DECRIMINALIZING PROFITABLE HUMAN ORGAN EXCHANGE FOR ORGAN SOURCES; IMPROVING OUR NATION’S EXCHANGE PARADIGM USING THE MILLIAN HARM PRINCIPLE

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ORGAN DONATION INVOLVES GIVING AN ORGAN OR PART OF AN ORGAN FOR THE PURPOSE OF TRANSPLANTATION INTO ANOTHER PERSON. A DONATION CAN OCCUR FROM DECEASED OR LIVING DONORS. A DECEASED DONOR CAN GIVE KIDNEYS, PANCREAS, LIVER, LUNGS, HEART, AND INTESTINES. A LIVING DONOR CAN GIVE A KIDNEY OR PORTIONS OF THE LIVER, LUNG, INTESTINE, OR PANCREAS. ON AVERAGE 18 PEOPLE PER DAY IN THE UNITED STATES DIE FROM THE LACK OF AN AVAILABLE ORGAN FOR TRANSPLANT. AS OF SEPTEMBER 24, 2010, OVER 108,000 PEOPLE IN THE UNITED STATES NEEDED A POTENTIALLY LIFESAVING ORGAN TRANSPLANT. IN 2009, THE DONATIONS OF 8,021 DECEASED ORGAN DONORS AND 6,610 LIVING ORGAN DONORS RESULTED IN 28,465 ORGAN TRANSPLANTS. UNFORTUNATELY, 200,000 USEFUL ORGANS IN THE UNITED STATES ARE BURIED AND WASTED EVERY YEAR INSTEAD OF BEING USED TO SAVE LIVES. THE LAW FACILITATES THIS WASTE WHILE THOUSANDS ANGUISH FOR WANT OF THE BURIED ORGANS.

A FEW YEARS BACK, SOMEONE TRIED TO SELL A HUMAN KIDNEY ON EBAY. THE COMPANY DISCONTINUED THE BIDDING AFTER IT REACHED $5.7 MILLION, BECAUSE FEDERAL LAW PROHIBITS THIS TYPE OF TRANSACTION. STEVE RIVKIN, WHO SPENT YEARS WAITING FOR A KIDNEY DONATION, DOES NOT AGREE WITH THE FEDERAL GOVERNMENT’S PROHIBITION AGAINST SELLING KIDNEYS. WHILE WAITING HE RELIED ON DIALYSIS MACHINES TO STAY ALIVE. STEVE USED DIALYSIS MACHINES TO CLEAN HIS BLOOD BECAUSE HIS KIDNEYS COULD NO LONGER PERFORM THE FUNCTION. ALTHOUGH DIALYSIS SAVES LIVES, IT IS PAINFUL, EXPENSIVE, AND TEDIOUS EXPERIENCE. IT REQUIRES A TIME COMMITMENT OF 3 DAYS A WEEK, 5 HOURS AT A TIME.

Therefore, many dialysis patients desperately want kidney transplants that would get them off the machines. Kidney procurement proves difficult because of the scarcity of available usable organs. One functional kidney solves this health crisis; most people are born with two. This

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1 DONATE LIFE AMERICA, UNDERSTANDING DONATION: ORGAN DONATION, HTTP://WWW.DONATELIFE.NET/UNDERSTANDINGDONATION/ORGANDONATION.PHP (LAST VISITED SEPTEMBER 28, 2010).
2 Id.
3 Id.
4 Id.
5 DONATE LIFE AMERICA, UNDERSTANDING DONATION: STATISTICS, HTTP://WWW.DONATELIFE.NET/UNDERSTANDINGDONATION/STATISTICS.PHP (LAST VISITED SEPTEMBER 28, 2010).
7 DONATE LIFE AMERICA, supra note 1.
9 Id.
raises the question: why, with literally billions of spare kidneys kicking around inside of us, do so many die each year waiting for a transplant?10

After a previous failed transplant, Steve found himself back on the waiting list. At that time, the list included up to 30,000 people. His doctors notified him that he might never receive a kidney, so he decided to look for a living donor. The dirty little secret in the organ transplant world lies here. Although illegal, a look at some web sites suggests that profitable human organ exchange happen all the time. "I knew that if I carefully worded an ad and just let people know that I needed a kidney transplant," Steve said, "a discussion about money would not occur." After Steve posted an ad, responses came in with offers from all over the world of those willing to sell their kidneys. Steve and his wife, Elaine, decided that they would pay for an organ despite the prohibition. "It is a fair exchange. You know, you are talking about two desperate people," Steve said, “some desperate for a kidney, others desperate for money." “There were some sad stories out there," Steve said, "one couple needed money due to bankruptcy. They needed a way to pay everything off, start over fresh, and move on.” Exchanges like these occur all the time in other countries. Some men from the Philippines gave up one of their kidneys for $1,000. The choice to exchange organs for money may not seem right to some people, but no one forced them to make the decision. Some people want money more than they want two kidneys. "I do not believe in prohibiting paying organ donors money for receiving a kidney, I think it is a wonderful thing and I think more people should try to do it," Steve said.11

Steve finally did get another kidney after receiving a donation from an acquaintance named Rebecca. "Rebecca offered her kidney altruistically because she felt morally compelled to help" Steve said. Steve left the hospital with Rebecca's kidney functioning well inside his body, and Rebecca likewise fully recovered from the procedure. The transplant ended well for Steve after receiving the donation; but why cannot other people buy and sell what he got? After all, everyone else makes money from transplants, why does not the donor? "The doctors make money, the hospitals make money, and the organ procurement organizations make money. Everybody gets something except for the donor," Steve said. If you find selling an organ immoral you do not have to do it, but should sick people who could pay for them not receive transplants because of the moral objections of others?12

Steve’s story illustrates the dire need to reevaluate policy regarding human organ exchange in the United States. The National Organ Transplant Act (NOTA) and the Uniform Anatomical Gift Act (UAGA) lack jurisdictional legitimacy in prohibiting a profitable human organ exchange. The primary focus of this note will remain explaining this lack of legitimacy, not the advocacy of particular forms of profitable exchange. Using John Stuart Mill’s harm principle, I will show why imposing criminal liability for profitable human organ exchange remains outside the scope of legitimate government coercion in a free society. The legislative paternalism of NOTA and UAGA illegitimately restrict the liberty of desperately ill people in procuring a lifesaving organ and the liberty of people who desire to obtain monetary value for their organs in life or after death. Eliminating these statutes would remove the greatest obstacle. Part I

11 Id.
12 Id.
addresses the current law and how it affects the organ exchange process. Part II introduces John Stuart Mill’s harm principle through his work in On Liberty and will address the boundaries of legitimate government coercion. Part III analyzes the type of conduct Mill considers a justifiable harm giving the government jurisdiction to regulate. Finally, Part IV discusses whether profitable exchange for a human organ would qualify as a justifiable harm under Mill giving the government jurisdiction for regulation.

PART I: THE CURRENT ALTRUISTIC MODEL OF EXCHANGE AND THE RESULTS OF THE CURRENT SYSTEM

A. The Altruistic System

Under the current organ supply system in the United States, altruism represents the sole motivating force for organ donation.\(^\text{13}\) Two acts, the UAGA and NOTA, detail the laws regarding the procurement and allocation of organs for transplantation.\(^\text{14}\) When organ transplantation became feasible, common law and statutory property rights in human corpses or in the organs therein did not exist. The UAGA in 1968 created a statutory property right to donate one’s organs, eyes, and tissue. Under the first version of the UAGA, donation could only occur upon the decedent’s expressed wish to donate and if the next of kin gave consent. The word ”gift” in the title of the UAGA, although not explicitly addressed in the Act, was widely interpreted to outlaw human organ sales. Revisions to the UAGA in 1987 clarified its intent and attempted to encourage more widespread organ donation. The revisions made organ sales explicitly illegal but did not prevent payment of consideration for the performance of the transplant and attendant services. This enabled everyone except the organ donor to profit from the transplant. The revised UAGA also protected the donor’s intent to donate organs upon death against an override by the next of kin and required hospitals to discuss the option of organ donation with adult patients and with family members of the deceased. It also authorized medical examiners to harvest organs if they cannot locate the family members of the deceased.\(^\text{15}\)

The legislative history of NOTA suggests that Congress primarily feared that a market in organs would commodify the human body and exploit the poor.\(^\text{16}\) NOTA responded to a scheme by Dr. H. Barry Jacobs to broker human kidneys for profit.\(^\text{17}\) Under NOTA, any person who knowingly acquires, receives, or otherwise transfers human organs for valuable consideration for use in human transplantation violates the law if the transfer affects interstate commerce.\(^\text{18}\)


\(^{14}\) KAHAN, SUPRA NOTE 6.

\(^{15}\) HUGHES, SUPRA NOTE 8 AT 355.

\(^{16}\) KAHAN, SUPRA NOTE 6 (CITING H.R. REP. NO. 98-575, AT 8, 22-23 (1983)).

\(^{17}\) Id.

Criminal liability includes a fine up to $50,000 or imprisonment of not more than five years, or both.19 “Human organ” means the human kidney, liver, heart, lung, pancreas, bone marrow, cornea, eye, bone, and skin or any subpart thereof and any other human organ specified by the Secretary of Health and Human Services by regulation.20 The term “valuable consideration” does not include the reasonable payments associated with 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.21 The exception to the no-consideration rule, which allowed payments for transplant support services, created a large and profitable industry in organ transplants.22

The UAGA and NOTA Acts require organ acquisition to occur at a price of zero instead of sales.23 NOTA sought to encourage organ donations by creating the Organ Procurement and Transplantation Network (OPTN), a national system responsible for: establishing a national organ waiting list, matching donors and recipients, allocating organs, controlling the quality of organ acquisition and transplantation, and collecting and publishing data concerning organ donation and transplants. Regional organ procurement organizations (OPOs) work with the OPTN, hospitals, and transplant centers in the process. The OPOs identify and acquire usable organs, define organ procurement and donation protocols, and procure and arrange the delivery of organs when matches are made. The OPOs encourage organ donations and control organ distribution.24

B. The Effects of the Current System

Currently in the United States, a deceased donor’s eligibility to donate requires neurological death and consent before death or after death by the next of kin.25 By law, hospitals must request permission from the next of kin to harvest organs from deceased candidates, since there is no presumption of consent. The law prohibits hospitals from harvesting organs in the absence of consent.26 Very few deaths in the United States meet the neurological death criteria required for harvesting, only 12,000 to 16,000 each year.27 The current system has failed to keep up with demand, despite the attempts of UAGA and NOTA to encourage organ donation. A large majority (81 percent) of U.S. citizens profess to support organ donation, but only one-quarter of them have actually registered as donors.28 This discrepancy exists for a multitude of reasons.

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22 HUGHES, supra note 8 at 356.
23 BLAIR, supra note 13 at 404-5.
24 HUGHES, supra note 8 at 356.
26 Id. (citing Omnibus Budget Reconciliation Act, 7 U.S.C.A. §§ 1314-1445 (West 1986) (requiring all hospitals receiving Medicare or Medicaid funds to institute “required request” policies).
27 Id.
28 HUGHES, supra note 8 at 356.
including: a lack of immediate personal benefit to donors, the fear of confronting one’s own mortality, the difficulty of persuading the bereaved to donate their loved ones’ organs, a lack of public awareness of the organ shortage, and the failure of doctors, hospitals, and family members to discover the deceased’s intent to donate.29

Because of the fact that need outstrips demand, and the desperation of those in need, alternatives in the black market arose.30 The shortfall of cadaveric organs has led those in need to turn to living donors. Even though relatives make up the most obvious source of living donation, donations from complete strangers have recently increased.31 The Internet has proved to be an effective resource for desperate individuals on the waiting list. Organ matching websites have become more common because desperate individuals with resources can post donor requests on these sites. People in need of a donor also engage in publicity campaigns through billboards and local media. These individuals essentially throw all their resources into finding a willing live donor. While technically the donor cannot be compensated, reimbursement is allowable for lost work, time and travel, as well as hospital, medical, and other similar out-of-pocket expenses.32 Such tactics have proven successful in some cases.33

Physician and hospital support for the current system likely results from its profitability. Political motivation also exists for physicians and hospitals to protect their turf from private third party organ procurement firms.34 Health insurance companies that cover transplant operations comprise a second group that stands to benefit from the current system. Restricting the supply of organs constrains the number of transplant operations, thereby reducing the claims experienced.35 The existing system also benefits organ procurement agencies, organ procurement officers, and those employed in quasi-governmental organizations involved in allocating the limited supply of organs. These entities directly depend on the current shortage for employment.36 A growing understanding that organ transplantation generates lucrative business has spurred many to question a system that insists organ sources go unpaid while hospitals, physicians, and others reap financial returns.37 NOTA’s compensation ban only prohibits organ sources and their survivors from receiving consideration in exchange for consent; it does not prohibit all transfers of organs in exchange for payment. Only the most obvious parties in the

29 Id. at 356-7.
30 Blue, supra note 25 at 82-3.
31 Id. at 83.
33 Id.
34 Blair, supra note 13 at 419.
35 Id. at 419-20.
36 Id. at 420.
commerce, the organ sources, find themselves subject criminal liability.\(^{38}\) In summary, the current system blends altruism, commerce, voluntarism, coercion, gift, barter, and theft.\(^{39}\)

**PART II: THE HARM PRINCIPLE OF JOHN STUART MILL AND LEGITIMATE GOVERNMENT COERCION.**

### A. An Overview of the Harm Principle

John Stuart Mill, in the latter part of the nineteenth century, developed the harm principle. Mill’s concepts made him a leading utilitarian philosopher and his harm principle undoubtedly remains his most famous statement.\(^{40}\) It provided the basis of his least utilitarian but best known work, *On Liberty*.\(^{41}\) *On Liberty* describes civil or social liberty and the nature and limits of the power legitimately exercised by society over the individual.\(^{42}\) The preference of society, or of some powerful portion of it, primarily determines the rules for general observance.\(^{43}\) Mill argues that people generally do not question what issues are fit for regulation by government; rather they argue about how the issue should be governed. *On Liberty* asserted a very simple concept that should govern absolutely the dealings of societal coercion over the individual. The principle argues that self protection offers the only legitimate reason for societal interference with the liberty of action of another person. Preventing harm to others, the only rightful purpose for the exercise of coercive governmental power over members of a civilized community, allows for legitimate governmental regulation. Coercive power, to prevent a person’s personal physical or moral destruction does not sufficiently warrant government intrusion. A person becomes liable to society and the government’s coercive force when the conduct adversely affects other members in society. Mill advocates that the individual retains sovereignty over himself, over his own body, and mind.\(^{44}\)

According to Mill, societies that fail to respect the liberties of the individual, absolute and unqualified, cannot be considered free. Freedom only exists when an individual can pursue his desires crafted by means the individual sees fit, so long as the individual’s action does not attempt to deprive others of the same right. The individual owns guardianship over his own health whether it is physical, mental, or spiritual. Society benefits by allowing the individual to

\(^{38}\) *Id.* at 21.

\(^{39}\) *Blue,* supra note 25 at 84.


\(^{41}\) *Id.* (citing J.S. Mill, *Essay on Liberty, in Utilitarianism, Liberty, and Representative Government* (New American ed. 1951)).


\(^{43}\) *Id.* at 7.

\(^{44}\) *Id.* at 9.
remain sovereign, rather than compelling each to live by society’s prescription. Although very old, this doctrine stands more directly opposed to the general tendency of existing opinion and practice.\footnote{\textit{Id.} at 12.} The world at large has an increasing inclination to stretch unduly the powers of society over the individual, both by force of opinion and by legislation. This tendency in the world strengthens society and diminishes the power of the individual. It does not tend to disappear, but rather grows more formidable. Mill believes that society’s disposition urges the use of government regulation to impose the opinions and inclinations of society into the rule of conduct.\footnote{\textit{Id.} at 13.}

**B. The Government’s Limit of Authority Over the Individual**

Within what boundaries does the individual have rightful sovereignty over himself, and where does the authority of society begin? Mill believes that the individual and society have appropriate jurisdiction over an issue when each has control over matters that more particularly concern it. Everyone who receives protection from society owes something in return. The undeniable fact that individuals live within a society makes it imperative that each individual observe a certain line of conduct toward the rest of society. This observance consists of not injuring the rights of others and bearing a share of the labor and sacrifice to defend the society or its members from outside injury. This reality justifies society enforcing the observance of such conduct and punishing those who seek to evade their duty. If acts of an individual only potentially hurt others, or simply lack consideration of the welfare of others without actually violating their constituted rights, then punishment of the offender may take the form of public admonishment, but not by law. When any part of a person’s conduct affects prejudicially the interests of others, society has jurisdiction. After society acquires jurisdiction, the question whether the general welfare requires interfering with it becomes open to discussion. Mill argues that jurisdiction of society does not exist when a person’s conduct affects the interests of no persons besides himself.\footnote{\textit{Id.} at 73.}

Mill states that many people refuse to admit the distinction between the parts of a person’s life that concern only them individually from that which concern others. Mill offers the rhetorical argument; how can an individual’s conduct solely affect only the individual and have no significance to others? Isolation of an individual from society cannot occur, because it is impossible for a person to do anything seriously or permanently hurtful to himself without mischief reaching at least his closest connections, and often far beyond them. If by his actions, a person does not directly do harm to others, he nevertheless injures by his example. Society’s interest in removing this detrimental example, to protect those who knowledge of conduct that misleads or corrupts, compels society to coerce the individual to control the objectionable conduct. Even without this motivation, should society abandon individuals, who exhibit no
fitness to take care of themselves, to their own guidance even if the objectionable conduct remains confined to the offending individual? Society legitimately protects children against themselves, why cannot society regulate persons of mature years equally incapable of self-government?48

Mill acknowledges that damage a person does to himself may seriously affect those with close affiliation, and in a minor degree, society at large. Mill concedes when, by conduct of this sort, a person violates a distinct and assignable obligation to any other person or persons, the case becomes amendable by society through punitive measures.49 Whenever definite damage or a definite risk of damage exists, either to an individual or to the public, the case leaves the province of individual liberty and becomes amendable by society in either morality or law. Mill makes a distinction when injuries become constructive or contingent in nature. When a person’s conduct neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual except himself, an inconvenience arises that society can afford to bear for the sake of human freedom.50

C. The Maxims of the Harm Principle

Actions of an individual that concern nobody else relieve the individual of any accountability to society for the action. Society’s only justifiable reaction to this type of conduct manifest itself through offering advice, instruction, persuasion, or by taking measures to avoid the objectionable conduct altogether. For actions prejudicial to the interests of others, the individual becomes accountable and subject to sanction by either social or legal punishment. The damage or probability of damage to others alone does not always justify the interference of society upon the actions of an individual. In many cases an individual, in pursuing a legitimate purpose, necessarily and therefore legitimately causes pain or loss to others, or takes a good that the other had a reasonable hope of obtaining. These oppositions of interest between individuals often arise from bad social institutions, but often remain unavoidable under any institutions.51 Successful individuals often reap benefits from the loss of others.52 The general interest of society benefits when people pursue goals undeterred by these sorts of consequences. Society admits no legal or moral right to make disappointed competitors immune from this kind of suffering. Legitimate societal interference should only occur if the means employed in creating the success are fraud, treachery, or force which are contrary to the general interest in permitting.53

48 Id. AT 78.
49 Id. AT 79.
50 Id. AT 80.
51 Id. AT 93.
52 Id. AT 93-94.
53 Id. AT 94.
PART III: UNDER MILL WHAT TYPE OF HARM JUSTIFIES POLITICAL REGULATION?

A. Conduct Safeguarded from Regulation by the Harm Principle

Far too often the justifications made to restrict liberty originate from imagined dire consequences, in absence of any real information about the subject. Much twentieth century regulation was promulgated without the benefit of any solid factual foundation. Emotion frequently motivated new law without weighing costs and benefits.\(^{54}\) The harm principle excludes the emotions or moral distresses of others from political justification for regulation. Mill describes this as the effects of our actions on others that result from their notions of morality, taste, or propriety. For Mill, the sphere of outward individual conduct safeguarded by the harm principle includes: (1) those actions that primarily affect the agent alone, and (2) acts that solely affect the morality of others in what they deem right or wrong.\(^{55}\)

In both spheres of outward conduct, no harm occurs to others under the harm principle, and individual independence from government regulation remains absolute. Excluding considerations of private morality from politics succinctly states the harm principle’s point. Excluding the moral distresses of others from politically justifying regulation explains the viewpoint of Mill. The opinions of others concerning the wisdom or foolishness of an act do not constitute harm and cannot, without more, justify government regulation of the act. In order to justify the political regulation of outward individual conduct, a different kind of harm to others must manifest.\(^{56}\)

B. Justifiable Regulation of Outward Individualized Conduct

Obviously, physical harm embodies the definition of definite damage or risk of damage to another and represents prima facie justification for the government to regulate the action. In addition, the violation of a distinct and assignable obligation to any other person also constitutes a prima facie justification for government regulation. Harm includes a public dimension, requiring each person to bear his share of labor and sacrifice in defending the society and its members from injury and molestation from outside forces. Finally, the foreseeable risks of the above harms afford government the power to prevent crime and accidents before they occur. The evidence must show an element of certainty, not “only a danger of mischief”, in order for the justification of government regulation for pre-harmful acts to have legitimacy.\(^{57}\) Mill exempted outward individual conduct from governmental interference unless the government

\(^{54}\) Moffat, supra note 40 at 1102.


\(^{56}\) Id.

\(^{57}\) Id. at 381.
established that the conduct caused harm to another of a specific circumscribed nature.\textsuperscript{58} Mill favored giving individuals’ sovereignty to act out their life projects, life plans, and social associations, unless evidence established a particular kind of harm to others.\textsuperscript{59} Conduct causing only “contingent” or “constructive” harm to society without breaching any particular duty to the public and failing to cause noticeable harm to any particular individual remains removed from societal jurisdiction. Mill concludes that society will too often impose an incorrect opinion on the person who engages in only self regarding conduct.\textsuperscript{60}

Mill in \textit{On Liberty} illustrates examples of outward individual conduct that cause harm to others.\textsuperscript{61} For instance, Mill argues that prohibiting the importation of opium into China constitutes an unjustified restraint on the liberty of the potential buyer. Similarly, public drunkenness ordinarily warrants exclusion from legal restraint. The criminal law can prohibit drinking by anyone known to commit prior violence even once while drunk and to impart a severe penalty for anyone who commits subsequent violence acts while drunk.\textsuperscript{62} In addition, Mill imposes criminal liability against individuals for certain acts that constitute offenses against decency if performed in public.\textsuperscript{63} These illustrations help show the jurisdictional nature of the harm principle and how it operates. The harm principle defines the boundaries of the state’s coercive jurisdiction over outward individual conduct, not when the state should or should not exercise its power. The principle operates in either/or fashion: the government either has coercive jurisdiction over particular conduct because it causes harm, or it does not. The harm principle operates catastrophically; individual conduct either causes harm to another person or it causes no harm. Outward individual conduct causing no harm becomes immune from governmental regulation. Conduct causing harm qualifies for governmental regulation.\textsuperscript{64} Where does profitable human organ exchange fall within this framework?

\textbf{PART IV: DOES PROFITABLE HUMAN ORGAN EXCHANGE JUSTIFY REGULATION?}

\textbf{A. Regulation to Prevent Exploitation of the Poor}

What type of harm justifies the prohibition of profitable human organ exchange? Most who oppose profitable organ exchange recognize that paying for organs will make more donor organs available. Their objections derive mainly from their own ethical considerations. Opponents argue that profitable organ exchange exploits the poor, because people who need money would

\textsuperscript{58} Id. at 381-382.
\textsuperscript{59} Id. at 382.
\textsuperscript{61} BEATTIE, JR., \textit{SUPRA NOTE 55 AT 381}.
\textsuperscript{62} ELKINS, \textit{SUPRA NOTE 60}.
\textsuperscript{63} Id. at 607-8.
\textsuperscript{64} STEVEN D. SMITH, \textit{IS THE HARM PRINCIPLE ILLIBERAL?}, 51 AM. J. JURIS. 1, 5 (2006).
not donate except for payment. Supporters of altruistic donation advocate for people deciding to donate voluntarily. Supporters of altruistic donation argue that when the poor donate out of financial motives, they do so because of financial coercion. When deciding to sell an organ, opponents argue that poverty coerces poor individuals to sell an organ. This coercion eliminates choice for the poor individual. The Bellagio Task Force, a collection of scientists who oppose profitable organ exchange, stated it this way: the poverty and deprivation of organ donors potentially becomes so extreme that the voluntary character of a sale of an organ remains in doubt.

Proponents of profitable exchange for organ sources argue that millions of citizens might welcome the opportunity to alleviate their poverty by selling an organ. Society does not object when people work in dangerous forms of employment; why should donating an organ be more objectionable? The poor do these activities because poverty forces them to make money. The difference between factory work and the sale of an organ consists in the risk involving the transaction. Selling an organ entails substantially more risk than working at a factory. The risk poses a threat to the donor's physical health and bodily integrity. Opponents to profitable organ exchange believe that poor individuals should be protected from making the decision to sell their organs for payment. This is the entire reasoning behind their argument.

The opposition fails to acknowledge that the very same argument, that the removal of an organ carries with it risk, applies to donations motivated by altruism. Whether an individual donates for profit or altruism, the risk is the same. No reasonable person can logically maintain that consideration heightens donor regret. In fact, the more likely scenario for donor regret occurs when consideration for the organ does not take place because of the real possibility of rejection by the body of the transplanted organ. The altruistic donor in this circumstance loses their kidney for nothing; this does not occur for the person who gave up a kidney for financial gain.

Nonetheless, the widespread assumption exists that a poor individual who decides to go through life with one kidney in exchange for a large sum of money makes the wrong decision. For example, in 1998 Atul Gawande, writing for the online magazine Slate, argued that the sale of an organ "would be right for so few, if any, that permitting the option makes no sense at all." By what means can an outsider, knowing nothing of the specific circumstances and preferences of the potential seller, make a better judgment of what decision best serves the seller than the organ source himself? The popularity of this view likely comes from intellectuals and politicians. They determine that they would not sell a kidney for money; therefore they conclude

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66 Id. at ¶ 8.
67 Id.
69 CROUGHS, SUPRA NOTE 64 at ¶ 9.
70 Id. at ¶ 10. (CITING HTTP://WWW.ICRC.ORG/WEB/ENG/SITEENG0.NSF/IWPList302/87DC95FCA3C3D63EC1256B66005B3F6C)
71 Id. at ¶ 11.
that people for whom selling a kidney can mean the difference between poverty and relative wealth should not do so either.\textsuperscript{72} Ironically, this forced-by-poverty argument actually provides support for profitable organ exchange. An individual coerced by poverty to sell a kidney has more to gain from profitable organ exchange being legalized rather than prohibited. When presented with the choice of selling a kidney or starving to death, those individuals living in the most extreme poverty need profitable organ exchange.\textsuperscript{73}

The forced-by-poverty argument against profitable organ exchange does not justify governmental regulation. The act of donating an organ in and of itself does not cause harm to the poor individual. The argument that profitable organ exchange harms the poor individual due to coercion comes from another individual’s ethical position. This ethical objection to profitable organ exchange affects others solely in their belief. This creates no physical harm to others, nor does it violate a distinct and assignable obligation to any other person. In addition, no foreseeably certain harm exists to justify regulation for any pre-harmful act. The harm principle safeguards profitable organ exchange against this objection and allows individuals to sell their organs for purposes the individual sees fit.

\textbf{B. Regulation to Prevent Commodification of the Human Body}

Opponents to profitable organ exchange also object because they fear the commodification of the human body. Opponents argue that markets have an indiscriminate and promiscuous nature that will reduce human beings to the status of commodities.\textsuperscript{74} In rebutting this argument, opponents of profitable organ exchange erroneously assume that pure altruism motivates the current transplant system. Already partly driven by market forces, commodification in the current transplant system already gives organs significant value to every actor in the system except for the organ sources themselves.\textsuperscript{75} The people involved in the system reduce organs to the status of objects, not markets. A logical reason exists: both the buyer and the seller expect to gain from the transaction without the involvement of any third party.\textsuperscript{76} Even if we assume that commodification of human organs creates harm; it remains unclear why this objection should only apply to profitable organ exchange and not to organ donations. Why do human organs exchanged for consideration get labeled objects, while human organs given altruistically remain free from such a status? Individuals can acquire chairs or tables either through exchange for consideration or altruistically; both remain objects regardless of the method of exchange. Why the distinction when human organs become the subject? No explanation logically explains why the status of human organs changes when consideration factors into the exchange. In short, if the reprehensibility of profitable human organ exchange warrants prohibition to prevent the

\textsuperscript{72} \textit{Id. at} ¶ 12.

\textsuperscript{73} \textit{Id. at} ¶ 13.

\textsuperscript{74} \textit{Id. at} ¶ 26. (Citing \textsc{http://www.cnn.com/\textsc{health/bioethics/9905/organ.donate/template.html}).


\textsuperscript{76} CROUGHS, \textsc{supra} note 65 at ¶ 27.
commodification of the human body, then altruistic human organ donation equally requires prohibition.77

The commodification of organs argument against profitable organ exchange does not justify government regulation. The harm principle safeguards profitable human organ exchange against this objection because the subjective viewpoint that human organs become objects when exchanged for consideration affects uninvolved people solely in their moral beliefs. The basis of the objection originates in the seller’s subjective intention for selling an organ, not the actual act of donating. The offended third party individuals suffer no violation of a distinct obligation owed to them nor do they suffer physical harm. The seller’s subjective viewpoint regarding commodification of the human body creates no discernable harm to another person when the seller makes decisions about whether to exchange a human organ for consideration. Therefore, this argument does not qualify for governmental regulation because no justifiable harm exists to warrant any regulation to prevent harm to another.

C. Regulation to Prevent the Stimulation of Criminal Conduct

The opponents of profitable organ exchange believe that a ready market in human organs will exacerbate criminal activity.78 Various proponents of altruistic donation cite human rights abuses that occur in association with black market activities, and argue that legalizing organ markets will only stimulate those illicit activities.79 This mistaken line of reasoning parallels the argument made during Prohibition that the legalization of liquor sales would result in an increase of Mafia related activity.80 Black markets have developed in human organ exchange because the demand has outstripped the supply.81 An inflated price for organs creates a strong profit incentive to violate the law by supplying the product and charging whatever the market will bear. In reality, criminal behavior tends to disappear when trade becomes legalized.82 When the legalization of profitable organ exchange becomes a reality, the supply of organs will increase and will make the price of organs drop. Therefore, stealing organs will become less profitable and criminals will have fewer reasons to continue the practice in black markets. In addition, the defrauding of organ sources will significantly decrease when profitable organ exchange becomes legal for the organ source. The current prohibition of profitable organ exchange discourages victimized organ sources from reporting fraud to the police. Counter intuitively, the prohibition against profitable organ exchange increases the risk of robbery or fraud for organ sources. Therefore, the argument actually favors the legalizing of profitable organ exchange for organ sources.83 Even if it were true, that the risk of crime would increase if profitable organ exchange became legalized, prohibition still lacks any basis. Some people kill to collect life insurance benefits; would prohibiting all life insurance appropriately address the problem to prevent these

77 Id. at ¶ 28.
78 Id. at ¶ 29. (CITING HTTP://WWW.ICRC.ORG/WEB/ENG/SITEENG0.NSF/IWP/I302/87DC95FCA3C3D63EC1256B66005B3F6C).
80 Id. at 573.
81 CROUGHS, SUPRA NOTE 65 AT ¶ 30.
82 KASERMAN, SUPRA NOTE 79 AT 573.
83 CROUGHS, SUPRA NOTE 65 AT ¶ 30.
deaths? Others kill quickly to receive an inheritance; would abolishing inheritance law appropriately remedy these deaths?  

The speculative argument against profitable organ exchange for organ sources because it may stimulate criminal conduct cannot justify continued government regulation. The harm principle requires certainty of a foreseeable risk for legitimate government regulation of a pre-harmful act. This argument against profitable organ exchange for organ sources provides no certainty that legal organ markets will stimulate criminal activity causing any physical harm or violations of assignable obligations to others. No justifiable harm arises from this objection that allows for legitimate government regulation.

D. Regulation to Prevent an Inequitable Distribution

In a regulatory environment allowing profitable organ exchange for organ sources, inequitable distribution of usable organs to individuals having the financial ability to pay will undoubtedly exist. This repulses those who oppose profitable organ exchange, and these opponents argue that this inequity cannot be tolerated. Proponents of the current system fail to point out that inequitable treatment of transplant recipients based on economic, racial, and social factors happen every day under the current system. For example, before transplant candidates qualify for placement on the national waiting list for an organ, candidates must prove their financial ability to pay for the transplant, either through insurance or state assistance.

Currently many individuals become prematurely regulated into their grave, because they cannot make the life saving purchase of an organ. All the while, these same unfortunate individuals, through government coercion pay for some of the operations of those lucky enough to survive the waiting list. Individuals having the financial means to buy a usable organ do not cause the illnesses of other people or the financial inabilities of others to purchase their own usable organs. Inequity exists when the government forces individuals with the financial ability to purchase organs to wait in an imaginary altruistic donation line for the lifesaving organ.

An inequitable distribution of organs already exists within the altruistic system, so decriminalizing profitable organ exchange does not introduce a new harm. The subjective belief that more harm results from inequity based upon an individual’s financial ability to procure an organ, rather than from some other equally discriminate factor, does not justify regulatory preference of one inequity over another. Although maybe unpleasant, inequitable distribution of organs based on financial ability does not cause physical harm to another or violate an assignable obligation to another individual. The harm principle safeguards from governmental regulation ethical evaluations preferring one type of inequitable distribution over another. Therefore, an argument against profitable organ exchange for organ sources because of harmful inequitable distribution cannot justify legitimate government regulation.

84 Id. at ¶ 31.
85 Id. at ¶ 19.
87 CROUGHS, supra note 65 at ¶ 19.
E. Regulation to Preserve Altruistic Donation

Opponents of decriminalizing profitable organ exchange for organ sources argue that an organs market eliminates voluntary donation of organs during life or upon death. People donate organs altruistically not because of the prohibition of an organs market, but because individuals have an inherent nature of altruism and generosity. Only certain types of people will donate organs, but the same remains true for those who will sell organs.88 Opponents to profitable organ exchange for organ sources fail to realize that altruism and organ markets can coexist without reducing altruism. Compensation does not necessarily destroy the altruistic nature of an act. Using military service as an example, the army compensates enlistees for their time in the army. Yet most people would agree that army service remains altruistic. Regardless of compensation, motivation to donate organs for most people originates from the selfless desire to help others. Altruistic ideals always play a prominent role in the making the decision to donate, regardless of possible compensation.89 Realizing that compensation and altruism can coexist dispels this reasoning for criminalizing profitable human organ exchange for organ sources.

In enacting NOTA, Congress criminalized organ sales to increase altruistic donations, eliminate commoditization of the human body, and prevent exploitation of the poor. Thousands of Americans die each year sacrificing for these ideals.90 These ideals justifying government regulation of profitable organ exchange for organ sources comes solely from ethical and moral objections. When conduct provokes moral or ethical disgust, the conduct deserves exemption from prohibition instead of subjection to it. Conduct reprehensible to another person’s morals or ethics does not offer a legitimate reason to make it a crime.91 Conduct prompting disgust from individuals stays uncertain, arbitrary, and changeable and makes for poor soil to root the criminal law.92

True Millian liberalism requires a community to redefine its notion of tolerance. Millian liberalism must include the right of individuals to act on their interests and to exclude the moral distresses of its members from justifying political regulation.93 If society holds individual autonomy intrinsically valuable, then society must also believe fostering a political environment necessary for individual autonomy intrinsically valuable. Individual autonomy requires two conditions: freedom of action and a variety of situations. Government implementation of the harm principle best achieves the condition of freedom required for individual autonomy. An individual’s choices and actions have enough room for exercise if the government does not intervene until harm to others occurs. A variety of situations required for individual autonomy achieves the best results by diversity in beliefs and actions. Optimal diversity occurs by

89 KAHAN, supra note 6.
92 Id. AT 903.
93 BEATTIE, JR, supra note 55 AT 382.
excluding the moral distresses of others when enacting political regulation. In the case of
profitable human organ exchange for organ sources, the individual autonomy to act in
furtherance of an interest equates to a life or death issue that government should in a liberal
society have no jurisdiction to regulate.

CONCLUSION

The ineffectiveness of the current system governing the exchange of human organs kills
people. An organ shortage exists not because of natural limits or because of human indifference
in our nation; rather it results from the existing human organ exchange policies of the United
States government. Thousands of people needlessly die waiting on an organ transplant each
year. The United States Congress must acknowledge the inefficiencies and impracticalities of the
current human organ exchange policy and make a change. The legislature can potentially save
lives and lessen suffering. The primary legislative objective behind UAGA and NOTA in
alleviating the organ shortage in America remains unresolved by the current altruistic organ
exchange system. Furtherance of this objective will require a new unique approach. Using John
Stuart Mill’s harm principle to decriminalize for profit human organ exchange for organ sources
protects the dignity of donors and reduces the suffering and death of the many people waiting for
transplant organs.

The ethical and moral objections currently sustaining the prohibition against exchanging an
organ for consideration comes with an unbearable cost. These objections do not constitute direct
and tangible harm to others that justify government regulation. Applying John Stuart Mill’s
harm principle to profitable human organ exchange in effect offers the donor and the donee the
freedom from government interference while pursuing potentially life-saving commodities. The
psychic and constructive harms raised by opponents to profitable human organ exchange are
secondary in nature and should not abridge this fundamental value. The United States
government must reconsider the possibility of allowing financial incentives to organ sources
because it can potentially resolve the organ shortage. Applying the harm principle to the
arguments for maintaining the prohibition against paying organ sources shows the weaknesses of
the altruistic donation justification under the current system. The evidence clearly indicates the
failure of paternalistic governmental jurisdiction over profitable human organ exchange in our
nation. When will the time come to allow individual freedom to succeed?

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94 Id. at 383.
95 Dunham, supra note 88 at 65.
96 Moffat, supra note 40 at 1100.
97 Id. at 1130.
98 Kahan, supra note 6.
99 Mahoney, supra note 37 at 35.