of Death Row Organs on the Black Market and What Americans Can Learn from it*, 47

implementing a system in which we abuse our own citizens, whose lack of financial stability makes them vulnerable to impairing their own health in the name of a few instant bucks.¹⁴ If we are to implement a system that allows organ sales from live donors, it must include clear safeguards and complete protections for those donors' continued health and access to health care—that is, life-long, comprehensive health care, which includes preventive care.¹⁵

I. BACKGROUND

In 2006, approximately 6,000 people died while waiting for a life-saving organ transplant;¹⁶ most of them were waiting for a kidney or liver.¹⁷ That same year, over 18,000 people died as a result of inadequate health care due to a lack of adequate health insurance.¹⁸

For decades, scholars have written countless articles and books on organ donation and transplantation, analyzing the moral, medical, legal and ethical issues surrounding the lack of an adequate organ supply in the United States and abroad.¹⁹ The shortage is not due to a lack of organs, but a lack of willing organ donors.²⁰ Although advances in medical technology have increased the success rates of transplants,²¹ there are many fears associated with organ donation. For example, many potential organ donors assume that doctors will not exhaust every avenue to save a potential donor's life, so they can harvest the organs needed to save the lives of

SANTA CLARA L. REV. 413, 426 (2007) ("Americans increasingly turn to the international marketplace due to legal obstacles preventing access to organ markets on the domestic front.") (citing Michael Finkel, *Complications*, N.Y. TIMES, May 27, 2001, at 26).

¹⁴ Robert D. Truog, *The Ethics of Organ Donation by Living Donors*, 353 N. ENGL. J. MED. 444 (2005) (noting that transplant physicians "must risk the life of a healthy person to save or improve the life of a patient.").

¹⁵ SARA R. COLLINS ET AL., THE COMMONWEALTH FUND, GAPS IN HEALTH INSURANCE: AN ALL AMERICAN PROBLEM: FINDINGS FROM THE COMMONWEALTH FUND BIENNIAL HEALTH INSURANCE SURVEY 11 (2006), available at http://www.commonwealthfund.org/usr_doc/Collins_gapshltins_920.pdf ("For many people with comprehensive insurance coverage, preventive care tests and screens like mammograms, colonoscopies, pap spears, and blood workups for cholesterol are part of their health care routine, performed annually or once every few years and requiring little out-of-pocket expense.").

¹⁶ See Donate Life Today: Statistics, <http://www.donatelifetoday.com/content/understanding-donation/statistics> [hereinafter *Donate Life*] (last visited Sept. 24, 2008) ("An average of 18 people die each day from the lack of available organs for transplant.").

¹⁷ See IAOD, *supra* note 4 (reporting that 4,066 people died waiting on a kidney and 1,605 people died waiting on a liver in 2006).

¹⁸ FAMILIES USA, *supra* note 11.

¹⁹ See, e.g., sources cited *supra* note 7 and accompanying text; see also Alexandra Glazier & Scott Sasjack, *Should it be Illicit to Solicit? A Legal Analysis of Policy Options to Regulate Solicitation of Organs for Transplant*, 17 HEALTH MATRIX 63 (2007).

²⁰ William Potts, *Increasing the Supply of Transplant Organs by way of Financial Incentives*, 31 MONASH U. L. REV. 212, 214–15 (2005) (finding that there is an abundance of organs that are not being utilized for transplants); Donny J. Perales, Comment, *Rethinking the Prohibition of Death Row Prisoners as Organ Donors: A Possible Lifeline to those on Organ Donor Waiting Lists*, 34 ST. MARY'S L.J. 687, 690 (2003) ("Commentators argue that this country does not have an organ shortage; it has a problem recovering organs.").

²¹ SCHALLER, *supra* note 7, at 107–08.

others.²² This may seem outlandish, but a transplant surgeon was recently criminally charged with hastening a patient’s death to harvest his organs.²³ Thus, notwithstanding significant medical advances, there has not been a viable solution to the organ shortage crisis in the United States or abroad.

In addition to the organ shortage crisis, the United States has a national health care crisis.²⁴ Because of rising health care costs, under- and unemployment, and diminishing employer-sponsored plans, the number of uninsured Americans has rapidly increased in the past several years,²⁵ causing a significant, negative impact on the United States economy because of sickness and premature death.²⁶

Notwithstanding both the organ shortage and health care crises, wealthy Americans have always had access to human organs.²⁷ They often travel abroad to buy human organs,²⁸ coined “transplant tourism.”²⁹ They also have health insurance and access to the most advanced health care.³⁰ It is the low- to moderate-income citizens, and increasingly middle- and upper-income citizens, who often lack health insurance and access to medical care.³¹

22 MayoClinic.com, Organ Donation: Don’t Let these 10 Myths Confuse You, <http://www.mayoclinic.com/health/organ-donation/FL00077> (last visited Oct. 23, 2008).

23 Steve Chawkins, *Transplant Surgeon Faces Trial on Abuse Charge*, L.A. TIMES, March 20, 2008, at B4, available at <http://articles.latimes.com/2008/mar/20/local/me-transplant20>. The transplant surgeon was acquitted, but transplant professionals feared that a conviction in this case would exacerbate the national shortage of human organs because people would be dissuaded from agreeing to become organ donors. *Id.*; Steve Chawkins, *Transplant Surgeon Acquitted*, L.A. TIMES, Dec. 19, 2008, at B3, available at <http://www.latimes.com/news/local/la-me-transplant19-2008dec19,0,2074223.story>.

24 See Mehlman, *supra* note 8.

25 CTR. ON BUDGET AND POLICY PRIORITIES, THE NUMBER OF UNINSURED AMERICANS IS AT AN ALL TIME HIGH 1–3 (2006), available at <http://www.cbpp.org/8-29-06health.pdf> (reporting the increase in uninsured Americans). Although the number of uninsured had declined in 2007, sharp increases in unemployment during the current economic downturn have reversed this trend. *Compare* Ian Urbina, *A Decline in Uninsured is Reported for 2007*, N.Y. TIMES, Aug. 26, 2008, at A14, available at <http://www.nytimes.com/2008/08/27/washington/27census.html> (reporting from a Census Bureau report finding that the number of uninsured Americans decreased by more than one million after having increased steadily for the past six years) with Mary Beth Lehman, *4 Million Americans Lost Health Insurance Since Recession Began*, PORTLAND BUS. J., Feb. 20, 2009, <http://www.bizjournals.com/portland/stories/2009/02/16/daily42.html> (reporting that an “estimated 4 million Americans have lost their health insurance since the recession began, and as many as 14,000 people could be losing their health coverage every day”).

26 See discussion *infra* Part III.B.

27 See Glazier & Sasjack, *supra* note 19, at 63 (noting that a recipient received a liver after advertising through emails, the Internet, and by launching an extensive media campaign); Sirico, Jr., *supra* note 11, at 6 (noting that individuals who can afford to do so often travel to foreign countries to purchase organs).

28 Kathleen Maclay, *UC Berkeley Anthropology Professor Working on Organs Trafficking*, U.C. BERKELEY NEWS, April 30, 2004, http://berkeley.edu/news/media/releases/2004/04/30_organs.shtml (last visited Oct. 23, 2008); Sirico, Jr., *supra* note 11, at 6; Woan, *supra* note 13.

29 Maclay, *supra* note 28.

30 See Liz Kowalczyk, *Health Service Firms Pamper Rich Patients*, BOSTON SUNDAY GLOBE, Feb. 4, 2001, at A1, available at <http://www.commondreams.org/headlines01/0204-01.htm> (reporting the opinion of health policy specialists that, because wealthy people have always purchased better health care services, the rich tend to be healthier than average citizens).

31 Silverman, *supra* note 9, at 2 (“Increasingly, being uninsured or underinsured has become a concern for those with moderate and higher incomes.”). See generally KATHERINE SWARTZ,

This Article was inspired by a newspaper publication, *Now for Sale on eBay—Your Kidney?*³² It discussed a recent scholarly article, *Introducing Incentives in the Market for Live and Cadaveric Organ Donations*, written by two economists, Professors Becker and Elias.³³ Their article argued that “monetary incentives could increase the supply of organs for transplant sufficiently to eliminate the large queues in the organ market, and it would do so while increasing the overall cost of transplant surgery by no more than about 12 percent.”³⁴ Although others have written about monetary incentives to increase the supply of *cadavers*, Becker and Elias stress using monetary incentives to encourage more *live* donations.³⁵

With the growing number of people dying due to a lack of available organs, scholars, physicians and policymakers are searching for a cure to the organ shortage. One such cure is to offer financial incentives to live donors.³⁶ One major problem with offering a monetary incentive for human organs from live donors is the possibility of the rich exploiting the poor.³⁷ This is especially true as America is rapidly moving from a grave economic downturn to potentially one of its worst recessions since the 1980s.³⁸ Indeed, the purpose of NOTA was to prevent such exploitation.³⁹ However, with the organ shortage and the resulting high number of deaths,

REINSURING HEALTH: WHY MORE MIDDLE-CLASS PEOPLE ARE UNINSURED AND WHAT GOVERNMENT CAN DO (2006).

³² Robyn Shelton, *Now for Sale on eBay—Your Kidney?*, ORLANDO SENTINEL, Dec. 18, 2007, at E4.

³³ *Id.* (discussing Gary S. Becker & Julio Jorge Elías, *Introducing Incentives in the Market for Live and Cadaveric Organ Donations*, 21 J. ECON. PERSP. 3 (2007)).

³⁴ Becker & Elias, *supra* note 33, at 3.

³⁵ *Id.* (emphasis added).

³⁶ See, e.g., Howard, *supra* note 6, at 34 (“The idea of offering large cash payments to living donors who are unknown to the recipient is gaining political support, but this support is insufficient to consider payment a politically feasible alternative at this time.”); Arthur J. Matas, *A Gift of Life Deserves Compensation: How to Increase Living Kidney Donation with Realistic Incentives*, in POL’Y ANALYSIS 18–19 (Cato Inst., Policy Analysis Series No. 604, Nov. 7, 2007), available at <http://www.cato.org/pubs/pas/pa-604.pdf> (asserting that establishing a system to compensate organ donors would be better than maintaining the status quo as transplant patients continue to die).

³⁷ See Curtis E. Harris & Stephen P. Alcorn, *To Solve a Deadly Shortage: Economic Incentives for Human Organ Donation*, 16 ISSUES L. & MED. 213, 231 (2001) (noting the concern that poor people may find organ donation as a solution to their economic problems); Kishore D. Phadke and Urmila Anandh, *Ethics of Paid Organ Donation*, 17 PEDIATRIC NEPHROLOGY 309, 310 (2002) (“It is usually the poor who donate and poverty is perhaps the most significant factor in making a person vulnerable to coercion.”) (endnote omitted).

³⁸ Steven Greenhouse, *Will the Safety Net Catch Economy’s Casualties?*, N.Y. TIMES, NOV. 16, 2008, at WK3, available at <http://www.nytimes.com/2008/11/16/weekinreview/16greenhouse.html> (“Economists rarely agree on anything, but a great many do agree on one unfortunate matter these days: the current economic downturn is likely to develop into the worst recession since the downturn of 1981–82.”).

³⁹ Robert Berman, *Lethal Legislation*, 6 KENNEDY SCH. REV. 13, 13 (2005), available at http://www.hods.org/pdf/ksr_volVI2005.pdf (“NOTA was enacted, in part, to protect poor people from being exploited.”); Monaco, *supra* note 12, at 956 (“[NOTA] was designed to protect the poor and disenfranchised from potentially dangerous and unhealthy exploitation by unscrupulous middlemen and avaricious brokers.”).

scholars and others have begun to minimize the concerns surrounding the exploitation and coercion of the poor.⁴⁰

But is an outright payment of cash, which leaves poor people open to exploitation and potential compromise of their own health, the solution? Or, is it possible to meld both national crises—the organ shortage and lack of health care—and come to a concurrent solution that does not bring with it all the ills associated with an outright sale of human organs? This Article proffers a solution to the organ shortage problem, while simultaneously addressing the health care crisis in the United States.

Because of the dire problems related to the organ shortage, there is growing acceptance of trial programs involving cash payment for organs.⁴¹ As Professors Becker and Elias assert, financial incentives will increase the organ supply.⁴² This is true, but opponents assert “that the line between selling organs and actually selling people is a rather fine one and that, as in sex trafficking, the marketplace is one in which coercion and exploitation may be unavoidable.”⁴³

To date, Americans have frowned upon the outright exchange of cash for organs because of the many ills associated with the purchase of body parts, especially the abuse that would fall primarily on the financially unstable.⁴⁴ If this country reverses its current ban on the sale of organs, the potential for exploiting the poor remains great. Yet, offering cash for organs is becoming more of a possibility every day.

Irrespective of whether organs come from living or cadaveric donors, there is no disagreement that there is an organ shortage crisis in the United

40 See, e.g., Becker & Elias, *supra* note 33, at 21 (“Should poor individuals be deprived of revenue that could be highly useful to them, especially when their organs might save the lives of persons who desperately need to replace their defective organs?”); Berman, *supra* note 39, at 13 (“NOTA deprives poor people the right to sell their kidneys in an effort to ‘protect’ them from their own ‘poor judgment.’”); Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813, 1841–43 (2007) (“[T]he risk [in organ donation] is modest. . . . But the risks surely do not justify the current ban”).

41 See Todd Zwillich, *Cash Payments for Organs*, UNITED PRESS INT’L, Apr. 21, 2006, [http://www.marsdaily.com/reports/Cash Payments For Organs.html](http://www.marsdaily.com/reports/Cash%20Payments%20For%20Organs.html) (last visited Oct. 26, 2008) (reporting that Robert Veatch, who opposed cash payment for organs for decades because of the potential to exploit poor people, is now calling for experimentation with such a policy because so many people are dying as a result of the organ shortage).

42 Becker & Elias, *supra* note 33, at 21.

43 Larry Rohter, *Tracking the Sale of a Kidney On a Path of Poverty and Hope*, N.Y. TIMES, May 23, 2004, at N1, available at <http://query.nytimes.com/gst/fullpage.html?res=9C0CE0DD163EF930A15756C0A9629C8B63&sec=health&spon=&pagewanted=1> (internal quotations omitted).

44 See MARK J. CHERRY, KIDNEY FOR SALE BY OWNER: HUMAN ORGANS, TRANSPLANTATION, AND THE MARKET 76 (Georgetown Univ. Press 2005) (stating that a social concern with commercialization is that “cash payments will attract primarily poor and low-income segments of the population, including racial minorities, who will disproportionately bear the health care complications of being vendors, as well as being increasingly subjected to exploitation.”); Laura Meckler, *Kidney Shortage Inspires a Radical Idea: Organ Sales*, WALL ST. J., Nov. 13, 2007, at D1, available at http://online.wsj.com/public/article_print/SB119490273908090431.html (reporting that Francis Delmonico, a transplant surgeon, fears that organ sales “would attract the poor, vulnerable and unhealthy”); Zwillich, *supra* note 41.

States and abroad. As a result, thousands of people die annually, often waiting for a non-essential organ—an organ that a living donor can spare—such as a kidney or a piece of a liver, while the transplant waiting lists continue to swell.⁴⁵ But what is a feasible and ethical answer to this crisis? This Article seeks to address how we can reduce the number of deaths due to the organ shortage.

This Article focuses mainly on the living donor market, as opposed to the cadaveric market, because living donors are subject to the greatest amount of coercion, fraud, and abuse.⁴⁶ Additionally, the best organs come from live donors.⁴⁷ Further, because of the large number of annual living donor transplants, legal and regulatory focus on living donations has increased, as have the medical technologies in this area.⁴⁸ Finally, a focus on the living donor market is important because some scholars argue that “compensation for living donation has the potential to provide all of the needed kidneys.”⁴⁹

If organ sales are permitted, the supply of human organs from living donors will come largely from the poorer segments of our society.⁵⁰ Although some scholars argue that this concern is overly and needlessly paternalistic,⁵¹ poor people are often exploited in the United States and

⁴⁵ See Donate Life, *supra* note 16.

⁴⁶ Troy R. Jensen, Note, *Organ Procurement: Various Legal Systems and Their Effectiveness*, 22 HOUS. J. INT'L L. 555, 557 (2000) (noting that many countries have passed laws to protect the exploited and curb human rights abuses resulting from the demand of desperate organ recipients, and that several European countries signed a treaty to protect living donors (citing Council of Europe, Convention on Human Rights and Biomedicine and Explanatory Report, Apr. 4, 1997, 36 I.L.M. 817 (1997)). But see Becker & Elias, *supra* note 33, at 4 (suggesting that in some respects live donations are subject to less corruption and abuse than cadaveric organs).

⁴⁷ PRICE, *supra* note 13, at 219; Alvin E. Roth, Tayfun Sönmez, & M. Utku Ünver, *Kidney Exchange*, Q. J. ECONOMICS, May 2004, at 457, 459.

⁴⁸ Alexandra K. Glazier & Glenn Krinsky, *Hot Topics in Organ Donation and Transplant*, American Health Lawyers Association, Legal Issues Affecting Academic Medical Centers and Other Teaching Institutions Conference 15 (2008) (reporting that forty-four percent of all organ transplants come from living donors and that 6000 living donor transplants occur every year).

⁴⁹ ABC News Internet Ventures, *Organ Transplant Expert Answers Our Viewers Questions about Kidney Sales*, Nov. 22, 2007, <http://abcnews.go.com/WN/Story?id=3902508&page=1> (last visited Oct. 25, 2008).

⁵⁰ See Sirico, *supra* note 11, at 6 (reporting that a survey in India of illegal kidney sales showed that most sellers lived below the poverty line); Erica Teagarden, *Human Trafficking: Legal Issues in Presumed Consent Laws*, 30 N.C. J. INT'L L. & COM. REG. 685, 686 (2005) (noting that poverty in third world countries often leads poor people to sell their body parts); Kishore D. Phadke & Urmila Anandh, *Ethics of Paid Organ Donation*, 17 PEDIATRIC NEPHROLOGY 309, 310 (2002) (“It is usually the poor who donate and poverty is perhaps the most significant factor in making a person vulnerable to coercion.”) (endnote omitted); Becker & Elias, *supra* note 33, at 21 (noting the probability that “the healthy poor and middle classes would actually provide most of the organs for live transplants under a market incentive system.”); CHERRY, *supra* note 44, at 8–9.

⁵¹ See William Barnett II et al., *A Free Market in Kidneys: Efficient and Equitable*, 5 INDEP. REV. 373, 379–80 (2001), available at http://www.independent.org/pdf/tir/tir_05_3_barnett.pdf (“The current prohibition is paternalistic, and as such it is dehumanizing. Adults, because they are poor, are treated as though they are incapable of making decisions in their own best interest.”); Monaco, *supra* note 12, at 957 (noting that government efforts to reward organ donors may be viewed as implementing a policy that directly exploits the poor); Volokh, *supra* note 40, at 1842–43 (noting that if an organ provider believed that money was worth the small health risk, the government’s interest in protecting him against

abroad. If the United States is to harvest the organs of living persons, it must ensure that these persons have access to affordable, lifelong, comprehensive health care—as differentiated from health insurance, which often leaves those underinsured with unwieldy medical bills due to co-payments, deductibles and other costs that insurance will not cover and their incomes cannot support.⁵²

II. HISTORICAL DEVELOPMENT OF LEGISLATION

A. Birth of the National Organ Transplantation Act

Beginning in the eighteenth century, researchers began experimenting with organ transplantation on humans and animals.⁵³ By the mid-twentieth century, doctors were performing successful transplants.⁵⁴ In 1954 and 1967, the first successful kidney transplant and liver transplant, respectively, were performed in the United States—the first of their kind in the world.⁵⁵ Medical advances in the prevention and treatment of organ rejection led to more successful transplants and an increase in demand.⁵⁶ Knowing that organ transplantation was possible, legislators began enacting laws to govern transplants and distribution.⁵⁷ Although several states had already passed organ donation laws before federal legislation was enacted, the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) drafted the Uniform Anatomical Gift Act (“UAGA”)⁵⁸ in 1968 to regulate organ donation among states.⁵⁹ By 1973, every state had bought into the UAGA and adopted some version thereof.⁶⁰

In 1983, Dr. H. Barry Jacobs attempted to form a company that would purchase kidneys from healthy, but very poor citizens of Third World countries and sell them to wealthy American recipients.⁶¹ Specifically, his proposal included creating the International Kidney Exchange, in which an indigent Third World resident would set a price for a kidney, which Jacobs

the temptation should not trump the recipient’s medical self-defense right) (citing Russell Korobkin, *Buying and Selling Human Tissues for Stem Cell Research*, 49 ARIZ. L. REV. 45 (2007)).

⁵² Timothy Stoltzfus Jost, *Access to Health Care: Is Self-Help the Answer?*, 29 J. LEGAL MED. 23, 25 (2008) (“Americans are also underinsured—that is, they have insurance but their insurance is inadequate to cover their health care needs.”).

⁵³ The Organ Procurement and Transplantation Network, *About Transplantation: History*, <http://www.optn.org/about/transplantation/history.asp> (last visited Oct. 25, 2008).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See Perales, *supra* note 20, at 688–89 (commenting that medical strides in organ transplantation have increased survival rates for organ recipients).

⁵⁷ See Steve P. Calandrillo, *Cash for Kidneys? Utilizing Incentives to End America’s Organ Shortage*, 13 GEO. MASON L. REV. 69, 77–78 (2004).

⁵⁸ UNIF. ANATOMICAL GIFT ACT §§ 1–11, 8A U.L.A. 94 (1968).

⁵⁹ Bethany J. Spielman, *Acquiring and Allocating Human Organs for Transplant: U.S. Law*, in *LEGAL PERSPECTIVES IN BIOETHICS* 143, 146 (Ana S. Iltis et al. eds., 2008).

⁶⁰ Henry Hansmann, *The Economics and Ethics of Markets for Human Organs*, 14 J. HEALTH POL. POL’Y & L. 57, 58 (1989).

⁶¹ Banks, *supra* note 7, at 72; Calandrillo, *supra* note 57, at 79; Samuel Gorovitz, *Is Law the Prescription that Can Cure Medicine?*, 11 J. L. & HEALTH 1, 9 (1996–97).

would then sell and collect a brokerage fee.⁶² Americans were outraged by his proposal;⁶³ yet wealthy Americans did, and still do, engage in this “transplant tourism”.⁶⁴ As a result, Congress passed NOTA in 1984,⁶⁵ which banned the sale of human organs.⁶⁶

B. The National Organ Transplantation Act of 1984

NOTA prohibits the acquisition of human organs for valuable consideration,⁶⁷ and states in pertinent part:

- (a) Prohibition. It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce.
- (b) Penalties. Any person who violates subsection (a) of this section shall be fined not more than \$50,000 or imprisoned not more than five years, or both.
- (c) Definitions. For purposes of subsection (a) of this section:
 - (1) 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 (or any subpart thereof, including that derived from a fetus) specified by the Secretary of Health and Human Services by regulation.
 - (2) The term “valuable consideration” does not include the reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ or the expenses of travel, housing, and lost wages incurred by the donor of a human organ in connection with the donation of the organ.
 - (3) The term “interstate commerce” has the meaning prescribed for it by section 321(b) of title 21.⁶⁸

Thus, NOTA makes it a crime to sell human organs.⁶⁹ However, NOTA governs only interstate commerce, so it is only violated if an organ sale crosses state lines.⁷⁰ Because the states have jurisdiction over organ donation within their boundaries, they needed to enact their own laws to prevent intrastate organ sales.⁷¹ Thus, the NCCUSL amended the UAGA in 1987 to specifically ban the sale of human organs within the individual

⁶² See Shelby E. Robinson, *Organs for Sale? An Analysis of Proposed Systems for Compensating Organ Providers*, 70 U. COLO. L. REV. 1019, 1036 (1999).

⁶³ Meckler, *supra* note 44.

⁶⁴ See *supra* notes 28–29 and accompanying text.

⁶⁵ Spielman, *supra* note 59, at 146.

⁶⁶ 42 U.S.C. § 274e (2000).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Spielman, *supra* note 59, at 146.

⁷⁰ See *id.*

⁷¹ TIMOTHY STOLTZFUS JOST, READINGS IN COMPARATIVE HEALTH LAW & BIOETHICS 93 (2d ed. 2007).

states.⁷² Although the 1968 version of the UAGA was adopted by all of the states, less than half of the states have adopted the 1987 amendment.⁷³

C. The Aftermath of the National Organ Transplantation Act

Because of NOTA, people in the United States cannot sell their body parts.⁷⁴ Some critics argue that this prohibition is a direct cause of the current organ shortage crisis and the numerous resulting deaths.⁷⁵ Others argue that offering monetary incentives to organ donors would increase the availability of organs in the United States.⁷⁶ Some blame the crisis on the legal system altogether.⁷⁷ Certainly, the law plays a major role in organ transplantation. However, the law is a shield to prevent grave abuses and coercion of potential organ donors—it is not the cause of the organ shortage.⁷⁸

Proponents of organ sales assert that society does not object when people work in dangerous forms of employment for monetary compensation (such as militia, firefighters, miners and policemen); therefore, they suggest that donating an organ should not be considered any more dangerous than those careers.⁷⁹ Proponents also assert that allowing organ sales would end the international black market in human organs, which operates unregulated, with the majority of the profits going to brokers, rather than the poor people selling their organs.⁸⁰

Still others believe that, from a philosophical point of view, it may be a misplaced sense of paternalism that is the driving force behind America’s objection to the sale of organs by the poor.⁸¹ Although other less invasive means to assist the poor exist, there are millions of citizens who might welcome an opportunity to alleviate their poverty by selling an organ.⁸² Opponents counter, however, that monetary incentives will not alleviate

72 See UNIF. ANATOMICAL GIFT ACT § 10(a), 8A U.L.A. 62 (2003).

73 Harris & Alcorn, *supra* note 37, at 222.

74 42 U.S.C. § 274e (2000).

75 See Charles C. Dunham IV, “Body Property”: Challenging the Ethical Barriers in Organ Transplantation to Protect Individual Autonomy, 17 ANNALS HEALTH L. 39, 45 (2008).

76 Harris & Alcorn, *supra* note 37, at 230 (“Proponents of a live donor market are convinced that even more donors would step forward if given a certain kind of nudge: that is, an economic incentive.”).

77 Potts, *supra* note 20, at 31 (“For a number of scholars, it is axiomatic that ‘the legal system itself is the cause of the organ shortage and of all the ensuing and unnecessary deaths’.”) (quoting Walter Block et al., *Human Organ Transplantation: Economic & Legal Issues*, 3 QUINNIPIAC HEALTH L.J. 87, 106 (1999–2000)).

78 See Monaco, *supra* note 12, at 956.

79 Becker & Elias, *supra* note 33, at 21 (noting that payment for organs and payment to military personnel both result in “commodification” of the body, and concluding that “our workplace lets many workers take on jobs that involve higher pay as compensation for some physical risk.”).

80 Clare Nullis-Kapp, *Organ Trafficking and Transplantation Pose New Challenges*, 82 BULL. WORLD HEALTH ORG. 715 (2004), available at <http://www.who.int/bulletin/volumes/82/9/infocus.pdf>.

81 See *supra* note 51.

82 Barnett II et al., *supra* note 51, at 380; Becker & Elias, *supra* note 33, at 21 (“Should poor individuals be deprived of revenue that could be highly useful to them, especially when their organs might save the lives of persons who desperately need to replace their defective organs?”).

poverty, and there are better ways to help the poor if there is truly an interest in doing so.⁸³

Moreover, proponents assert that a thriving legal market for blood, semen, human eggs, and surrogate wombs already exists.⁸⁴ Thus, extending markets to include non-essential solid organs such as kidneys and pieces of liver is analogous to these other markets.⁸⁵ But, there is also continuous debate as to the degree of risk involved in organ transplantation.⁸⁶ It is clear that there is at least some risk involved in the intrusion into a healthy person's body to remove an organ.⁸⁷

Because of the lack of available donors in this country, approximately eighteen people die every day while waiting for an organ or tissue transplant.⁸⁸ Currently, there are approximately 100,000 people on the national waiting list for organs.⁸⁹ Every thirteen minutes, another person is added to the list.⁹⁰ With the number of waitlist recipients swelling, the distressed who need an organ are seeking desperate measures, and people are willing to sell their organs for a high price.⁹¹ Due to the ease of international access via the internet, public awareness of the proposed sale of organs has increased.⁹² In 1999, "eBay reported nearly a dozen kidneys were listed for sale, with one having a price of \$10 million."⁹³

With the prohibition of organ sales in almost every international region, a black market in living donor kidneys has developed.⁹⁴ The organ

⁸³ Phadke & Anandh, *supra* note 37, at 310 ("[T]here are better ways to address poverty issues, which include providing fresh drinking water, adequate sewage facilities, and immunization programs.").

⁸⁴ Harris & Alcorn, *supra* note 37, at 229–30.

⁸⁵ *Id.*

⁸⁶ PRICE, *supra* note 13, at 220–21.

⁸⁷ *Id.* at 220 ("There are inevitably short-term risks of both mortality and morbidity attaching to all organ removal procedures."); Robert S. Gaston, *Is it Safe to Donate a Kidney?*, 11 TRANSPLANT CHRONOS 8 (2003), available at http://www.kidney.org/transplantation/transAction/pdf/tc_su03.pdf; R. S. Gaston et al., *Limiting Financial Disincentives in Live Organ Donation: A Rational Solution to the Kidney Shortage*, 6 AM. J. TRANSPLANTATION 2548, 2550 (2006) ("[U]nder current policy in the United States, donor interests remain unprotected relative to current Western standards: risk cannot be quantitated (particularly among ethnic minorities) and [living donors] are not adequately shielded from financial and health consequences associated with nephrectomy.") (endnote omitted); Patricia L. Adams et al., *The Nondirected Live-Kidney Donor: Ethical Considerations and Practice Guidelines*, 74 TRANSPLANTATION 582, 588 (2002) (recommending that educational materials on living donor transplants "state the risk of complications and death associated with live-kidney donation.").

⁸⁸ Donate Life, *supra* note 16.

⁸⁹ United Network for Organ Sharing: Organ Donation and Transplantation, <http://www.unos.org> [hereinafter UNOS] (last visited Sept. 25, 2008) (updating the number of waiting list candidates daily).

⁹⁰ Donate Life, *supra* note 16.

⁹¹ See Nullis-Kapp, *supra* note 80, at 715.

⁹² Truog, *supra* note 14, at 446 ("The solicitation of organs over the Internet is probably here to stay, but it will require higher standards of responsibility and accountability than are currently in place.").

⁹³ *Human Kidney Offered on Internet Auction Site eBay; \$5.7 Million Bid*, TRANSPLANT NEWS, Sept. 13, 1999, at 4, available at <http://www.allbusiness.com/health-care-social-assistance/ambulatory-health-services/304660-1.html>.

⁹⁴ See NICHOLAS L. TILNEY, TRANSPLANT: FROM MYTH TO REALITY 263–74 (2003); Friedman

shortage is considered to have the greatest impact in the United States,⁹⁵ and Americans are increasingly purchasing organs in the black market and returning to the United States for the transplant or post-operative care.⁹⁶ Although there are no reliable statistics on organ trafficking, it is believed to be on the upswing.⁹⁷

But how do we increase the organ supply in the United States without exploiting our poor citizens or traveling abroad to foreign regions and exploiting their poor citizens? Because of the extreme levels of poverty in some regions, Americans and others have procured organs from living donors in many Third World countries with no real long-term benefit bestowed upon the donor.

D. Organ Donation Laws Abroad

The organ shortage is an international crisis. Other countries have the same problem as the United States—the demand for organs exceeds the supply. The international consensus with respect to organ donation is that human organs should not be sold. In 1991, the World Health Organization (“WHO”) issued guidelines to avoid the coercion or exploitation of organ donors.⁹⁸ The United States and 191 other countries endorsed the guidelines, which were not binding and have been largely ignored.⁹⁹ A few years ago, WHO officially acknowledged the ethical and safety risks of organ transplants and the need “to take measures to protect the poorest and vulnerable groups from transplant tourism.”¹⁰⁰ Nevertheless, selling organs is a big business in many countries.

& Friedman, *supra* note 7, at 961 (“Our current non-system promotes a kidney black market available only to the wealthy who bear the total expense for what may be inadequately screened, suboptimally matched organs inserted by unregulated (inferior?) surgeons.”); Monaco, *supra* note 12, at 956; Brian Handwerk, *Organ Shortage Fuels Illicit Trade in Human Parts*, NAT’L GEOGRAPHIC ULTIMATE EXPLORER, Jan. 16, 2004, http://news.nationalgeographic.com/news/2004/01/0116_040116_EXPL_organtraffic.html (last visited Sept. 24, 2008).

⁹⁵ See Potts, *supra* note 20, at 214.

⁹⁶ Finkel, *supra* note 13, at 30; Michele Goodwin, *Altruism’s Limits: Law, Capacity, and Organ Commodification*, 56 RUTGERS L. REV. 305, 328–29 (2004) (finding that “desperate Americans in greater numbers seek life-saving transplantations outside of the United States from death row inmates and others in India, China, and Brazil, and follow-up care from their local doctors and hospitals.”); Monaco, *supra* note 12, at 956 (“The number of American patients who use these organ black markets has grown; the presence of such patients seeking post-transplantation care is now commonplace in most American programs.”); Craig S. Smith, *Quandry in U.S. Over Use of Organs of Chinese Inmates*, N.Y. TIMES, Nov. 11, 2001, at A1 (“Kidneys, livers, corneas and other body parts from [Chinese] prisoners are being transplanted into American citizens or permanent residents who otherwise would have to wait years for organs. Many of the patients come back to the United States for follow-up care, which Medicaid or other government programs pay for.”).

⁹⁷ Nullis-Kapp, *supra* note 80, at 715.

⁹⁸ Rohrer, *supra* note 43.

⁹⁹ *Id.*

¹⁰⁰ 57th World Health Assembly, 8th plen. mtg. at 56–58, Res. WHA57.18 (May 22, 2004), available at http://www.who.int/ethics/en/A57_R18-en.pdf (internal quotations omitted).

Poorer regions are particularly a target for the black market.¹⁰¹ This is largely because of the extreme poverty and the resulting desperation, long waiting lists, and the fact that higher quality organs coming from living donors.¹⁰² As shown below, these countries often have no legislation on human organ sales, and any legislation that does exist is either not enforced or fails to protect the country's poor citizens.

In the Philippines, for example, kidneys may be legally purchased on the open market.¹⁰³ Medical teams enter poor neighborhoods to obtain blood and tissue samples for testing, and store the results for later matching when a recipient arrives for a transplant.¹⁰⁴ Although proponents of this system argue that it is a matter of "free choice," opponents contend that the empirical evidence shows that those who sold their kidneys often later complain of pain and disabilities, but cannot afford to be treated by a physician.¹⁰⁵ Apparently, most Filipinos who sold their kidneys did so to pay off high interest debt, leaving them unable to afford health care.¹⁰⁶ Not long ago, a religious group urged the Philippine government to impose stricter standards because of the lucrative illegal trade that has grown in the Philippines.¹⁰⁷ More recently, the Philippine government banned most organ transplants to foreigners, but human rights groups assert that the legislation must be even tougher to protect the country's poor.¹⁰⁸

In Egypt, where half of the population is in poverty and there are no laws regulating organ sales, the poor are selling their organs to pay off debts to avoid jail and for other less compelling reasons, such as "to buy an apartment to get married."¹⁰⁹ Although some in the Egyptian parliament—the ruling Democratic party—have been working for over a decade to pass laws to ban organ sales and to stop the black market that draws foreign patients from across the world, there has been no success.¹¹⁰ This is largely due to disagreement between physicians who believe in harvesting organs from brain dead patients, and Islamic clerics who regard it as a forbidden

¹⁰¹ JOST, *supra* note 71, at 90 ("Most alleged organ sales involve sellers from developing nations."); Friedman & Friedman, *supra* note 7, at 961 (reporting an estimate that "thousands of illegal transplants occur every year" purchased by patients from the United States, Japan, Italy, the Persian Gulf states, Israel, and Canada, and sold by "donor nations" such as India, Pakistan, South Africa, Romania, Turkey, Peru and Mexico) (internal quotations omitted).

¹⁰² PRICE, *supra* note 13, at 217–19 (acknowledging the benefits of living donor transplantation as compared to cadaveric transplantation); Teagarden, *supra* note 50, at 686–87 (noting that poverty is so oppressive, the resulting desperation leads to selling body parts).

¹⁰³ Teagarden, *supra* note 50, at 691.

¹⁰⁴ *Id.* at 691–92.

¹⁰⁵ *Id.* at 692.

¹⁰⁶ *Id.*

¹⁰⁷ *Philippine Bishops Urge Halt to Organ Trafficking*, REUTERS, Jan. 28, 2008, <http://www.reuters.com/article/latestCrisis/idUSMAN101053> (last visited Oct. 21, 2008).

¹⁰⁸ Philippines Ban Organ Transplant to Foreigners, <http://www.medindia.net/news/Philippines-Ban-Organ-Transplant-to-Foreigners-36152-1.htm> (May 1, 2008).

¹⁰⁹ Jeffrey Fleishman & Noha El-Hannawy, *When the Body Becomes an ATM*, L.A. TIMES, March 13, 2008, at A1, available at <http://articles.latimes.com/2008/mar/13/world/fg-organs13>.

¹¹⁰ *Id.*

religious practice.¹¹¹ But there is no legislation to punish those participating in organ sales that violate Islamic law.¹¹²

In Thailand, there are two health care systems—one for the rich and one for the poor.¹¹³ The hospitals that treat the rich generally do not accept poor patients because they cannot pay their bills; but these facilities will treat the poor upon the condition that, if they die, their families will donate their organs to the hospital.¹¹⁴ Not surprisingly, investigations revealed evidence that these hospitals had been harvesting the organs of poor patients who were not yet dead.¹¹⁵ Nevertheless, physicians and hospital administrators in Thailand are still allowed to broker their own deals in the organ donation arena.¹¹⁶

In India, the illegal sale of body parts is growing, despite a government ban that became effective in 1994.¹¹⁷ An investigation revealed that a significant number of the poorest people in India continue to sell their organs to pay off debt or to buy food.¹¹⁸ The recipients are often individuals from Western countries.¹¹⁹ Recently, a kidney ring was exposed in India, in which several doctors, nurses, paramedics, private hospitals, pathology clinics and diagnostic centers were determined to have performed 400 to 500 illegal kidney transplants in the past decade.¹²⁰ Many of the donors were day laborers who were initially promised work and were later duped or threatened at gunpoint to undergo the operation.¹²¹ Other donors were bicycle rickshaw drivers and poor farmers who were persuaded to sell their kidneys in violation of the law.¹²²

Pakistan’s media has dubbed the country a “kidney bazaar” because of the large number of kidney sales resulting from extreme poverty.¹²³ While the recipient of a kidney likely pays between \$6,000 and \$12,000, the donor may net about \$2,500 (often less than half that).¹²⁴ A senior official at a transplant clinic in Pakistan reported that kidney donors need constant check-ups to keep their blood pressure and sugar under control, but donors

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Teagarden, *supra* note 50, at 689.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 689–90.

¹¹⁶ *Id.* at 690.

¹¹⁷ *Indians Selling Human Organs*, BBC NEWS, Oct. 15, 2002, <http://news.bbc.co.uk/2/hi/health/2331341.stm>; Scott Carney, *Indians Buy Organs with Impunity*, WIRED, Feb. 8, 2007, <http://www.wired.com/medtech/health/news/2007/02/72675>.

¹¹⁸ *Indians Selling Human Organs*, *supra* note 117.

¹¹⁹ *Id.*

¹²⁰ Amelia Gentleman, *Kidney Theft Ring Preys on India’s Poorest Laborers*, N.Y. TIMES, Jan. 30, 2008, at A3, available at <http://www.nytimes.com/2008/01/30/world/asia/30kidney.html>.

¹²¹ *Id.*

¹²² *Id.*

¹²³ Sadaqat Jan, *Poor Pakistanis Donate Kidneys for Money*, WASH. POST, Nov. 12, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/12/AR2006111200375.html> (last visited Oct. 21, 2008).

¹²⁴ *Id.*

report that they do not get follow-up care and often suffer with poor health.¹²⁵ As a result of the transplant surgery, they cannot walk, run, or work, and sometimes the money earned from selling the kidney was not enough to pay off the full debt that prompted the sale in the first place.¹²⁶

In 2006, China enacted legislation that banned the sale of human organs.¹²⁷ The new law does not allow foreigners visiting on a tourist visas to receive organ transplants.¹²⁸ Prior to this new law, China allowed the sale of executed prisoners' organs to foreigners, oftentimes wealthy Americans.¹²⁹ China's government officials—some who profited greatly from these underground organ sales—initially denied the existence of a black market organ trade, but finally acknowledged it prior to the new law being passed.¹³⁰

Living donor transplant legislation around the world generally includes provisions too broad or too vague to be of any real help.¹³¹ For example, in Romania, Portugal and Germany, the laws provide that there must not be any serious effects upon the donor's health, although they vary in the degree allowed.¹³² The law in Greece provides that there must not be "any manifest serious risk to the life or health of the donor."¹³³ Although kidney donation has been deemed a relatively safe procedure for the donor (perhaps dependent upon the facilities and the medical teams), there may be some risk of serious harm, thereby making these legislative enactments useless if applied literally—even a completely healthy donor would be precluded from donating a kidney under these provisions.¹³⁴

The organ shortage problem is complicated by the fact that many poorer nations do not have comprehensive national health care programs. While this is somewhat understandable in non-industrialized countries, Americans are suffering daily as the United States remains the only industrialized country that does not have a comprehensive national health

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Woan, *supra* note 13, at 421; Associated Press, *China Bans Sales of Human Transplant Organs*, MSNBC, March 28, 2006, <http://www.msnbc.msn.com/id/12050522>.

¹²⁸ Edward Cody, *China Tightens Restrictions on Transplants*, WASH. POST, Jul 4, 2007, at A12, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/03/AR2007070300640.html>.

¹²⁹ Woan, *supra* note 13, at 415, 421 (citing Craig G. Smith, *On Death Row, China's Source of Transplants*, N.Y. TIMES, Oct. 18, 2001, at A1); Vanessa Hua, *Patients Seeking Transplants Turn to China: Rights Activists Fear Organs are Taken from Executed Prisoners*, S.F. CHRON., April 17, 2006, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2006/04/17/MNGHAIASB51.DTL>.

¹³⁰ Woan, *supra* note 13, at 415, 421; Whitney Hinkle, Note, *Giving Until It Hurts: Prisoners are Not the Answer to the National Organ Shortage*, 35 IND. L. REV. 593, 597–98 (2002); *Organ Sales 'Thriving' in China*, BBC NEWS, Sept. 27, 2006, <http://news.bbc.co.uk/2/hi/asia-pacific/5386720.stm>.

¹³¹ PRICE, *supra* note 13, at 247.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 247–48.

2008]

“*Dirty Pretty Things*” and the Law

377

care system.¹³⁵ This impacts the organ shortage crisis and must be examined to fully understand how the two crises intersect and whether there is a potential concurrent solution.

III. HEALTH CARE IN THE UNITED STATES

A. An American Crisis

Public surveys show that “health care is currently the top domestic concern for Americans.”¹³⁶ Indeed, in this past election, both national presidential candidates had health care as a part of their campaign agenda.¹³⁷ This concern regarding health care is principally due to the significant numbers of Americans who are uninsured.¹³⁸

The number of uninsured Americans has reached peak levels.¹³⁹ This increase is attributed to rising “health insurance premiums, a changing labor market, and underfunded health care safety net programs” such as Medicaid and the Children’s Health Insurance Program.¹⁴⁰ The United States has approximately forty-seven million uninsured citizens, which means that about sixteen percent of the population lacks health insurance.¹⁴¹ Many uninsured individuals have incomes below \$25,000,¹⁴² and every racial and ethnic group is impacted.¹⁴³ The higher a person’s income, the more likely he or she will have health insurance.¹⁴⁴ Notwithstanding the aforementioned \$25,000 figure, studies are showing that “more moderate- and middle-income earners and their families are also [at risk of not having insurance coverage].”¹⁴⁵

¹³⁵ Mehlman, *supra* note 8, at 3.

¹³⁶ FAMILIES USA, *supra* note 11, at 1.

¹³⁷ See, e.g., Obama for America, Health Care, <http://www.barackobama.com/issues/healthcare> (last visited Sept. 23, 2008); McCain-Palin 2008, Straight Talk on Health Care Reform: A “Call to Action”, <http://www.johnmccain.com/Informing/Issues/> (follow “Health Care” hyperlink) (last visited Sept. 23, 2008); see also Christie L. Hager, *Massachusetts Health Reform: A Model of Shared Responsibility*, 29 J. LEGAL MED 11, 11 (2008) (“As the 2008 Presidential campaign season progresses, health reform has become firmly placed on the agendas of candidates of both parties.”).

¹³⁸ FAMILIES USA, *supra* note 11, at 1.

¹³⁹ See CTR. ON BUDGET POLICY & PRIORITIES, *supra* note 25, at 1; see also Lawrence E. Singer, *Leveraging Tax-Exempt Status of Hospitals*, 29 J. LEGAL MED 41, 42 (2008) (stating that “by 2013 some 56 million Americans will be without coverage.”). Although a decrease in the number of uninsured was reported for 2007 due to an increase in government-sponsored programs, experts noted that the report “did not take into account the economic downturn that began late last year, and therefore it probably presents a rosier picture than the current economic reality.” Urbina, *supra* note 25.

¹⁴⁰ FAMILIES USA, *supra* note 11, at 11, 14.

¹⁴¹ CTR. ON BUDGET AND POLICY PRIORITIES, *supra* note 25, at 1 (reporting that there were 46.6 million uninsured in 2005 up from 45.3 million in 2004); CARMEN DENAVAS-WALT ET AL., U.S. DEP’T OF COMMERCE, INCOME, POVERTY AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2006, 18 (2007), available at <http://www.census.gov/prod/2007pubs/p60-233.pdf> (reporting forty-seven million uninsured in 2006, which is 15.8% of the population).

¹⁴² CTR. ON BUDGET & POLICY PRIORITIES, *supra* note 25, at 2 (noting that a lack of health insurance is most common amongst those with incomes less than \$25,000).

¹⁴³ FAMILIES USA, *supra* note 11, at 9.

¹⁴⁴ DENAVAS-WALT, *supra* note 141, at 9.

¹⁴⁵ COLLINS ET AL., *supra* note 15, at 1; see also Silverman, *supra* note 9, at 2 (reporting from the

As a result of being uninsured, adults often forego needed medical care or preventive care.¹⁴⁶ The uninsured may go without medical care because they fear medical debt.¹⁴⁷ Unfortunately, when they finally do obtain medical help, they do not get the benefit of the discounts negotiated by insurance companies; therefore, they are left with significant medical bills.¹⁴⁸ They often have to sacrifice basic needs such as food, rent, or heat, to pay medical bills.¹⁴⁹ More than half of uninsured adults are forced to forgo needed medical care and, as a result, are twice as likely to have poor health than those with private insurance.¹⁵⁰ Further, uninsured Americans with chronic conditions, such as diabetes, cancer, or heart disease, have difficulty in managing the condition because they lack health insurance.¹⁵¹

In addition to those who are uninsured, there are sixteen million Americans who are underinsured in light of large out-of-pocket expenses relative to their salaries.¹⁵² Even those with health insurance are often subject to large deductibles and co-payments, and unwieldy medical bills.¹⁵³ Unlike other countries, health insurance in the United States is often tied to employment.¹⁵⁴ Rising health care costs as well as employers shifting more health care costs to employees have increased the out-of-pocket expenses for employees, thus leaving even moderate-income families with a significant financial strain.¹⁵⁵ Employers are not required to provide health care benefits for their retired workers, but many do so voluntarily.¹⁵⁶ Without these voluntary health benefits packages, many

U.S. Census Bureau that “more than 28% of the uninsured live in families with annual incomes above \$50,000” and that 73% (1.6 million) of the 2.2 million Americans who became uninsured between 2005 and 2006 were from middle- and upper-income families).

¹⁴⁶ COLLINS ET AL., *supra* note 15, at 9.

¹⁴⁷ *Health Care Affordability and the Uninsured*, *supra* note 11, at 5.

¹⁴⁸ *Id.* at 5–7.

¹⁴⁹ COLLINS ET AL., *supra* note 15, at 7.

¹⁵⁰ *Id.* at 9.

¹⁵¹ Mehlman, *supra* note 8, at 3.

¹⁵² *Id.* at 2–3; *see also* Jost, *supra* note 52, at 25 (defining “underinsurance” as “having to spend more than 10% of household income on health care costs”).

¹⁵³ COLLINS, *supra* note 15, at 5 (reporting that the majority of adults who had medical debt problems had insurance when the bill was incurred); Jost, *supra* note 52, at 25 (further noting that uninsured persons with a good safety-net system may have better access to health care than underinsured persons).

¹⁵⁴ Jost, *supra* note 52, at 26 (noting that “employment-based health insurance has served as the primary source of health care coverage for working age Americans”); Mehlman, *supra* note 8, at 2 (“Fewer employers, the source of health insurance for most Americans, are offering it to their employees.”).

¹⁵⁵ *Health Care Affordability and the Uninsured*, *supra* note 11, at 7 (reporting that health insurance policies do not cover 100% of the costs and those who are insured face deductibles, co-payments, cost-sharing for medical services and additional monies to receive health care outside of the plan’s network); MICHELLE M. DOTY ET AL., THE COMMONWEALTH FUND, SEEING RED: AMERICANS DRIVEN INTO DEBT BY MEDICAL BILLS 1 (Aug. 2005), available at http://www.commonwealthfund.org/usr_doc/837_Doty_seeing_red_medical_debt.pdf?section=4039 (stating that medical debt accounts for about half of personal bankruptcies).

¹⁵⁶ Associated Press, Supreme Court Allows Employers to Coordinate Retiree Benefits with Medicare (March 24, 2008), <http://www.law.com/jsp/article.jsp?id=1206357948199>.

retirees who are ineligible for Medicare due to being under age sixty-five would not have any health insurance.¹⁵⁷

Recently, the United States Supreme Court declined to review, and thus affirmed, a federal policy that allows employers to reduce or eliminate health insurance expenses for retired workers who reach age sixty-five and qualify for Medicare.¹⁵⁸ In *AARP v. EEOC*, the American Association of Retired Persons (“AARP”), an advocacy group, brought an action under the Age Discrimination in Employment Act (“ADEA”), alleging that an Equal Employment Opportunity Commission (“EEOC”) proposed regulation would allow employers to decrease health care benefits to retirees when they reach the age of sixty-five, at which time they become eligible for Medicare.¹⁵⁹ The EEOC argued that this regulation would encourage employers to provide increased health care benefits to those who most need it—those who are not eligible for Medicare because they are under age sixty-five.¹⁶⁰ Because of rising health care costs, many employers had ceased paying for health benefits for retirees of all ages because it is not required by law.¹⁶¹ For this reason, labor unions and many companies celebrated the decision because they believe it will encourage employers to coordinate retiree benefits with Medicare and thus maintain health care benefits for their retirees.¹⁶² Allowing employers to reduce or eliminate health care benefits for those eligible for Medicare will allow employers to significantly reduce their costs and presumably provide greater access to health care for retirees under age sixty-five, who are age-barred from Medicare.¹⁶³

A likely assumption is that those without health insurance are non-working families. But the reality is that those without health insurance are largely from working families,¹⁶⁴ demonstrating that lack of health insurance is a crisis of national proportions.

¹⁵⁷ Jost, *supra* note 52, at 29 (“Employers also have cut back dramatically on retiree coverage, eliminating what was for many Americans over the age of 65 a vital supplement to public coverage and for many retired Americans under the age of 65 their sole means of insurance coverage.”).

¹⁵⁸ *AARP v. EEOC*, 383 F. Supp. 2d 705 (E.D. Pa. 2005), *motion for relief from judgment granted*, 390 F. Supp. 2d 437 (E.D. Pa. 2005), *aff’d on other grounds*, 489 F.3d 558 (3d Cir. 2007), *cert. denied*, 128 S. Ct. 1733 (2008).

¹⁵⁹ *Id.* at 706.

¹⁶⁰ *Id.*

¹⁶¹ David G. Savage, *Justices Allow Cuts to Retiree Benefits*, L.A. TIMES, March 25, 2008, at A8, available at <http://articles.latimes.com/2008/mar/25/nation/na-scotus25>.

¹⁶² *Id.*

¹⁶³ Anne Kimbol, *Medicare and Retiree Benefits—The Impact of AARP v. EEOC*, HEALTH L. PERSP., Apr. 7, 2008, [http://www.law.uh.edu/healthlaw/perspectives/2008/\(AK\)AARP.pdf](http://www.law.uh.edu/healthlaw/perspectives/2008/(AK)AARP.pdf) (last visited Dec. 23, 2008).

¹⁶⁴ FAMILIES USA, *supra* note 11, at 1 (reporting that “four out of five Americans who were uninsured during the 2006–2007 period were in working families.”).

B. The National Importance of Health Care

America's health care crisis has morphed from an individual concern to a societal concern. We collectively pay the costs of not insuring all of our citizens.¹⁶⁵ Lack of adequate health care due to the absence of health insurance is the sixth leading cause of death, preceding HIV/AIDS and diabetes.¹⁶⁶ Indeed, not having health insurance has been linked to "increased morbidity and mortality, decreased access to all health care services, lower use of preventive care, delays in seeking out necessary care, and an increased rate of hospitalization for exacerbation of problems that could have been simply managed on an outpatient basis[.]" as well as "developmental and educational deficits for children, reductions in workforce productivity, and significant familial and community stresses."¹⁶⁷ Not surprisingly, uninsured hospital patients are more likely to die than insured patients.¹⁶⁸ Uninsured citizens have less access to health care than those with insurance.¹⁶⁹ Even if uninsured adults receive preventive care and a chronic condition is diagnosed, there is usually not adequate follow-up care.¹⁷⁰ Moreover, by the time uninsured adults reach age sixty-five and are able to qualify for Medicare, they require more care than their counterparts who have had insurance.¹⁷¹ In addition, uninsured citizens use the emergency room as their primary source of care.¹⁷² This places a heavy burden on medical facilities because uninsured persons receive billions in care where the provider is not paid.¹⁷³ The uninsured receive about \$100 billion in health care services annually for diseases that could have been treated more efficiently had there been an earlier diagnosis.¹⁷⁴

Clearly, critical economic and policy implications are attached to uninsured citizens. The United States has lost hundreds of billions of

¹⁶⁵ Silverman, *supra* note 9, at 4 (finding that *all* Americans pay for the health care of the uninsured and underinsured through "increased charges for our own care, increased taxes to subsidize appropriations made to health care providers for delivering uncompensated care, and increased burdens such as overcrowded emergency departments and ambulance diversions.").

¹⁶⁶ FAMILIES USA, *supra* note 11, at 17.

¹⁶⁷ Silverman, *supra* note 9, at 2.

¹⁶⁸ AMERICAN COLLEGE OF PHYSICIANS-AMERICAN SOCIETY OF INTERNAL MEDICINE, NO HEALTH INSURANCE? IT'S ENOUGH TO MAKE YOU SICK (Philadelphia: American College of Physicians-American Society of Internal Medicine, Nov. 1999); *see also* Judy Feder, *Federal Action is Required*, U.S. NEWS & WORLD REP., 6 (Feb. 2009) (reporting that "[t]he uninsured live sicker and die younger than people with coverage").

¹⁶⁹ FAMILIES USA, *supra* note 11, at 16.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 17.

¹⁷² *See generally* KAISER COMMISSION ON MEDICAID AND THE UNINSURED, THE UNINSURED AND THEIR ACCESS TO HEALTH CARE (Kaiser Family Found., Oct. 2006).

¹⁷³ *See* FAMILIES USA, PAYING A PREMIUM: THE INCREASED COST OF CARE FOR THE UNINSURED 13 (June 2005), *available at* https://www.policyarchive.org/bitstream/handle/10207/6261/Paying_a_Premium_rev_July_13731e.pdf.

¹⁷⁴ *See* INSTITUTE OF MEDICINE, HIDDEN COSTS, VALUES LOST: UNINSURANCE IN AMERICA 3 (June 2003), *available at* <http://www.iom.edu/Object.File/Master/12/327/Uninsured5FINAL.pdf> (reporting \$99 billion spent for uninsured Americans).

dollars in economic output because employees are unable to work, take off for sick days, or perform in a subpar manner due to illness.¹⁷⁵ The United States cannot afford to ignore its uninsured citizens or the lack of affordable access to health care for all Americans.

IV. PROPOSAL

The organ shortage and national health care crises should not be viewed solely as a problem for poor Americans, but for *all* Americans. The country cannot afford to exploit the poor by harvesting their organs for cash—they are already the most vulnerable in society and the least able to obtain follow up medical care. Likewise, the United States cannot afford to ignore those who are uninsured or underinsured. But is there a possible compromise? The promise of life-long comprehensive health care in exchange for organ donation is a potential solution that will ensure that organ donors will not be exploited to their detriment. Ensuring that all Americans have health care is on the national agenda, and numerous scholars have proposed various cures to the organ shortage crisis. Thus, the importance of both is not exaggerated, and combining the two may be warranted.

A. Other Proposals

There are many proposed solutions to the organ shortage crisis. Some scholars have recommended broadening the educational awareness of the importance of organ donation, as well as making it easier for individuals to donate their organs.¹⁷⁶ While both of these suggestions are necessary, they alone are insufficient. Others have proposed conscription—simply taking organs of the dead without requiring any consent by the deceased or their family members.¹⁷⁷ Obviously, this solution has some constitutional, religious, and ethical objections,¹⁷⁸ and it ignores the fact that living donors not only provide higher quality organs,¹⁷⁹ but they contribute over one-fourth of the total number of organs transplanted.¹⁸⁰ Still others have recommended presumed consent, which is the choice in many European countries.¹⁸¹ It provides that every person is presumed to be an organ donor, unless they declare a contrary intention.¹⁸² This opt-out approach is

¹⁷⁵ See *supra* notes 9–10 and accompanying text.

¹⁷⁶ See Amitai Etzioni, *Organ Donation: A Communitarian Approach*, 13 KENNEDY INST. ETHICS J. 1, 8–9 (2003); Brian Vastag, *Need for Donor Organs Spurs Thought and Action*, 287 JAMA 2491, 2492 (2002).

¹⁷⁷ John Harris, *Organ Procurement: Dead Interests, Living Needs*, 29 J. INST. MED. ETHICS 130, 131 (2003); H.E. Emson, *It is Immoral to Require Consent for Cadaver Organ Donation*, 29 J. INST. MED. ETHICS 125, 126–27 (2003).

¹⁷⁸ See Bernard T. Kwitowski, *Learning From Each Other: Combining Strategies to End the Organ Shortage*, 9 J. MED. & L. 141, 155–56, 156 n.66 (2005).

¹⁷⁹ See *supra* note 47 and accompanying text.

¹⁸⁰ See *supra* note 48.

¹⁸¹ Teagarden, *supra* note 50, at 721–26.

¹⁸² Council on Ethical and Judicial Affairs, American Medical Association, *Strategies for*

tricky at best because it puts the onus on individuals to undo being an organ donor rather than allowing them to choose to be an organ donor. Presumed consent is distinguished from mandated choice, in which an individual must *choose* whether to be an organ donor.¹⁸³ Another proposal involves a multi-strategy approach, combining several of the prior recommendations to provide a newly-formed procurement system.¹⁸⁴ While these solutions may be helpful, they fail to provide an incentive for the donors.

Scholars have also proposed various financial incentives. These include tax benefits to encourage living and cadaveric donations,¹⁸⁵ providing payments to donors in exchange for consent to harvest their organs at death,¹⁸⁶ discounted drivers' license fees when registering as a donor to obtain their driver's license,¹⁸⁷ reimbursement of medical care and burial expenses,¹⁸⁸ and health insurance.¹⁸⁹

One transplant surgeon, Dr. Arthur Matas, has suggested that "[t]he best way to increase the supply of kidneys without drastically changing the existing allocation system is to legalize a regulated system of compensation for living kidney donors," but maintain existing prohibitions on private sales.¹⁹⁰ "Such a system could be established using the infrastructure already in place for evaluating deceased donors and allocating their organs. The only change required to ease and probably even solve the organ shortage is some form of payment for donors," which makes sense because all other participants in the transplantation process (e.g. doctors, coordinators, hospitals and recipients) receive a financial benefit, except for the donors.¹⁹¹ Also, Americans would not be permitted to harvest the organs from Third World countries.¹⁹² Compensation for donors may include a one-time fixed payment, long-term health insurance, college tuition, tax breaks, or a combination thereof.¹⁹³ As explained earlier, there

Cadaveric Organ Procurement: Mandated Choice and Presumed Consent, 272 JAMA 809, 810 (1994).

¹⁸³ *Id.* at 809.

¹⁸⁴ Kwitowski, *supra* note 178, at 156.

¹⁸⁵ Calandrillo, *supra* note 57, at 111.

¹⁸⁶ Lloyd R. Cohen, *Increasing the Supply of Transplant Organs: The Virtues of a Futures Market*, 58 GEO. WASH. L. REV. 1 (1989); PRICE, *supra* note 13, at 372.

¹⁸⁷ Calandrillo, *supra* note 57, at 113.

¹⁸⁸ *Id.* at 115.

¹⁸⁹ Richard Knox, *Should We Legalize the Market for Human Organs?*, NAT'L PUB. RADIO, May 21, 2008, <http://www.npr.org/templates/story/story.php?storyId=90632108> (last visited Oct. 21, 2008) (quoting Amy Friedman who recommended lifelong health insurance, life insurance, and monetary compensation for living organ donors).

¹⁹⁰ See Matas, *supra* note 36, at 1, 4–5; Meckler, *supra* note 44 (reporting that, for living donors, Dr. Matas proposes a regulated market only for kidneys, because transplants of other organs, such as livers and lungs, have a greater potential for complications to donors).

¹⁹¹ Matas, *supra* note 36, at 1.

¹⁹² *Id.* at 17.

¹⁹³ *Id.* at 4 (citing Gaston et al., *supra* note 87, at 2551 (recommending life insurance, health insurance for long-term medical care, reasonable reimbursement for travel and lost wages, and a tax deduction or nontaxable lump sum)).

is great cause for concern with outright payment of money as an incentive for donors.¹⁹⁴ But considering a non-cash incentive seems sensible.

B. Proposed Legislation

The United States presently has an altruistic system, simply relying upon voluntary or goodwill donors.¹⁹⁵ This system has not been effective in supplying all of the organs needed in the United States, but it has protected poor Americans from exploitation. Financial incentives are usually sufficient to get people to do things they may not otherwise do, such as donating an organ, but payment for organs is not the cure. In seeking organ donors, one must ask what is it that potential donors lack? What is it that many Americans are lacking? What is it that shows up on most presidential national agenda?¹⁹⁶ The answer is a comprehensive national health care program—Americans want affordable health care.

Under our current organ donation system, everyone wins except for the donors and their families. Organ donations provide hospitals, doctors and transplant coordinators with thousands of dollars for *each* organ donated.¹⁹⁷ Why not allow living donors to donate a kidney or a piece of their liver in exchange for life-long, comprehensive health care? This would include preventive care and certainly any costs associated with the transplant procedure—that is, long-term health care (at no cost to the donor) as distinguished from health insurance.

Even those with health insurance are often left with significant medical debt because premiums, deductibles and co-payments are not affordable.¹⁹⁸ Studies show that sixty-two percent of those with medical debt incurred the debt at the time they had health insurance.¹⁹⁹ Providing health insurance to organ donors who are still unable to pay other health plan fees would result in a meaningless return. Providing the actual service of health care would confer a meaningful benefit upon the organ donor, as opposed to health insurance which, as it stands now, is generally unaffordable.

¹⁹⁴ See *supra* note 44 and accompanying text. Professors Becker and Elias have proposed valuing a kidney from a living donor at \$15,200 and a liver at \$37,600. Becker & Elias, *supra* note 33, at 11, 13; see also Robert M. Veatch, *Why Liberals Should Accept Financial Incentives for Organ Procurement*, 13 KENNEDY INST. ETHICS J. 19, 27 (2003) (“Something seems wrong when some people would perceive an offer to sell a kidney for \$5000 as irresistibly powerful while others would not be moved in the slightest.”).

¹⁹⁵ See CHERRY, *supra* note 44, at 4–5.

¹⁹⁶ See *supra* note 137.

¹⁹⁷ Calandrillo, *supra* note 57, at 115 (citing Peter S. Young, *Moving to Compensate Families in the Human-Organ Market*, N.Y. Times, July 8, 1994, at B7).

¹⁹⁸ See *supra* note 155 and accompanying text; see also Michelle Andrews, *How Health Bills Strain Budgets*, U.S. NEWS & WORLD REP., Feb. 2009, at 21 (“The debate over healthcare affordability often focuses on monthly premiums, but it’s the relentless, never-ending drain from copayments, deductibles, and other out-of-pocket expenses not covered by health insurance that often gets people into trouble.”).

¹⁹⁹ COLLINS ET AL., *supra* note 15, at viii.

Because of the current language in NOTA, however, even giving an organ in return for health care would be considered transferring a human organ for valuable consideration. Thus, to move forward with this recommendation, a change in the United States' current organ transplant legislation is needed. Hopefully, the states will follow the federal government's lead.

NOTA is presently comprised of several sections relating to organ transplants. The section most pertinent to this Article is the section titled "Prohibition of Organ Purchases."²⁰⁰ The language should be amended to exclude health care services from the definition of "valuable consideration":

(2) The term "valuable consideration" does not include the reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ; the expenses of travel, housing, and lost wages incurred by the donor of a human organ in connection with the donation of the organ; *or life-long comprehensive and preventive health care for the donor of a human organ.*

1. Pros in Favor of Recommendation

The benefits of this recommendation are significant to the donor, the recipient and the government. Providing health care to organ donors will reduce the organ shortage, as well as the number of Americans without health care, while discouraging black market transactions. Further, it will ensure that the donor will benefit from the transaction,²⁰¹ as well as the government via substantial health care savings.²⁰² It will also continue to prevent the further exploitation of the poor.²⁰³ This proposal may also incentivize moderate-income earners to become organ donors because they too find health care inaccessible and unaffordable.²⁰⁴ This will result in a healthier population of organ donors, which is needed for successful transplants. This incentive may also encourage those who have health insurance to become organ donors if they cannot afford the health insurance plan fees, further increasing the healthy pool of donors.

Some transplant professionals believe that an organ sales market may actually decrease the current organ supply, because potential donors may

²⁰⁰ See discussion *supra* Part II.B.

²⁰¹ See Teagarden, *supra* note 50, at 691–92 (noting the resulting health problems and continuing financial difficulties suffered by donors in the Philippines).

²⁰² See *supra* notes 9–10, 175 and accompanying text; see also Michelle Andrews, *The State of America's Health*, U.S. NEWS & WORLD REP., Feb. 2009, at 10 ("The United States spent more than \$2 trillion on healthcare in 2007. It accounts for a whopping 16 percent of our gross domestic product, and that's projected to rise to 20 percent by 2017. Much of this healthcare spending can be tied to preventable health problems."); Gaston, *supra* note 87, at 2550 ("The financial benefits of a successful kidney transplant are enormous, to both recipient and society.").

²⁰³ See Monaco, *supra* note 12, at 956 (discussing NOTA's protection of the poor from exploitation in black market organ sales).

²⁰⁴ See *supra* notes 31 & 145 and accompanying text.

not want to donate an organ if they can get compensation for it.²⁰⁵ Although there is the possibility of a diminished supply of organs if there is an organ sales market where donors receive a one-time cash payment, it seems that this would be less of a possibility if there is instead an exchange for lifetime health care.

This recommendation would also allow those who are traditionally uneducated about health issues to have increased access to information through their health care professionals. This would potentially reduce some of the chronic diseases in the United States.²⁰⁶ Increasing the number of Americans with health care would also reduce the number of sick citizens and cause less of a strain on America’s economy due to sick workers and shorter life spans for workers who previously did not have health care.²⁰⁷

Additionally, this proposal can significantly impact the organ shortage. However, it may only make a dent in the forty seven million uninsured and sixteen million underinsured Americans, because the number of those lacking adequate health care greatly outweighs the number of those who need kidney or liver transplants. Nevertheless, it is a progressive move in the healing of both crises.

This recommendation would also ensure that access to organs is not dominated by wealthy Americans. Instead of providing a menial payout of \$15,000 to \$37,000—as proposed by Professors Becker and Elias—to a poor person to pay off debt in exchange for an organ and little access to follow up care; it will provide a meaningful, long-term return to the donor. Finally, the organ donors get a benefit.

2. Cons Against Recommendation

Offering life-long comprehensive health care for organs has many benefits, but it also has pitfalls. The cost of health care is very high and “health care is big business.”²⁰⁸ This is primarily why so many Americans lack health insurance. Providing long-term comprehensive health care may not be considered a “fair” trade-off for donating an organ. Based upon the amount of money that has been spent procuring human organs, the figures advanced by Professors Becker and Elias seem low.²⁰⁹ But if we consider that the market price for organs is much higher than \$15,000 or \$37,000,²¹⁰

²⁰⁵ See, e.g., Knox, *supra* note 189 (citing Professor David Rothman, who noted that blood donation rates were higher in England where the sale of blood was not allowed, than in the United States where blood sales were permitted).

²⁰⁶ Andrews, *supra* note 202, at 9 (“Overall, caring for people with chronic medical conditions, many of them preventable, accounts for about 75 percent of medical spending nationwide.”).

²⁰⁷ See discussion *supra* Part III.B.

²⁰⁸ Singer, *supra* note 139, at 41.

²⁰⁹ See *supra* note 194.

²¹⁰ See Handwerk, *supra* note 94 (“Recipients may have paid as much as \$100,000 for their ill-gotten organs.”). But see Berman, *supra* note 39, at 13 (finding that kidneys would sell for approximately \$3,000 rather than \$100,000 under a regulated free market).

the proposal seems more sensible. Further, providing preventive health care will surely result in future health care savings for the United States.²¹¹

Finally, how will this solution be implemented; who will pay for it; and who will provide the health care? The shortest answer is the federal government in coordination with health care providers. As mentioned earlier, the United States spends billions in health care annually to care for uninsured Americans with diseases in advanced stages and has lost billions in economic input as a result of uninsured Americans. Thus, the funds are already being spent.²¹² This proposal assumes that there would not need to be an infusion of new funds, but rather a shift of funds already being spent. From a cost-benefit perspective, this proposal makes sense.²¹³ Further, the number of potential organ donors could be limited by a designated monetary amount or a designated number of potential donors. Lastly, the United Network for Organ Sharing ("UNOS")²¹⁴—a private corporation created by NOTA that operates the Organ Procurement and Transplantation Network ("OPTN")²¹⁵—presumably would continue to be instrumental in the regulation of organ transplantation.

CONCLUSION

Overturning NOTA to legalize the purchase and sale of human organs for human transplantation will fail our most vulnerable citizens—the poor. Contrary to the opinions of some transplant professionals, protection of the poor is not a needless paternalistic concern.²¹⁶ Yet, legalizing the purchase and sale of human organs is becoming more of a possibility every day. Instead of overturning NOTA, Congress should combine the aforementioned legislative change to NOTA to allow for an exchange of an organ in return for life-long, comprehensive health care with some of the other proposals mentioned above, such as raising awareness,²¹⁷ education and increased access to donating.²¹⁸ This will increase the number of living organ donors, protect their post-transplant health, and assist with

²¹¹ See *supra* note 202 and accompanying text.

²¹² Joan Indiana Rigdon, *Universal Health Care?*, WASH. LAWYER, July/Aug. 2008, at 22, 24:

There is no question that our current health care system is remarkably inefficient. The United States government spends a greater percentage of its gross domestic product (GDP) on health care than any other industrialized nation, yet – unlike other industrialized nations who insure all of their citizens – 16 percent of our population is uninsured.

²¹³ See generally Richard A. Posner, *Cost-Benefit Analysis: Definition, Justification, and Comment on Conference Papers*, 29 J. LEGAL STUD. 1153, 1153–54 (2000).

²¹⁴ See UNOS, *supra* note 89.

²¹⁵ CHERRY, *supra* note 44, at 109.

²¹⁶ See *supra* note 51.

²¹⁷ Spielman, *supra* note 59, at 150–51; see also Jennifer M. Krueger, *Life Coming Bravely Out of Death: Organ Donation Legislation Across European Countries*, 18 WIS. INT'L L.J. 321, 321–22 (2000) (citing REG GREEN, *THE NICHOLAS EFFECT: A BOY'S GIFT TO THE WORLD* (1999), and describing how the number of organ donor cards quadrupled within days of Nicholas' death, which resulted in saving seven lives).

²¹⁸ See discussion *supra* Part IV.A.

2008]

“Dirty Pretty Things” and the Law

387

preventable health problems. It will also encourage a healthier and wealthier class of donors, because it is not just the poor who are without health care—the groups of uninsured and underinsured Americans increasingly include middle- to upper-income people.²¹⁹ There are some promising proposals being advanced regarding health care plans and recommendations to overcome the barrier caused by high premiums for those who cannot afford them.²²⁰ Rising health care costs have pushed many into debt.²²¹ But this non-cash incentive would increase the number of living organ donors who would receive life-long, comprehensive health care while not forcing people who are trying to pay for their health care into medical debt, thus encouraging healthier Americans and a healthier America—a benefit for all.

²¹⁹ See *supra* note 31 and accompanying text.

²²⁰ See, e.g., Mehlman, *supra* note 8, at 1–2 (detailing a proposed national health insurance program).

²²¹ Feder, *supra* note 168 (“In 2007, 57 million Americans had problems paying medical bills. At the most extreme, health expenses are a factor in half of all personal bankruptcies, with nearly half of people in foreclosure naming such costs as a cause.”); Bob Herbert, *Caught in the Credit Card Vise*, N.Y. TIMES, Sept. 22, 2003, at A17 (“Men and women struggling with such structural problems as job displacement, declining real wages and rising housing and health care costs have been relying on their credit cards as a way of warding off complete disaster.”).