

DEBUNKING MISCONCEPTIONS ABOUT THE JEWISH FAITH AND ORGAN DONATIONS: EXPLORING EDUCATION AND COMPENSATION IN THE UNITED STATES AND ISRAEL

*Lauren Bess**

I. INTRODUCTION

Around the globe, nearly every country is suffering from an extreme shortage of available organs for transplantation.¹ While the term “organ donor” can refer to both deceased and living organ donations, this note is written to specifically address donations that occur after an individual is declared brain dead. Less than half of the United States eligible donor population has formally committed to becoming an organ donor by registering through their appropriate state agency.² Each day only eighty people in the United States receive an organ for transplantation, while 150 people are added to the waitlist. This gap continues to widen as the organ donation rate has remained constant since 2005. According to a 2012 Gallup poll, while 94.9% of Americans reported that they “support” the organ donation process, only 60.1% of those surveyed had “organ donor” declared on their driver’s license or have formerly joined an organ donation registry.³ The number of registered donors is inconsistent with research studies that have indicated many

* Business & Marketing Editor, *Rutgers Journal of Law and Religion*; J.D. Candidate *Rutgers Law School*, Class of 2021. This note is dedicated to my parents, brother, mom-mom & pop-pop, and boyfriend for their unconditional love and endless support. I would like to express my utmost gratitude to Professor Frankford for his research assistance throughout this process. Thank you to the entire staff of the Rutgers Journal of Law and Religion for providing me with this opportunity and preparing my work for publication. Finally, thank you to my family and friends for their constant support and encouragement.

¹ Gary S. Becker & Julio Jorge Elias, *Introducing Incentives in the Market for Live and Cadaveric Organ Donations*, J. ECON. PERSPS. 3, 7-8 (2007); Madhav Goyal et al., *Economic and Health Consequences of Selling a Kidney in India*, 288 J. AM. MED. ASS’N 1589, 1589 (2002) (“Nearly every country has a shortage of kidneys for transplantation.”).

² Mark S. Nadel & Carolina A. Nadel, *Using Reciprocity to Motivate Organ Donations*, 5 YALE J. HEALTH POL’Y L. & ETHICS 293 (2005).

³ *2012 Nat’l Survey of Organ Donation Attitudes and Behaviors*, GALLUP ORG., 1, 46 (2013), <https://www.organdonor.gov/sites/default/files/about-dot/files/nationalsurveyorgandonation.pdf> (The survey shows that 48.8% of Americans “strongly support” organ donation, a significant increase from 2005, where 39.4% of the population reported strongly supporting organ donation).

Americans have expressed a willingness to donate their organs upon death.⁴

The organ shortage can be defined as the mismatch between demands for organs and the organs available for transplantation.⁵ This article seeks to identify causes contributing to the shortage of donor registrants. This essay specifically looks at the inconsistencies regarding organ donation projected by the Jewish faith and seeks to highlight that Judaism does encourage practicing Jews to partake in the organ donation process. This note identifies religious misconceptions surrounding burial rituals and addresses how an increased in education and development of incentivization measures can lead to a rise in organ donation participation. Considering the massive organ shortage prevalent in every nation, altruism alone has proven to be an unsuccessful doctrine.

Part II of this essay identifies the regulatory legislation that oversees the organ donation process in the United States and Israel. In the United States, federal law outlines the protocols for organ procurement, the allocation of donated organs, and organ transplantation. On the other hand, state law covers the scope of public education and organ donation awareness programs. Additionally, the U.S. Department of Health & Human Services plays a role in working to increase the percentage of registered donors. This essay sets out the health department's plan for tackling the organ shortage. In Israel, The National Transplant Center, a subset of the Ministry of Health, is tasked with donor management and organ allocation. The center maintains the country's database of transplant candidates and is responsible for the coordination of organ procurements.⁶ Additionally, the center is responsible for overseeing the allocation and transplantation processes.⁷ Lastly, this section identifies the differing methods the United States and Israel utilize to register organ donors. This essay explains how an individual can join their respective county's registry.

Part III of this essay clarifies the Jewish perspective on organ donation. Through the words of rabbis, the Torah, and Judaic principles, a conclusion can be drawn that Judaism does in fact

⁴ *Id.*

⁵ Mélanie Levy, *State Incentives to Promote Organ Donation: Honoring the Principles of Reciprocity and Solidarity Inherent in the Gift Relationship*, 5 J.L. & BIOSCIENCES 2, 398-435 (2018).

⁶ *Id.*

⁷ Tamar Ashkenazi, *Organ Donation in Israel—Achievements and Challenges*, 99 TRANSPLANTATION 2, 265-66 (2015).

encourage members of its faith to become organ donors. This section explores the burial rituals for deceased Jews, and addresses the exceptions made in favor of organ donation. For example, traditionally the body of a deceased Jew should be buried within twenty-four hours of their death, to conform with ideals set forth in the Torah.⁸ In the event where the harvesting of organs becomes a lengthy process, this note addresses the Jewish religion's willingness to grant exceptions in order to incentivize organ donation. Further, Judaism views the act of organ donation as a mitzvah, i.e., good deed.⁹ The faith holds that the positive commandment of saving another individual's life is of the highest priority.¹⁰

Part IV of this note explores proposals for combatting the organ shortage and the underwhelming number of donor registrations throughout the world. Specific to the United States, there are three types of public policy instruments surrounding healthcare that have been applied in an attempt to change the behavior of citizens.¹¹ It is first argued that public officials should suggest a change in public behavior through the art of persuasion, public awareness campaigns and education.¹² In Section A, a strong emphasis is placed on education. This will be explored in terms of creating widespread awareness about the shortage of organs, educating individuals on the importance of organ donations, and debunking misconceptions surrounding the organ donations in the Jewish religion.

Secondly, the United States can impose a change in the behavior of its citizens through the creation of new laws and regulations.¹³ Sections B-D of this article propose recommendations by exploring the concepts of mandatory choice, preferred status and organ conscription. These methods are regulatory enactments proposed to increase the number of registered organ donors in the United States and Israel. A mandatory choice system would require individuals to explicitly choose whether or not they are willing to

⁸ *The Basics of the Jewish Funeral*, CHABAD-LUBAVITCH MEDIA CTR. (2006), https://www.chabad.org/library/article_cdo/aid/282548/jewish/The-Basics.htm.

⁹ Rabbi Joseph H. Prouser, *The Mitzvah of Organ Donation*, RABBINICAL ASSEMBLY (Nov. 26, 2019), <https://www.rabbinicalassembly.org/story/mitzvah-organ-donation>.

¹⁰ *Id.*

¹¹ Levy, *supra* note 5, at 407.

¹² *Id.*

¹³ *Id.*

become an organ donor.¹⁴ Preferred status programs reward individuals with preferred status should they need an organ donation. This status is based upon their own willingness to donate, or because a relative has done so.¹⁵ Under an organ conscription system, it would be mandated that all viable organs be removed from deceased individual's bodies, regardless of the wishes of the specific individual of their families.¹⁶

Thirdly, the country can induce a behavioral change in its population by offering positive or negative financial incentives to registrants.¹⁷ Financial incentives in the United States and Israel will be explored in detail in Part V. The United States currently use the first and second categories of public policy instruments in their efforts to support individuals in need of transplantation.¹⁸ While public widespread educational initiatives have already been implemented in numerous states, these awareness campaigns have failed to be particularly successful in increasing the numbers of registered organ donors.¹⁹ As such, it important to explore new regulatory measures that can lead to influx of registrants. Organ conscription which was introduced above is not currently being considered as a viable proposal in the United States. Regulations coupled with public education may improves the likelihood of increasing donor registrants.

Part V of this essay will address the concept of compensation for organ donors. The legality of reimbursements will be analyzed under the United States and Israel's current systems. In the United States compensation for organ donors, including the estates of deceased individuals, is restricted. For the purposes of discussing compensation in this section, the realm of donated organs will be broadened to include living organ donations.

Some states offer tax reductions or stipends to cover travel expenses for living donors, however these refunds are not enough to

¹⁴ Francesca Scheiber, *Opt-Out Policies Increase Organ Donation*, STAN. SPARQ, <https://sparq.stanford.edu/solutions/opt-out-policies-increase-organ-donation>

¹⁵ Sam Crowe & Eric Cohen, *Organ Transplantation Policies and Concerns*, GEO. BIOETHICS ARCHIVES (Sept. 2006), <https://bioethicsarchive.georgetown.edu/pcbe/background/crowepaper.html>.

¹⁶ Aaron Spital & Charles A. Erin, *Conscription of Cadaveric Organs for Transplantation: We Need to Start Talking About It*, 39 AM. J. TRANSPLANTATION 3, 611-615 (Apr. 2005), <https://onlinelibrary.wiley.com/doi/full/10.1111/j.1600-6143.2005.00820>.

¹⁷ Levy, *supra* note 5, at 407.

¹⁸ *Id.*

¹⁹ *Id.*

incentivize greater participation.²⁰ Additionally, case law is presented to discuss the disparities in compensation for bodily components. Blood, sperm and eggs are all legally compensable, yet there is no shortage of availability for any of these bodily byproducts.²¹

In Israel, the nation has been actively reforming its legislation to provide incentives for organ donors in an effort to make registration more appealing. This note will explore the history and progression of the proposed and enacted legislation in the country. Under Israel's new compensation model, the families of deceased organ donors are permitted to receive up to \$13,400 for the donation.²² This payment can be used to memorialize the deceased or compensate the family for medical and burial costs.²³ This essay will seek to draw early inferences on the effects the Israeli compensation model is having on the number of the registrants.

Lastly, this note addresses concerns surrounding organ compensation, specifically in regard to exploitation. Opponents of compensation policies believe these models would impose an undue influence on impoverished individuals. While Jewish law does permit monetary compensation for organ donation, religious leaders are cognoscente of the concerns that may arise due to the financial imbalances that are prevalent within their population.²⁴ This essay's last substantive section will discuss a departing from altruistic principles. Statistics have repeatedly reflected that altruism alone is unsuccessful in combatting the organ transplantation shortage.²⁵ As such, compensation may be an effective tool in motivating individuals and families of deceased persons to donate their organs.

²⁰ Sean Arthurs, Comment, *No More Circumventing the Dead: The Least-Cost Model Congress Should Adopt to Address the Abject Failure of Our National Organ Donation Regime*, 73 U. CIN. L. REV. 1101, 1110-11 (2005).

²¹ Thomas G. Peters et al., *Views of US Voters on Compensating Living Kidney Donors*, 151 JAMA SURGERY 710 (2016).

²² David Schwark, *Organ Constriction: How the Dead Can Stay Living*, 24 J.L. & HEALTH 323 (2011).

²³ Levy, *supra* note 5, at 411.

²⁴ *Id.*

²⁵ *Id.*

II. BECOMING AN ORGAN DONOR

A. Regulations and Registration in the United States

1. Regulations

In the United States, becoming an organ donor is voluntary. There are four rules that govern organ donation registration and the transplantation process. They are as follow: state laws, federal laws, federal regulations, and policies set forth by the United Network for Organ Sharing (UNOS).²⁶ State laws primarily cover the donation process, establish criteria for declaring an individual deceased, and create consent requirements for becoming an organ donor.²⁷ Further, state laws cover the scope of public education in introducing individuals to the organ donation process, and developing awareness programs.²⁸ Generally, these laws do not differ significantly from state to state.²⁹

Federal laws outline the process of organ procurement, the allocation of donated organs, and the organ transplantation process.³⁰ The United States government established the Organ Procurement and Transplantation Network (OPTN), which creates guidelines for organ procurement organizations.³¹ The OPTN is tasked with coordinating, implementing, and monitoring the organ transplantation system.³² Organ procurement organizations (OPOs) are responsible for retrieving donated organs and notifying potential organ match recipients.³³ Through the OPTN and federal regulations, the government has established guidelines and restriction regarding how organs can be transferred from a donor to the selected organ recipient.

It is heavily debated whether Good Samaritan statutes apply to organ donation because federal legislation does not require citizens to put themselves in harm's way. Good Samaritan Laws aim to, "strike a balance between encouraging the public to help others,

²⁶ Crowe & Cohen, *supra* note 15.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Crowe & Cohen, *supra* note 15.

³³ *Id.*

while protecting those who render aid, but may cause unintentional harm to those they attempt to help.”³⁴ While the law is intended to be helpful, there are difficulties in both enforcing and the weighing of morality due to the expectations the law sets forth. Minnesota and Vermont have enacted Good Samaritan statutes which impose a penalty on individuals who fail to intervene with life-saving assistance when in a position to help someone in need.³⁵ Good Samaritan Law requires citizens to provide “reasonable assistance” to other individuals in harm’s way. These laws aim to encourage more people to respond to emergencies.

Despite Minnesota and Vermont’s Good Samaritan Law, Courts have traditionally refused to hold that an individual can compel another to donate their organs for life saving purposes. In *McCall v. Shimp*, The Supreme Court of Pennsylvania noted “the common law has consistently held to a rule which provides that one human being is under no legal compulsion to give aid or to take action to save another human being or to rescue.”³⁶ In this case, an individual seeking bone marrow attempted to compel his first cousin, the only available donor match at the time, to donate his bone marrow. Plaintiff utilized the court system to sue, asking the judiciary to force the Defendant to donate bone marrow. Judge Flaherty held that compelling an individual to donate an organ, “would defeat the sanctity of the individual and would impose a rule which would know no limits, and one could not imagine where the line would be drawn.”³⁷ While this judicial opinion centers around living donations, it is likely that the same rule of law would apply to circumstances where an individual has explicitly stated they do not wish to donate their organs, but a family member objects and files suit.

³⁴ *Id.*

³⁵ See MINN. STAT. ANN. § 604A.01 (West 2000) (“A person at the scene of an emergency who knows that another person is exposed to or has suffered grave physical harm shall, to the extent that the person can do so without danger or peril to self or others, give reasonable assistance to the exposed person. Reasonable assistance may include obtaining or attempting to obtain aid from law enforcement or medical personnel.”); VT. STAT. ANN. tit 12, § 519 (1973) (“A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.”).

³⁶ *McFall v. Shimp*, 10 Pa. D. & C. 3d 90 (Pa. Com. Pl. 1978).

³⁷ *McFall Philosophy* 22, BRANDEIS: PHIL. LAW, <http://people.brandeis.edu/~teuber/lawmcfall.html>.

2. Registration

Any individual in the United States over the age of eighteen can register to be an organ, eye, and/or tissue donor. Individuals can choose what organs wish to donate, and have the ability to change their status at any time.³⁸ Individuals can register to be an organ donor online or in-person at their local motor vehicle department.³⁹ While 95% of United States adults support organ donation, only 58% are formally registered as donors.⁴⁰ Even with more than 145 million people registered to be organ donors, only about 3 individuals for every 1,000 are eligible to donate their organs upon death.⁴¹ If every individual in the United States registers to be an organ donor, statistics show there would still be a drastic shortage in organs available for transplantation, thus it is imperative to register as many individuals as possible to begin increasing the number of transplantable organs.⁴²

B. Regulations and Registration in Israel

1. Regulations

All organ donor management and allocations are coordinated by the Israel National Transplant Center (“INTC”).⁴³ In 1994, the INTC was established as a department within the Ministry of Health.⁴⁴ The INTC maintains updated lists of transplant candidates and is responsible for the coordination of organ procurements. The INTC is also responsible for transplant programs and overseeing the transplantation process.⁴⁵ The center functions by hiring “nurse donor coordinators” to manage organ donations for each of Israel’s sixteen hospitals.⁴⁶ In addition, an intensive care unit physician is assigned to every hospital. These

³⁸ *Who Can Donate?*, HEALTH RES. & SERVS. ADMIN., <https://www.organdonor.gov/about/donors.html>.

³⁹ *Id.*

⁴⁰ *Organ Procurement and Transplantation Network*, U.S. DEP’T HEALTH & HUM. SERVS. (July 2019), <https://optn.transplant.hrsa.gov/data/about-data/>.

⁴¹ Crowe & Cohen, *supra* note 15.

⁴² *The Challenge*, AM. TRANSPLANT FOUND., <https://www.americantransplantfoundation.org/the-challenge/>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Ashkenazi, *supra* note 7 at 265–66.

⁴⁶ *Id.*

physicians are responsible for supporting the nurse donor coordinators by assisting with donor management and consenting to the donation process.⁴⁷

Israel's National Transplant and Organ Donation Center, known as ADI, maintains a database of Israeli citizens who have pledged willingness to donate their organs upon death.⁴⁸ Individuals who register with ADI receive an organ donation card. The donation card will also indicate whether the organ donation should be contingent upon approval by a religious leader, who would be selected by the donor's family.⁴⁹ Further, the National Transplant Center in Israel's Ministry of Health is responsible for maintaining the country's ADI card signatories' repository.⁵⁰

2. Registration

Every Israeli citizen over the age of 17 can register with the ADI by signing a donor notice card.⁵¹ Signing an ADI donor card, "testifies to the desire of the card-holder to donate his organs after his death, in order to save the lives of patients awaiting transplants."⁵² It is generally easier for the family members of individuals who have passed to make decisions regarding organ donation if the decedent has an ADI card. The ADI card explicitly identifies an individual's desire to be a donor and will outline any steps that must be taken first, such as approval by a religious leader.⁵³ The ADI system currently has approximately 823,264 registered citizens.⁵⁴ This accounts for roughly 14% of Israel's adult population.⁵⁵

⁴⁷ *Id.*

⁴⁸ *Donor Card*, STATE ISR. MINISTRY HEALTH, http://www.health.gov.il/transplant/about_adi.htm.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ AM. TRANSPLANT FOUND, *supra* note 42.

III. CLARIFYING THE RELIGIOUS STANDPOINT OF THE JEWISH FAITH ON ORGAN DONATIONS

Amongst Jews, there is a common misconception that the faith forbids individuals from becoming organ donors. Traditional interpretations of the treatment of deceased bodies within the Jewish religion may lead individuals to object to becoming an organ donor.⁵⁶ An obligation to the deceased individual derives from Jewish law requiring the immediate burial of the deceased without removing organs from the body. “You must not let his corpse remain on the stake overnight but must bury him the same day. For a hanged [or impaled] body is an affront to God.”⁵⁷ Practicing Jews must balance two competing interests: *pikuah nefesh*, the sacred obligation to preserve human life, and Jewish law that prohibits desecration of a dead body, *nivul hamet*.⁵⁸

The Jewish religion maintains that an individual’s organs may not be removed from their body until death has definitely occurred.⁵⁹ Within the Jewish faith, there are different beliefs regarding organ donation based upon the “death” of specific organs, such as brain stem death or death upon declaration of a non-beating heart.⁶⁰ For the purposes of this essay, I will only focus on the removal of organs from a donor once brain death has been declared.⁶¹ Brain death, defined by the complete stopping of all brain function which cannot be reversed, is also representative of the legal definition of “death.”⁶²

There are numerous concerns that have manifested into the false interpretation that Judaism forbids organ donations. This stems from the prohibition against dishonoring the dead or disfiguring a dead body, prohibition against deriving benefit from a

⁵⁶ *Id.*

⁵⁷ Shabtai A. Rappoport, *The Deceased, The Family and Organ Donation*, MED. & HALACHA, (2009), <http://www.daat.ac.il/daat/refua/donation.htm> (2009); *see also Deuteronomy 21:22-23*.

⁵⁸ Rabbi Shraga Simmons, *Organ Donation*, AISH (Jan. 2000), <https://www.aish.com/ci-sam/48936217.html>.

⁵⁹ *Id.*

⁶⁰ HODS Mission, HALACHIC ORGAN DONOR SOC’Y, <https://hods.org/about-hods/hods-mission/>.

⁶¹ *Id.*

⁶² *Brain Death*, NAT’L KIDNEY FOUND., <https://www.kidney.org/atoz/content/braindeath>.

dead body, and the requirement to bury a person's remains.⁶³ The primary conflicting obligation in Jewish law is the preservation of one's own life. This obligation includes the responsibility to avoid self-injury.⁶⁴ This commitment to upholding the sanctity of life explains why some Jews may be wary about registering to become an organ donor. At one time, organ transplantation and donations were strictly prohibited by Jewish law due to the experimental nature of the procedures and in circumstances of living donations, the possibility of endangering life.⁶⁵ Significant advancements in medical care and technology, have diminished the preceding argument, and Jewish law no longer maintains this perspective.

Rabbis conclude that to mistreat or mutilate the body of a deceased, known in Hebrew as *nivul hamet*, is a violation of scriptural law.⁶⁶ *Deuteronomy* 21:22-2 states that if a criminal is put to death by hanging, "his body shall not remain all night hanging on the tree, but thou shalt surely bury him that same day."⁶⁷ Strong opposition to organ donation exists because it is argued that the body of a deceased individual is in a sense "being mutilated" when an organ is removed for transplantation into the body of a living person.⁶⁸ Most authorities agree however, that when a transplant is likely to save a life, organ donation is permitted. Transplant surgery that results in the saving of human life adds glory and honor to the dead, known as *kavod hamet*.⁶⁹ Thus, the positive commandment of saving a life is of the highest priority, even superseding the laws of the Sabbath.⁷⁰

Specifically in the Orthodox community, there is a common misconception that organ donation violates Jewish law and burial customs.⁷¹ Jewish funeral rituals require that all severed parts of an individual be buried.⁷² In opposition to the false narrative, Rabbi Moshe Feinstein, an American rabbi and scholar, proposed that

⁶³ Robert E. Steinbuch, *Kidneys, Cash, Kashrut: A Legal, Economic, and Religious Analysis of Selling Kidneys*, 45 HOUS. L. REV. 1529, 1573 (2009).

⁶⁴ *Id.*

⁶⁵ *What Does Judaism Say About Organ Donation?*, MOMENT MAG (March 2006), <https://momentmag.com/what-does-judaism-say-about-organ-donation/>.

⁶⁶ *Jewish Medical Ethics: Organ Donation*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/organ-donation-in-judaism>

⁶⁷ *Deuteronomy* 21:22-2.

⁶⁸ NAT'L KIDNEY FOUND., *supra* note 62.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

“when any organ from the body of a deceased is transplanted into a living person, the organ can no longer be considered an organ of the dead; it becomes part of a living body, and the law demanding the burial of all parts of a deceased does not apply.”⁷³ Similarly, Rabbi Isaac Klein, who will be remembered as a prominent Conservative rabbi, pointed out that the organ(s) donated will eventually be buried, thus satisfying the Judaic burial requirement.⁷⁴ Although the Torah commands that Jews be buried whole, an exception is granted in circumstances of organ donation because the potential to save lives outweighs Judaic mandates.⁷⁵

Jewish law imposes the affirmative duty, “to save a person's life through one's direct intervention or through the use of one's resources.”⁷⁶ In Western culture, such acts of helping others are known as charitable work or contributions.⁷⁷ In the Jewish faith charity, known as tzedakah, simply means monetary assistance.⁷⁸ So instead of viewing organ donation as charity, the Jewish faith interprets organ donation as an obligation to G-d and individuals in need. The Conservative Movement's Committee on Jewish Laws and Standards has formally stated, “organ donations after death represents not only an act of kindness but is also a commanded obligation which saves human lives.”⁷⁹

Jewish law honors the traditional notion of *pikuah nefesh*. This concept holds that one must act to save another's life, even at the expense of transgressing other prohibitions. While this is not halachically mandated, it is simply the right thing to do.⁸⁰ The timeless content of the scriptures speak to the donation in principle. The biblical context for this rule states, “do not stand idly by your fellow's blood.”⁸¹ Additionally, Jewish tradition believes that it was G-d who donated the first body part. G-d's action of removing

⁷³ *Id.*

⁷⁴ NAT'L KIDNEY FOUND., *supra* note 62.

⁷⁵ *Id.*

⁷⁶ Steven H. Resnicoff, *The Supply & Demand of Body Parts: Supplying Human Body Parts: A Jewish Law Perspective* (2006), 55 DEPAUL L. REV. 851, 853.

⁷⁷ Steinbuch, *supra* note 63, at 1570.

⁷⁸ *Charity (Tzedakah): What is Tzedakah?*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtual-library.org/what-is-tzedakah>.

⁷⁹ *Organ Donation and Religion*, DONATE LIFE AM., <https://www.donatelife.net/organ-donation-and-religion/>

⁸⁰ Steinbuch, *supra* note 63, at 1570.

⁸¹ *Leviticus* 19:16.

Adam's rib and transferring it to Eve in her creation can be interpreted as the first organ transplantation.⁸²

Out of respect for the deceased individual, Jewish law generally requires near immediate burial of the human body.⁸³ In the case of organ transplantation, an exception is granted. While the Torah prohibits the postponement of burials, the act of organ harvesting may postpone the start of traditional burial rituals by a number of hours. The principle of *pikuach nefesh* as described above allows for this delay, as it is for the purpose of saving another's life.

IV. PROPOSED RESPONSES AND POLICY CHANGES TO COMBATTING LOW ORGAN DONATION RATES

A. Emphasis on Education

Emphasis on Jewish history and biblical stories is necessary to clarify the religion's position on organ donation. The dissipation of religious text in this manner will further education about the faith's perception of organ donation by drawing direct connections between the transplantation process and written scripture. Rabbi Steve Moskowitz, a devoted Jewish teacher has publicly argued that there needs to be more widespread education surrounding organ donation. The organ donation process is supported by the Jewish principle of completing acts of mitzvot, i.e., good deeds.⁸⁴

The Advisory Committee on Organ Transplantation (ACOT) was established under 42 U.S.C. Section 217a, Section 222 of the Public Health Service Act and 42 CFR 121.12 (2000).⁸⁵ The committee is tasked with advising the United States Department of Health & Human Services (HHS) Secretary on organ donation,

⁸² Steinbuch, *supra* note 63, at 1573.

⁸³ Aaron L. Mackler, *Respecting Bodies and Saving Lives: Jewish Perspectives on Organ Donation and Transplantation*, 10 CAMBRIDGE Q. HEALTHCARE ETHICS 420, 422 (2001) (explaining how the Jewish tradition values respect for the human body, commanding certain requirements after death including burial of the body as soon as possible).

⁸⁴ Cathryn J. Prince, *Rabbis Work To Uproot Taboo Against Organ Donation*, TIMES ISRAEL (May 12, 2019, 4:16 AM), <https://www.timesofisrael.com/rabbis-work-to-uproot-taboo-against-organ-donation/>.

⁸⁵ *Organ Procurement and Transplantation Network*, U.S. DEP'T HEALTH & HUM. SERVS. (July 2019), <https://optn.transplant.hrsa.gov/data/about-data/>.

procurement, allocation, and transplantation.⁸⁶ One of the committee's most important functions is to advise the Secretary on "ways to maximize federal efforts to increase living and deceased organ donation nationally."⁸⁷ More recently, The United States Department of Health & Human Services has focused its efforts on helping hospitals spread awareness. The department encourages families of dead or dying patients to donate their loved one's organs for transplantation.⁸⁸ The department has created a Gift of Life Initiative, which includes an Organ Donation Breakthrough Collaborative.⁸⁹ The collaborative was specifically formed to identify and promote practices for properly requesting these donations from deceased individual's family members, in an effort to increase the number of consenting families.⁹⁰

The Halachic Organ Donor Society (HODS) is a non-profit organization dedicated to saving lives by increasing organ donations from those of the Jewish faith. The transplantation promotion is targeted towards disseminating accurate information regarding the donation process and debunking common misconceptions.⁹¹ The organization seeks to educate practicing Jews about different halachic and medical issues concerning organ donation.⁹² Additionally the organization provides rabbinic consultations and oversight for cases of organ transplantation, in hopes of clarifying the faith's stance on this matter.⁹³

HODS has spoken to more than 50,000 Jews about the misconceptions regarding organ donations in the Jewish religion. The organization has also traveled to over a dozen countries to speak with Jews about the donation process.⁹⁴ Rabbi Ari Perl, Vice-President of the Jewish Community Engagement and Multicultural Education council for LiveOnNY proclaims, "progress can only be accomplished by hiring an insider, a rabbi with a thorough understanding of both organ donation and Jewish law and culture,

⁸⁶ *HHS Secretary Adds New Members to Organ Transplantation Advisory Committee*, ORGAN PROCUREMENT & TRANSPLANTATION NETWORK, <https://optn.transplant.hrsa.gov/news/hhs-secretary-adds-new-members-to-organ-transplantation-advisory-committee/>.

⁸⁷ Crowe & Cohen, *supra* note 15.

⁸⁸ Mark & Carolina Nadel, *supra* note 2, at 302.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ MOMENT MAG, *supra* note 65.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

to engage and educate the Jewish community.”⁹⁵ As such, HODS utilizes the services of influential Jewish leaders to spread awareness about the organ shortage and encourage members of the faith to join their country’s registry.

HODS offers an organ donation card that individuals can register for, which differs from the standard registration process in the United States. While a Jewish individual may indicate or identify themselves as an organ donor on their driver’s license in the United States, the HODS organ donor card features language that is more in-line with Judaic law.⁹⁶ It specifically states, “all preparations for transplant must be done in consultation with my family-appointed rabbi. All medical procedures must be done with the utmost care, respect, and minimum damage to the cadaver.”⁹⁷ Additionally a sample donor card may read, “in keeping with the Jewish belief that the human body is God’s creation and is thus to be accorded sanctity even after death, please see that all appropriate steps are taken on my behalf to maintain *kevod hameit* (honor to the deceased).⁹⁸ As soon as needed organs or tissues are retrieved in accordance with my instructions, see that the rest of my remains are buried in a Jewish cemetery, in accordance with Jewish law and custom.”⁹⁹

Beginning organ donation education in Hebrew school is vital in instilling these values in the youth. Reaffirmation will occur through weekly prayer services. The Rabbinical Assembly passed a resolution regarding organ donations in 2000, yet the reaffirmation of the 1996 resolution calling for each Conservative synagogue to encourage organ donations to its members through an educational program and campaign has still fallen short in terms of progress.¹⁰⁰ HODS recently created an Ambassadors Program for college age students.¹⁰¹ The program will award five fellowships to Jewish students, where they will receive a stipend for their efforts as on-campus advocates for organ donation.¹⁰² The fellows will

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ HALACHIC ORGAN DONOR SOC’Y, *supra* note 60.

⁹⁸ *Id.*

⁹⁹ Mackler, *supra* note 83, at 421.

¹⁰⁰ *Resolution on Organ Donation*, RABBINICAL ASSEMBLY (March 2000), <https://www.rabbinicalassembly.org/resolution-organ-donations>.

¹⁰¹ *Id.*

¹⁰² *Id.*

become versed in the issues surrounding organ donation in Jewish law so they can disseminate accurate information.

The HODS Ambassadors Program is one of the first actions taken by a Jewish organization to educate the public about organ donations. HODS' program was created in effort to debunk religious misconceptions. It has been long recognized that getting in the door is half the battle in educating the public. In breaking these barriers, HODS believes greater education will increase the number of registered organ donors.¹⁰³

The United States' Health Resources & Services Administration has four main objectives in increasing the number of registered donors.¹⁰⁴ The first being registration through an individual's state agency. Secondly, the Administration encourages conversation and persuasion about registering to become an organ donor to occur through word of mouth. Next, spreading awareness through talking to your family, friends, and utilizing social media for engagement about organ donations. Lastly, the Administration is actively seeking volunteers to assist in advancing and promoting their mission to increase the number of registered organ donors across the country.¹⁰⁵

There are opportunities for workplace partnerships and national donation events that are in need of public support, advertising and hands-on service. Specifically, HODS seeks financial donations to better articulate their message. The donations are used for delivering lectures, creating advertisements, publishing brochures, producing educational videos, using social media and community events to raise awareness. Additionally, funds are used to manufacture and distribute organ donation cards, manage the database of organ donor card members, consult with families in the hospital who are unsure whether or not to donate their loved one's organs, and to recruit rabbis, physicians and women leaders to speak and bring awareness to the benefits of organ donation.¹⁰⁶

¹⁰³ Prince, *supra* note 84.

¹⁰⁴ *About HRSA*, HEALTH RES. & SERVS. ADMIN., <https://www.hrsa.gov/about/index.html>.

¹⁰⁵ *Id.*

¹⁰⁶ AM. TRANSPLANT FOUND., *supra* note 42.

B. Exploring Mandatory Choice Systems

Sections B-D will explore proposals for crafting regulatory systems that may lead to an increase in registered organ donors, thus leading to more transplantations being performed. Under a mandatory choice law system, individuals will be required to explicitly choose whether or not they are willing to become an organ donor.¹⁰⁷ If a mandatory choice policy is enacted, by law, individuals would be required to assume the status of either a donor or non-donor.¹⁰⁸ Every citizen in a mandatory choice country, also known as an “opt-out” policy will be required to make a determination on whether or not they wish to become an organ donor. Changing policies in both the United States and Israel by creating an “opt-out” program, where an individual’s organs are automatically donated when they die unless they expressly opt-out from the program may lead to greater participation in the organ donation process.¹⁰⁹

Researchers from the University of Michigan utilized data from the Organ Procurement and Transplantation Network Standard Transplant Analysis and Research files to build a model simulating how a policy shift towards mandatory choice would affect patients on the organ transplant waiting list.¹¹⁰ The study found that had an opt-out or presumed consent policy program been enacted between the years of 2004 and 2014, approximately somewhere between 4,300 and 11,400 life years would have been added for the more than a half-million patients on the organ transplant list.¹¹¹ This data supports the proposal that mandatory choice systems would increase the number of organ donors.

Currently, the United States uses an “opt-in” consent policy.¹¹² It is reported that in opt-in countries, fewer than 15% of individuals register to become an organ donor.¹¹³ Mandatory choice laws would alter the current system by eliminating the possibility that individuals do not make a choice on this issue.¹¹⁴ One of the

¹⁰⁷ Scheiber, *supra* note 14.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *How Opt-Out Organ Donation Could Affect US Waiting Lists*, SCIENCE DAILY (Oct. 2, 2019), www.sciencedaily.com/releases/2019/10/191002165224.htm.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ S. Davidai et al., *The Meaning of Default Options for Potential Organ Donors*, PROC. NAT'L ACAD. SCI. (2012), 15201-05; *see also* STAN. SPARQ, *supra* note 15.

¹¹⁴ *Id.*

strongest arguments in favor of a mandatory choice system is that by essentially forcing citizens to choose their donation status, it is likely more individuals will opt to donate their organs.¹¹⁵ Mandatory choice in conjunction with widespread public educational campaigns will stimulate conversation surrounding the organ transplantation system and highlight the societal benefits of organ donation. Further, mandatory choice laws respect an individual's right to choose. The law simply requires that each individual exercise their capacity to do so in determining their status as an organ donor.¹¹⁶

Individuals opposed to a mandatory choice program argue these laws undermine the very ends they seek to achieve.¹¹⁷ It is argued the mandatory nature of the policy imposes upon an individual's freedom to not declare a position regarding organ donation. Instead, this system requires every citizen to make a decision about their willingness to partake in the organ transplantation process upon death. Contrary to the goal of expanding the number of organ donors, this proposed system would create a new class of explicit non-donors.¹¹⁸ Unlike in an opt-in system, where family members of a deceased individual may choose to donate their loved one's organs if that individual has not stated an opinion in regards to organ donation, under the mandatory choice system, the family of a deceased individual will no longer be allowed to authorize organ donation for an individual that has not legally declared organ donation as their intention.¹¹⁹

An individual's decision regarding organ donation may be affected by the implicit biases in the construction of the mandatory choice system. These biases may influence an individual's assessment of the organ donation practice.¹²⁰ Additionally, individuals who lack an adequate understanding of what becoming an organ donor means may feel coerced into making an uneducated decision regarding their bodies.¹²¹ The fear and uncertainty regarding such a heavy decision can lead individuals to opt-out of the donation system because they do not have enough information to consent to organ donation.

¹¹⁵ Prince, *supra* note 84.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Davidai et al., *supra* note 113, at 15204.

C. Analyzing Preferred Status Systems

Preferred status is another method of increasing the number of potential organ donors by granting individuals a “privilege” for their decision to register as organ donors. Living donors would be rewarded by being given preferred status as an organ recipient. This preferred status would take effects should a registered donor ever be in need of organ transplantation services themselves.¹²² To some degree, preferred status has already been implemented as standard practice in regard to living organ donations.¹²³ Living donors are granted extra priority because of their donation. Due to their status as a previous organ donor, should they be in need of an organ donation, they will be moved up the organ wait list.¹²⁴

I argue the policy implemented for specific living donors should be expanded to include priority to more organs such as the liver, lung, heart or other types of organs, that a previous donor might foresee needing in the future.¹²⁵ Individuals favoring a preferred status system see this policy as a form of reciprocity.¹²⁶ Under a preferred status system, “individuals who willingly put their health at risk by giving up one of their organs to help another should be helped first if and when they need an organ themselves.”¹²⁷ This is not an incentive to donate so much as a way to care for willing donors.¹²⁸

In 2008, Israel enacted preferred status legislation. The policy provides incentives for registered organ donors by allocating priority based on individuals’ willingness to donate into the organ procurement system.¹²⁹ Israel was the first county to do so.¹³⁰ The allocation priority incentive has been operational since April of 2012.¹³¹ The primary purpose of this incentive is to increase the number of organ donations and transplantations in Israel, and curb transplant tourism taking place in developing countries.¹³² The Israeli Organ Transplantation Law imposes a three-year waiting

¹²² Crowe & Cohen, *supra* note 15.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Crowe & Cohen, *supra* note 15.

¹²⁹ Levy, *supra* note 5, at 413.

¹³⁰ *Id.* at 418.

¹³¹ *Id.*

¹³² *Id.* at 419.

period, therefore individuals have to be registered as a potential organ donor for this period of time before becoming eligible to potentially benefit from the allocation priority system.¹³³

The Israeli incentivization process of allocation priority offers an individual priority on the organ transplant waiting list, in the form of additional points.¹³⁴ The system is based on relative priority.¹³⁵ Individuals should not be alarmed by the system, as medical necessity remains the highest priority. Allocation priority is assessed if two patients on the transplant waiting list have equal medical need for an organ.¹³⁶ Under this system, priority will be given to (a) individuals with a first-degree relative that has donated organs upon their death; (b) non-directed and directed living donors; (c) individuals who have expressly consented to donating their organs by signing a formal donor card; and (d) individuals with a first-degree relative that has signed a donor card.¹³⁷

Each of the listed four categories are weighed differently for the purposes of the points system. Categories (a) and (b) are granted top priority and hold the most weight, as they involve an actual organ donation that has physically occurred in the past.¹³⁸ Category (c) receives second priority, followed by category (d) that receives third priority.¹³⁹ In the case where more than one category is applicable to an individual, only the highest priority is relevant.¹⁴⁰ Individuals incapable of granting consent and individuals under the age of eighteen automatically receive relative priority status.¹⁴¹

Category (a) of the priority system provides an incentive for individuals expressing their consent to organ donation.¹⁴² Additionally, the Israeli system grants priority not only to registered donors, but also to their first-degree relatives who have not signed a donor card (Category d).¹⁴³ According to Brazier &

¹³³ *Id.*

¹³⁴ *Id.* at 418.

¹³⁵ Levy, *supra* note 5, at 418.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*; see also Jacob Lavee, *Ethical Amendments to the Israeli Organ Transplant Law*, 13 AM. J. TRANSPLANT 1614, 1614 (2013).

¹³⁹ Levy, *supra* note 5, at 418.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

Harris, “this may be explained by the fact that donation is perceived as a family enterprise and the reward is shared by the family.”¹⁴⁴

The Israeli incentive is unique in that it grants allocation priority to different categories of individuals, as opposed to only the registered donor.¹⁴⁵ Further, this policy offers reassurance to living donors should they need an organ at some point in their lives.¹⁴⁶ This incentivization model was developed to motivate individuals to register as potential organ donors during their lifetime.¹⁴⁷ Further it seeks to encourage individuals to donate deceased first-degree relatives’ organs if their loved one has not explicitly stated whether they support or are opposed to the donation of their organs.¹⁴⁸ Although individuals can register as organ donors, unlike the preferred status policy initially described in this section, the decision whether to donate organs remains with the potential donor's first-degree relatives.¹⁴⁹

It should be noted, the Israeli prioritization Category (d) can be problematic and disadvantage individuals simply because they are not “lucky” enough to be related to an organ donor.¹⁵⁰ Additionally, this category places individuals with extended family at an unfair advantage.¹⁵¹ This prioritization category allows individuals unwilling to consent to donation themselves to benefit from the actions of their family members.¹⁵² Awarding priority to individuals because a first-degree relative has signed an organ donor card can be seen as unfair because it does not adhere to the concept of reciprocity.¹⁵³ Priority is awarded regardless of an individual’s own behavior and intent.¹⁵⁴

Individuals who oppose overall preferred status argue that one’s status as a prior donor is not a relevant criterion in

¹⁴⁴ Levy, *supra* note 5, at 418 (referring to Margaret Brazier & John Harris, *Does Ethical Controversy Cost Lives?*, ORGAN SHORTAGE: ETHICS, LAW, AND PRAGMATISM (Anne-Maree Farrell et al. ed., 2011)); *see also* Jennifer A. Chandler, *Priority Systems in the Allocation of Organs for Transplant: Should We Reward Those Who Have Previously Agreed to Donate?*, 13 HEALTH L.J. 99, 105 (2005).

¹⁴⁵ Levy, *supra* note 5, at 418

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Levy, *supra* note 5, at 419.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

determining whose need for an organ is most medically urgent.¹⁵⁵ They maintain an individuals' previous actions in donating an organ should not provide an advantage. Further they argue there should be no advantages or disadvantages that people can claim with respect to medical care.¹⁵⁶ This is especially the case for individual's seeking specific transplants, such as livers. In circumstances where there is no alternative to donation in urgent cases, opponents hold medical need alone is the only sensible criteria for allocating a scarce resource because all individuals should be treated equally.¹⁵⁷

While there are concerns with Israel's current preferred status policy system, as well as a similar proposed policy that has been debated in the United States, it is undisputed that the overall effect Israel's policy has had on increasing organ donations is persuading. A public awareness campaign surrounding organ donation was recently initiated by the National Transplant Center of Israel.¹⁵⁸ The campaign featured radio, TV, billboard and newspaper ads which sought to counter the perception that Jewish burial principles forbid donation.¹⁵⁹ Further, the campaign promoted the new organ donation priority system.¹⁶⁰ The center reported the public's response was significant. The public awareness campaign lasted for a period of 10 weeks, during which 70,000 Israelis registered for organ donor cards.¹⁶¹ In addition to the spike in newly registered organ donors, consent rates for deceased organ donation rose, leading to an increase in the number of organs available for transplantation.¹⁶²

D. Exploring Organ Conscription Policies

An organ conscription policy would mandate that all available organs be removed from deceased persons, regardless of the wishes of the individuals or their families.¹⁶³ Under this plan, all usable organs would be removed from every recently deceased

¹⁵⁵ Crowe & Cohen, *supra* note 15.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Levy, *supra* note 5, at 419.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Spital & Erin, *supra* note 16.

individual and then made available for transplantation.¹⁶⁴ The consent of the individual, prior to death, would neither be required nor requested.¹⁶⁵ Conscription would satisfy the principle of distributive justice because all individuals who pass with usable organs would be forced to contribute to the organ transplantation system.¹⁶⁶

Organ conscription would abolish the concept of “free riders,” which is defined as individuals who are unwilling to give an organ but will happily accept transplantation if needed.¹⁶⁷ Under this proposed policy, all individuals would stand to benefit from organ donations. With the possible exception of people with religious objections, opting-out of organ donation would not be permitted.¹⁶⁸ Due to its mandatory nature, there is no potential for exploitation.¹⁶⁹

It should be noted, organ conscription is not presently being contemplated as a proposed system for the United States.¹⁷⁰ However, as a matter of policy, it is worth highlighting that organ conscription would maximize the number of available organs. Further, this system would effectively eliminate the complexities of creating donor registries and seeking permission from surviving family members to donate their loved one’s organs.¹⁷¹ Instead, organs would be treated as a societal resource.

Opponents to a conscription policy find the prospect ethically indefensible because it violates both individual freedom and human dignity.¹⁷² Under this policy, it can be argued that individuals and their bodies would become resources of the state.¹⁷³ Conscription transforms organ donation from a generous act of altruism into a mandatory act as decided by the government. This principle violates the autonomy of individuals who do not wish to be organ donors.¹⁷⁴

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Spital & Erin, *supra* note 16.

¹⁷¹ Crowe & Cohen, *supra* note 15.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

V. ANALYZING A COMPENSATORY SYSTEM FOR ORGAN DONATIONS

A. Legislation Prohibiting Compensation in The United States

The United States' organ donation system is based entirely on altruistic principles. The Uniform Anatomical Gift Act and the National Organ Transplant Act ("UAGA") set forth the laws regarding the procurement and allocation of organs for transplantation in the United States.¹⁷⁵ The UAGA was drafted by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") for the purposes of outlining uniform legal and ethical guidelines for the allocation and transplantation of organs as well as cadaveric organ procurement.¹⁷⁶ The Act, provides that an individual can either pre-designate their organs to be donated upon death, or upon declaration of death, the decedent's next of kin can consent to organ donation.¹⁷⁷ While the UAGA did not explicitly forbid compensation for organ donors, the Act did use the term "gift" when referring to the donation.¹⁷⁸ This term has since been interpreted to prohibit the sale or purchase of organs.¹⁷⁹

In 1987, the NCCUSL amended the UAGA, to place an additional emphasis on the need to secure organs for future transplantation. The new emphasis departed from the Act's original intent to focus on research or education.¹⁸⁰ The newly defined main goal of the amended Act was to increase the number of registered donors and the available organ supply by simplifying the donation process.¹⁸¹ Additionally, the UAGA gives the donor's requests priority over familial objections.¹⁸² This was incorporated to ensure that the intent of the donor is carried out despite potential objections by next of kin.¹⁸³ Similarly, a donor is able to limit their anatomical gift for a specific purpose or to specific organs, e.g.,

¹⁷⁵ National Organ Transplant Act of 1984, Pub. L. No. 98-507, 98 Stat. 2339 (1984), *amended by* 42 U.S.C. §§ 273-274 (2006).

¹⁷⁶ *Id.*

¹⁷⁷ Uniform Anatomical Gift Act, § 2(a)-(b) (1968); 8 U.L.A. 116 (2004).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Crowe & Cohen, *supra* note 15.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

transplantation rather than medical research or only the heart.¹⁸⁴ Their requests must be clearly stated and documented.¹⁸⁵

Under the UAGA, hospitals now have a legal obligation to discuss the option of organ donation with terminally ill patients and the families of recently deceased individuals.¹⁸⁶ Despite this mandated requirement, a study surveying the families of deceased individuals found 30% were never approached by a doctor or UAGA representative to discuss the possibility of organ donation.¹⁸⁷ The families unaware of this option were never given the opportunity to consent to organ donation.¹⁸⁸ The study also noted that amongst the population that was approached about donating their deceased family member's organs, families declined to consent approximately half the time.¹⁸⁹

There is no legally permissible market for the sale of human organs for transplantation in the United States.¹⁹⁰ Congress has explicitly prohibited the sale of human organs noting, "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."¹⁹¹ Under the law, any individual who violates the outlined policies may be subject to a fine of up to \$50,000, imprisonment for up to five years, or both.¹⁹²

The National Organ Transplantation Act ("NOTA") prohibits the creation of a nationally regulated market for organs.¹⁹³ This legislation was developed to clarify federally acceptable organ procurement practices, improve the efficiency of the organ donation and allocation processes and encourage live organ donation.¹⁹⁴ The human organs specifically prohibited for sale or compensation under the Act are the liver, kidney, heart, lung, bone marrow, bone,

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Crowe & Cohen, *supra* note 15.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Williams et al., *Just Say No to NOTA: Why the Prohibition of Compensation for Human Transplant Organs in NOTA Should Be Repealed and a Regulated Market for Cadaver Organs Instituted*, 40 AM. J. L. & MED. 275 (2014).

¹⁹¹ National Organ Transplantation Act of 1984, § 301, 98 Stat. at 2346-47.

¹⁹² *Id.*

¹⁹³ Crowe & Cohen, *supra* note 15.

¹⁹⁴ *Id.*

skin, eye, and cornea.¹⁹⁵ Additionally restricted are any other human organ specified by the Secretary of Health and Human Services by regulation.¹⁹⁶

On a local level, NOTA prohibits states from providing any financial incentives to living donors and the estates of deceased organ donors.¹⁹⁷ Legislative history suggests fears surrounding potential black markets for organs ultimately led the enactment of NOTA. The Act was intended to prevent commodification of the human body and exploitation of the poor.¹⁹⁸ It should be noted however that a black market for human organs does exist.¹⁹⁹

B. Legally Permissible Compensation Under NOTA

In 2000, Congress allowed for the compensation for travel and living expenses incurred as a result of organ donation to encourage living organ transplantation.²⁰⁰ While the sale of organs is prohibited by law, some states offer tax deductions to families for the donation of organs from their deceased relatives.²⁰¹ The Organ Donation Tax Deduction Act is designed to create an individual income tax subtract of up to \$10,000, for individuals who donate one or more human organs.

There are currently seventeen that provide special tax breaks for living donor residents that donate the following organs: bone marrow, portions of their liver, kidneys, pancreas, or intestines, for transplantation.²⁰² Fifteen states offer a special state income tax deduction of up to \$10,000 for donation-related expenses incurred such as lost wages, travel, and lodging.²⁰³ Unfortunately, these state tax deductions are not worth all too much and generally do not cover the actual costs faced for organ donors for lodging, lost wages, and medical costs.²⁰⁴ For example, it has been estimated that

¹⁹⁵ *Id.*

¹⁹⁶ 42 U.S.C.S. § 274e(c)(1).

¹⁹⁷ Williams, *supra* note 190.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ Curtis E. Harris & Stephen P. Alcorn, *To Solve a Deadly Shortage: Economic Incentives for Human Organ Donation*, 16 ISSUES L. & MED. 213, 227 (2001).

²⁰¹ Arthurs, *supra* note 20.

²⁰² Stephen Fishman, *Are There Tax Incentives for Organ Donations?*, NOLO, <https://www.nolo.com/legal-encyclopedia/are-there-tax-incentives-organ-donations.html>.

²⁰³ *Id.*

²⁰⁴ *Id.*

the cost of being a living kidney donor ranges from \$907 to \$3,089 depending on the type of surgery involved.²⁰⁵ These state tax breaks have not led to an increase in organ donations.²⁰⁶

While state tax provisions and benefits appear to have had little impact on donations thus far, this is likely attributable to the fact that these incentives are not publicized. Greater awareness of the offered financial gains to donors through education and promotional campaigns may have a significant effect. In a survey conducted in 2014 by an international polling firm, 59% of the survey's respondents agreed that compensation upwards of \$50,000 would make them more likely consider being a living donor.²⁰⁷

While organ donors and donor families are barred from seeking compensation for human organs, blood is omitted from the list of human organs in the statute and regulation.²⁰⁸ Additionally, unlike in many other countries where compensation for egg donations is restricted, egg and sperm donations are compensable in the United States. There is no shortage of eggs or sperm for use in assisted reproduction, whereas the same cannot be said about vital organs.²⁰⁹ In *Flynn v. Holder*, the plaintiffs' challenged the constitutionality of the ban on compensation for human organs as held under the National Organ Transplant Act, as applied to bone marrow transplants.²¹⁰ The heart of the plaintiffs' argument is that there is no rational basis for the government to allow compensation for sperm, egg donations and blood, yet restrict compensation for bone marrow donations.²¹¹

The plaintiffs' challenge failed because the Court held that legislation forbidding compensation for human organs includes bone marrow.²¹² The purpose of discussing this case is to call attention to the disparities that exist in regard to compensation for parts or products of the human body. While this case specifically tackles what living bodily aspects an individual can receive compensation for, it is necessary to analyze the plaintiffs'

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ Peters et al., *supra* note 21.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Flynn v. Holder*, 684 F.3d 852 (9th Cir. 2011).

²¹¹ *Id.*

²¹² 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.

arguments in shifting the narrative towards compensation in the form of tax credits for the families of deceased organ donors. Being that compensation is permitted for live donations of blood, sperm, and eggs which there is generally widespread availability of, there should also be compensation for postmortem organ donations in order to combat the global shortage of transplantable organs.

C. Organ Compensation in Israel

Israel, known as the Jewish homeland,²¹³ is one of the many countries struggling in in terms of the number of organs available for transplantation. Israel recently came to the conclusion that its voluntary, altruistic organ donation system is not working, and should therefore be reexamined.²¹⁴ In 2008, the Knesset, Israel's legislative branch, ratified the Organ Transplant Act.²¹⁵ This act outlawed compensation for giving and receiving organ donations.²¹⁶ In abolishing a commercial source of organs, Israel was forced to seek new policies to induce a dramatic increase in its number of organ donors to counterbalance the loss due to the Organ Transplant Act.²¹⁷ Later that same year, Israel passed a law which while still prohibiting compensation for the organ itself, granted allowance for living donors to receive forty days of lost wages, reimbursement on five years of health and life insurance premiums, priority status for future transplants, and free lifetime access to Israel's national parks.²¹⁸

The country has since switched to a compensation model, where the families of deceased organ donors are permitted to receive up to \$13,400, which can be used to memorialize the deceased or

²¹³ *Commending State of Israel on Occasion of 40th Anniversary of Reestablishment of the Independent State of Israel*, 134 Cong. Rec. H 2446-05 (1998).

²¹⁴ Schwark, *supra* note 22.

²¹⁵ *Id.*

²¹⁶ Dimitri Linde, *Israel, A Leader in Transplant Tourism, Finds a Formula for Increasing Domestic Donations*, TABLET (Apr. 10, 2014), <https://www.tabletmag.com/sections/israel-middle-east/articles/israel-organ-donation>

²¹⁷ *Id.*

²¹⁸ These provisions are in Note 22 of Israel's Organ Transplantation Act. To see an English language translation of this Act, see *Israel Transplant Law- Organ Transplant Act, 2008*, DECLARATION ISTANBUL ON ORGAN TRAFFICKING & TRANSPLANT TOURISM (Oct. 7, 2018), <http://www.declarationofistanbul.org/resources/legislation/267-israel-transplant-law-organ-transplant-act-2008>.

compensate the family for medical/burial costs. By incentivizing organ donations, Israel has become the first country in the world to reward deceased organ donors for their willingness to donate.²¹⁹ During the 2000s, Israel's organ donation rate was around 45%, among the lowest percentages in the developed world.²²⁰ After the new policies were implemented, the consent rate from families has substantially increased. The number of organs available for patients has also increased in parallel.²²¹ Further, transplants have increased by more than 60% overall.²²² While these percentages are still low, the shift demonstrates a turnaround in the public opinion surrounding organ donation.²²³ A critical component of the law's success was in engaging the country's highly influential religious leadership.

D. Exploitation and Altruistic Concerns

Under an incentivization policy, donors may disproportionately come from lower socioeconomic parts of society.²²⁴ While these concerns are generally tailored towards incentivizing living donations, they are important objections to note should The United States consider an all-encompassing compensation model. Individuals living in poverty or whom have a lower income are far more likely to accept financial incentives than those who are well-off. In a state incentivized organ donation system, it appears this problem may be unavoidable.²²⁵ The concern of equity and distributive justice must be taken into consideration.²²⁶ Similar to many fields of work, individuals from lower socioeconomic backgrounds often perform tasks that individuals deemed financially stable would not perform.²²⁷ This implicates a particular risk and/or burden on lower income individuals and families to willingly.

While incentivized organ donation benefits the larger population, irrespective of one's financial situation, through a larger

²¹⁹ Schwark, *supra* note 22.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ Levy, *supra* note 5, at 427.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

pool of available organs, the individuals who provide these benefits may feel compelled to do so given their financial status. Countries designing a system of federal or state incentives for organ donation should take into consideration the welfare of the populations of donors and the potential for harm or exploitation.²²⁸ It is imperative that safeguards and protections be implemented to prevent these occurrences.²²⁹ Specifically, agencies must assure that the consent to donating an organ is voluntary and informed.²³⁰ The issue of exploitation renders non-financial incentives such as allocation priority/preferred status particularly attractive.²³¹ The reward of this policy is appealing to all persons, independently of an individual's wealth.²³²

Not only would this policy impose an undue influence on lower class individuals in the United States, but beyond our borders. "By striving to establish national self-sufficiency in kidneys and reducing waiting lists, the developed world can diminish its contribution to the demand driving today's black market activities."²³³ The black market for organs exists as a result of the global shortage of available organs for transplantation.²³⁴ Lower-income citizens, generally within developing countries, are often the individuals in which the marketed organs are harvested from.²³⁵ It is inherently unfair to export the developed world's organ shortage crisis upon developing countries, where transplant tourism and organ trafficking is increasingly evident.²³⁶

Jewish law permits compensation for organ donation but is cognoscente of the concerns that may arise due to the financial imbalances of classes. The law warns against "using wealth and power to improperly influence others into making unwise decisions."²³⁷ Individuals opposed to financial incentives for organ

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ Levy, *supra* note 5, at 427.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ Michael Hentrich, *Health Matters: Human Organ Donations, Sales, and the Black Market*, at 4, <https://arxiv.org/pdf/1203.4289v2.pdf>.

²³⁵ *Id.* In one documented case, a seventeen-year-old boy in China told a local television station that he sold his kidney for the money to buy an iPad (Patience 2011).

²³⁶ Levy, *supra* note 5, at 404.

²³⁷ Steinbuch, *supra* note 63, at 1577 (citing to Alfred Cohen, *Sale or Donation of Human Organs*, 52 J. HALACHA 37, 38 (2006)).

donation predict the potential loss of control of this process to government bureaucracies and “organ brokers.”²³⁸ An organ broker is a middleman between two individuals- the seller and the buyer. The organ broker seeks to profit from this exchange. For a broker to do so, they must make a match between a willing donor and typically a financially stable recipient in need, who can afford to pay for the organ, transplantation and the broker fee.²³⁹ While many scholars express concern for the risk of undue inducement or coercion of destitute individuals when considering exchanges of money and organs, it can be argued state incentives first and foremost value the donor’s or his relatives’ consent.²⁴⁰

Another concern regarding incentivizing organ donation is the depart from current practices of altruism-based donation.²⁴¹ Despite the enactment of the UAGA and NOTA, the donor registry remains irreflective of the overwhelming public support surrounding organ donation. The United States continues to suffer from a severe shortage of transplantable organs.²⁴² Contrary to the mission of the legislation, scholars argue the UAGA and NOTA has hindered, rather than increased the organ donation supply.²⁴³ Without the potential for compensation, which is generally an effective motivating factor, the system depends on altruistic donors. Statistics have repeatedly reflected that altruism alone has been unsuccessful in combatting the organ transplant shortage.²⁴⁴

The Nuffield Council states, the “idea of altruistic donation-giving bodily material because another person needs it- underpins a communal and collective approach where generosity and compassion are valued.”²⁴⁵ Here, those in support of incentivization argue that altruism should remain at the heart of donation. This

²³⁸ *A Report of the Payment Subcommittee of the Ethics Committee*, FIN. INCENTIVES FOR ORGAN DONATION (June 1993), <https://optn.transplant.hrsa.gov/resources/ethics/financial-incentives-for-organ-donation/>.

²³⁹ Philip Perry, *What You Need to Know About Human Organ Trafficking*, BIG THINK (Apr. 25, 2016), <https://bigthink.com/philip-perry/what-you-need-to-know-about-human-organ-trafficking>.

²⁴⁰ Levy, *supra* note 5, at 425.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.* at 411.

²⁴⁴ *Id.*

²⁴⁵ *Id.* (citing to *Human Bodies: Donation for Medicine and Research*- Report 132ff, NUFFIELD COUNCIL ON BIOETHICS (2011), <https://www.nuffieldbioethics.org/assets/pdfs/Human-bodies-donation-report.pdf>).

notion reflects important community values. However, it is important to note that altruism does not exclude the possibility of introducing a reward for individuals who seek to donate.²⁴⁶ Altruism and state incentives to encourage individuals' willingness to donate are not mutually exclusive. The donation of certain body parts, which allow for compensation, such as sperm, egg and blood donation previously discussed, is still considered a donation, and not an act adhering to market principles only.²⁴⁷

VI. CONCLUSION

Across the globe, nations are suffering from a lack of available organs and underwhelming numbers of registered donors. The common misconception that organ donations are forbidden by the Jewish religion has hindered an entire populations' view of organ donation and the societal benefits. The traditional interpretations of Jews' treatment of deceased bodies have restricted individuals' decisions to become organ donors. The question of organ donation has been addressed by many Rabbis including Rabbi Moshe Feinstein and Rabbi Isaac Klein, who find that when any organ from the body of a deceased is transplanted into a living person, the organ can no longer be considered an organ of the dead. The organ becomes part of a living body, and the law demanding the burial of all parts of a deceased does not apply.

Jewish law imposes the affirmative duty to save a person's life through one's direct intervention or through the use of one's resources. Through the use of biblical scripture and interpretation this essay explored the Jewish faith's interpretation of organ donation as an obligation to G-d and individuals in need. Education and the spread of awareness is the first step in changing public opinion. The Halachic Organ Donor Society (HODS) advocated to individuals and religious leaders about the misconceptions regarding organ donations in the Jewish religion in over a dozen countries. Specifically, in the Jewish religion, beginning education in Hebrew school is vital in educating the youth as to the benefits of organ donation so they can register as a donor once they reach the required age minimum.

This essay further explored the concepts of mandatory choice, preferred status and organ conscription. Mandatory choice,

²⁴⁶ Levy, *supra* note 5, at 411.

²⁴⁷ *Id.*

also known as an opt-out policy, requires every individual to make a choice whether or not to become a donor. They are obligated to choose, as opposed to the United States' opt-in system, where to become a donor you must register as one. The preferred status policy grants privileges to individuals who are registered donors. These individuals receive priority, should they ever need an organ transplant. Israel's preferred status system is discussed. Israel's system is calculated through points. Under their system, an individual can benefit from the decision of their relatives. For example, if an immediate relative is an organ donor, you may benefit from their registration, should you be in need of a transplant. Finally, the policy of organ conscription was discussed. While the United States is not currently debating such a policy, under this type of regulation, every individual will be considered an organ donor. There is no need for registration, as upon death, individuals' organs will be harvested and entered into the transplantation network.

Compensation methods for organ donation is explored through in Israel and the United States. In the United States, the Uniform Anatomical Gift Act and the National Organ Transplant Act set forth laws regarding the procurement and allocation of organs for transplantation. The selling of organs is prohibited by law. Some states do offer tax deductions to families for the donation of organs of their deceased relatives, but these incentives are not enough to encourage widespread registration. On the other hand, Israel has switched to a compensation model. Families of deceased organ donors are permitted to receive up to \$13,400, which can be used to memorialize the deceased or compensate the family for medical/burial costs. By incentivizing organ donations, Israel has become the first country in the world to reward deceased organ donors for their willingness to donate.

This note addresses factors that play a role in many government's hesitation to allow compensation for organ donation, particularly the undue influence this policy would have on lower income individuals. Individuals living in poverty or individuals strapped for cash are far more likely to accept financial incentives than those who are well-off. In a state incentivized organ donation system, it appears this problem may be unavoidable. This factor carries great weight when being applied to whether or not countries should establish a financial compensation method for organ donation.