Organ Trafficking: Legislative Proposals to Protect Minors

Maria N. Morelli

Follow this and additional works at: http://digitalcommons.wcl.american.edu/auilr

Part of the International Law Commons

Recommended Citation
ORGAN TRAFFICKING:
LEGISLATIVE PROPOSALS TO PROTECT MINORS

Maria N. Morelli*

INTRODUCTION

For the many afflicted with organ failure, organ substitution is often the only viable, life-saving option. As medical advances with anti-rejection drugs have yielded high success rates, the demand for organ transplants has increased at a rate greatly exceeding supply. This void has spawned an international trade in adult organs to meet the excessive demand for organs and to bypass Western countries' laws prohibiting financial remuneration for organ donations.

* J.D. candidate, May 1996, Washington College of Law, The American University; B.A. 1992, Yale University. I would like to thank my family for their unconditional love, support and confidence over the years. Special thanks to T.J. Wolfe for his patience and computer skills, for supplying me with caffeine during the wee hours of the morning and, finally, for keeping a smile on my face. I am especially grateful to Max Holland for his untiring editorial assistance, Heather Thomas and the entire ILJ staff. Any errors are, of course, entirely my own.

1. See Organ Transplant Act, 4 U.S.C.C.A.N. 3975, 3976 (1984) (providing a detailed legislative history of the National Organ Transplant Act and explaining that the anti-rejection drug, cyclosporine was released in 1983). Cyclosporine increases survival rates. Id. Kidneys have a better than 80% chance of survival for at least one year, up from 50% before cyclosporine. Id. Specifically, from 1984 to April 1990, the annual number of heart transplants increased from 346 to 1673; liver transplants increased from 308 to 2160; and kidney transplants increased from 6969 to 8890. National Organ Transplantation Act, Hearing Before the Subcomm. on Health and the Env't of the House Comm. on Energy and Commerce, 101st Cong., 2d Sess. 17 (1990) [hereinafter Hearing] (statement of Robert G. Harmon, Admin'r, Health Resources and Serv.'s Admin., Pub. Health Serv.).

2. Hearing, supra note 1, at 17 (statement of Harmon).

3. Id.

4. See WHO Guiding Principles on Human Organ Transplantation, pmbl. ¶ 1 [hereinafter WHO Guiding Principles], reprinted in LEGISLATIVE RESPONSES TO ORGAN TRANSPLANTATION 470-71 (World Health Organization (WHO) ed., 1994) [hereinafter LEGISLATIVE RESPONSES] (stating, "rational argument can be made to the effect
This documented trade in adult organs and the paucity of organs for medical transplants have fueled fears of a thriving criminal market in children's organs. Beginning in 1987, rumors of such a trade to North America, Europe, and Israel have raged throughout Latin America. These rumors remain unsubstantiated. Nonetheless, the

that shortage has led to the rise of commercial traffic in human organs, particularly from living donors who are unrelated to recipients"). See generally, Maud Beelman, Parts Needed for Transplants in Human Organs Stirs Global Attention, L.A. TIMES, July 16, 1989, at A6 (reporting on the commercialization of organ transplants, including sales by Turkish and Philippine citizens).


6. UNITED STATES INFORMATION AGENCY (USIA), THE BABY PARTS MYTH: THE ANATOMY OF A RUMOR (June 1994) [hereinafter USIA].

7. See Victor Perrera, New Reports on Baby Trafficking in Guatemala, Sacramento Bee, May 29, 1994, at F3 (explaining that the rumors suggest that North Americans, Swiss, Germans, and Italians participate in the trafficking of children's organs).

8. Id.

9. See Baby-Selling Ring, LATIN AM. WKLY. REP., Feb. 4, 1988, at 12 (reporting that two Israelis and three Guatemalans were arrested for alleged involvement in children's organ trafficking).


11. See Letter from James O. Mason, Assistant Secretary of Health, & C. Everett Koop, Surgeon General, to Karel de Gucht, Chair Human Rights Subcomm. of the Eur. Parl. (June 6, 1989) [hereinafter Letter] (on file with AM. U. J. INT'L L. & POL'Y) (explaining that the USIA and most health professionals in the United States insist that a trade in minors' organs at this time is legally and scientifically impossible). The trade appears impossible for many reasons. First, the United States has a careful death registration system; thus, any suspicious hospital deaths would be detected. See Letter, supra; UNOS, ORGAN TRAFFICKING: PERSPECTIVE FROM UNOS 7 (Apr. 1994) [hereinafter UNOS ORGAN TRAFFICKING] (responding to the rumors to allay fears of unethical practices and to increase organ donations). Organs obtained
fear runs rampant in Latin America. Angry and frightened Guatemalan crowds recently attacked American women, whom they suspected were involved in trafficking in children’s organs. These attacks on American citizens arguably damage the reputation of the United States, decrease international adoptions, and discourage organ donations.

This comment argues that the most effective way to counter the rumors and their devastating effects is to address the rumored trade candidly. If Latin Americans believe that the United States and the international community are listening to and assessing their fears, then the rumors and their violent aftermath may subside. The discussion and from uncertain sources will be refused. See UNOS ORGAN TRAFFICKING, at 7. Second, organ harvesting and transplantation are very complex and require highly trained health professionals and surgical facilities. See Letter, supra. Make-shift hospitals would not suffice, and one is unlikely to find health professionals willing to jeopardize their careers by violating the law and medical ethics. Id. Third, doctors must know the cause and time of death of the donor because organs must be tissue-typed to find a matching recipient and are only viable for a limited time outside of the human body. See USIA, supra note 6, at 4 (explaining that hearts last five hours, livers two to four hours, pancreases six to twelve hours, and kidneys for longer than forty-eight hours but doctors hesitate to use them beyond twenty-four to forty-eight hours). Organ transplant centers are government certified and inspected so irregularities in organ procurement and transplantation would be uncovered. See Letter, supra. But see Lindsey Gruson, Signs of Traffic in Cadavers Seen, Raising Ethical Issues, N.Y. TIMES, Sept. 25, 1986, at A14 (arguing that because organs can live outside the body for longer and demand is constantly increasing, “the motive and technology now exist for a black market in transplant organs”).

12. See Booth, supra note 10, at C1-2. The spring of 1994 witnessed three attacks on American women in Guatemala. On March 29, a mob attacked June Weinstock, a fifty-one year old environmentalist from Alaska, leaving her in a coma. Id. The mob accused her of stealing a child, who was found unharmed four hours later. Id. On May 15, a crowd attacked Janice Vogel of Philadelphia on a Guatemala City bus believing that she stole her recently adopted six-month old Guatemalan baby. Id. Authorities arrested Melissa Larson in Santa Lucia Cotzumalguapa and released her after 19 days. Id. See also Americans Beware—Danger in Central America, (20/20, ABC television network, June 3, 1994) [hereinafter Americans Beware!] (interviewing Janice Vogel; two missionaries who witnessed the attack on June Weinstock; and Todd Levanthal of the United States Information Agency).

13. But see UNOS ORGAN TRAFFICKING, supra note 11, at 5 (arguing that the rumors do not injure the government of the United States, but rather hurt individuals waiting for transplants who may not receive an organ because the rumors decrease donations).

14. See USIA, supra note 6, at 9, 12 (arguing that the rumors interfere with adoption proceedings, depriving many children of loving adoptive families).

15. See id. (contesting that the rumored trade may decrease voluntary organ donations and result in premature deaths).
passage of legislation to protect children from trafficking in organs may adequately calm Latin American anxiety. While legislation aimed at crippling the alleged trade in children's organs or laws designed to prevent the development of such a trade may pacify fears, in light of the present scarcity of transplant organs and their increasing monetary value on the underground market, only a noteworthy alleviation of the shortage of transplant organs will ultimately safeguard children.

Part I of this Comment provides background on the international organ trade by looking at the international scarcity of organs, the trade itself, and the Latin American rumors about trafficking in children's organs. Part II develops a legal analysis of existing sources of regulation to protect children from trafficking in organs, including the Convention on the Rights of the Child, the World Health Organization's Guiding Principles on Human Organ Transplantation, and domestic laws concerning the ability of minors to consent to organ donation. Part III explores proposed regulations to increase the supply of organs which should diminish the need to turn to underground channels for organ procurement. Part IV presents recommendations for the improved protection of children, such as amending the Convention on the Rights of the Child and adopting an international treaty, based on amended WHO Guiding Principles, to regulate organ transplantation.

I. BACKGROUND: THE DEVELOPMENT OF AN INTERNATIONAL ORGAN TRADE

A. ORGAN SCARCITY

The scarcity in transplant organs results from the combination of a decreasing donor pool and few voluntary, post-mortem donations.

16. See Hearing, supra note 1, at 28 (statement of Harmon) (claiming that state seatbelt legislation reduces the number of traffic fatalities, thereby diminishing the number of suitable, brain-dead, heart-beating cadaveric donors); Ronald Sullivan, New York's Shortage of Organ Donors Grows Acute, N.Y. TIMES, Sept. 8, 1985, at E26 (reporting that New York's seatbelt law was decreasing traffic fatalities and subsequently the number of available organs for transplants). AIDS has also lessened the donor pool. Hearing, supra note 1, at 28 (statement of Harmon). Some propose harvesting organs from non-heartbeating cadavers to increase the supply of organs for transplants. See Stuart M. Youngner & Robert M. Arnold, Ethical, Psychosocial, and Public Policy Implications of Procuring Organs from Non-Heart-Beating Cadaver Donors, JAMA, June 2, 1993, at 2769 (explaining that new methods of procurement from non-heartbeating cadavers have increased their usefulness as organ donors).

Surveys in the United States indicate that 60% of the population favors organ donation for themselves while 85% claim they would consent to the donation of their loved ones' organs. Nevertheless, at the time of death, only 25-30% of families agree to donate. Certain religious beliefs may curtail the number of organ donations, while ignorance of UAGA (regulating voluntary post-mortem donations). In the United States, a person may consent to post-mortem donation by signing a Uniform Donor Card or a driver's license, UAGA § 2(b), or by leaving a will, UAGA § 2(c). These gifts can be revoked. UAGA § 2(f). See Hastings Centre Report (1983), reprinted in LEGISLATIVE RESPONSES, supra note 4, at 396 (explaining that donor cards do not mean automatic organ harvesting upon death because doctors often ask the next of kin for permission despite the card).

If the decedent did not expressly consent or refuse to donate, the following family members may consent to make a gift of decedent's body parts in the United States: 1) decedent's spouse; 2) decedent's adult son or daughter; 3) either of decedent's parents; 4) decedent's adult brother or sister; 5) a grandparent of decedent; and 6) a guardian of the person of decedent at time of death. UAGA §3(a). The UAGA requires each state to have “required request” laws which mandate physicians and health care professionals to ask family members for permission to harvest organs from the deceased. UAGA § 5. But see Letters: Financial Incentives for Organ Donation: The Perspective of Health Care Professionals, JAMA, Apr. 15, 1992, at 2037 (arguing that retrieval rates remain low with required request because doctors feel uncomfortable asking families to donate a loved one's organs and the provision is not well enforced); Hearing, supra note 1 (statement of Kaplan) (explaining that doctors who feel uncomfortable asking for organ donations have lower procurement rates and complain that lack of training in solicitation techniques impairs their success in getting donors).

18. Too Few Human Organs For Transplantation, Too Many In Need . . . And The Gap Widens, JAMA, Mar. 13, 1991, at 1223 [hereinafter Too Few Human Organs]. See Hearing, supra note 1, at 180-81 (statement of Arthur L. Kaplan, Ctr. for Biomedical Ethics, Univ. of Minn.) (estimating that only 60-70% of the population in the United States would consent to the donation of a loved one's organs).

19. Hearing, supra note 1, at 181 (statement of Kaplan); Too Few Human Organs, supra note 18, at 1223.

organ transplantation prevents others from donating.\textsuperscript{21} Furthermore, the absence of uniform brain death definitions in some countries exacerbates the international shortage of human organs for transplants,\textsuperscript{22} and until recently, some nations lacked the technology necessary for the successful, healthy removal of organs from cadavers.\textsuperscript{23}

Growing waiting lists are the result of this shortage of organs.\textsuperscript{24} For example, in the United States, as of June 22, 1994, the Scientific Registry at the United Network of Organ Sharing (UNOS)\textsuperscript{25} reported over

\begin{itemize}
  \item David Lamb, \textit{Organ Transplantation and Ethics} 123 (1990) (explaining the prevailing Islamic theological thought that the living should command greater respect than the dead, thereby encouraging followers of Islam to donate organs); Mohammed Rasooldeen, \textit{Saudi Center for Organ Transplantation, In the Service of Humanity}, RIYADH DAILY, June 15, 1994 (discussing the growing number of pledges by Saudis to donate organs post-mortem).
  \item See Novello, supra note 20, at 213 (explaining that many Americans fear their organs will be removed before all measures are taken to save their lives). Lack of information within the Black community hinders donations by this population. \textit{Id.} Blacks donate little in proportion to their numbers on the waiting list. \textit{See The Color of Kidneys}, \textit{The Economist}, Oct. 2, 1993, at 92, 94 (reporting that Blacks comprise 33\% of all those in need of transplants, but only 8\% of all donors). Of those Blacks awaiting transplants, 80\% could receive across racial lines, whereas 20\% cannot because genetic differences in blood types and antigens make donations potentially more difficult. \textit{See Medical Expert Gives 5 Reasons Blacks Aren't Donors}, \textit{Jet}, Feb. 15, 1990, at 38, 39 (announcing the start of national education campaign to recruit more Black organ donors); Sharon Jefferson, \textit{Donor Organs: A Crisis}, \textit{Essence}, Oct. 1990, at 146 (urging Blacks to donate organs as a way of shaping their race's destiny). \textit{But see The Color of Kidneys, supra}, at 92, 94 (showing that tissue-typing in effect discriminated against Blacks and may be unnecessary because immunosuppressive drugs increase success rates regardless of the degree of tissue-matching).
  \item See Heartless, supra note 20, at 94 (discussing the traditional Japanese belief that the beating heart houses a living soul, which inhibits passage of a uniform brain death statute to facilitate organ donation); Japan Law No. 70, \textit{reprinted in Legislative Responses}, supra note 4, at 249 (establishing the Special Research Committee on Brain Death and Organ Transplantation to deliberate on bioethics and policy issues).
  \item See Egypt Doctors Trying to End Sale of Kidneys, Group to Ban Transplants From Most Living Donors, S.F. CHRON., Jan. 24, 1992, at A16 [hereinafter Egypt Doctors] (explaining that organ harvesting and transplantation took place in a single five-hour procedure because of inability to remove organs from cadavers).
  \item See Hearing, supra note 1, at 17 (statement of Harmon) (stressing that the gap between available organs and the need for these organs is widening).
  \item See UNOS TRAFFICKING, supra note 11, at 3 (stating that UNOS was named the government contractor for the National Organ Procurement and Transplantation Network (OPTN)). OPTN was established by the National Organ Transplantation Act to facilitate and encourage organ donation and to oversee and assist organ procure-
35,000 patients needing an organ transplant, with more than 25,000 waiting for a kidney transplant. Comparable statistics demonstrate that in 1993, only 18,167 patients actually received organ transplants. Nearly 11,000 kidney transplants alone were performed in 1993. As of December 31, 1992, the Scientific Registry listed over 1542 patients under the age of eighteen waiting for an organ transplant. In Britain, in 1993, the medical community performed 1750 kidney transplants, but 4500 patients remained on the waiting list. Eurotransplant, which monitors organ transplants for the Benelux countries, Germany and Austria, list over 7000 patients waiting for organ transplants.
pitals report 100,000-120,000 renal failures each year, where kidney
donations fail to meet this demand.

B. THE INTERNATIONAL ORGAN TRADE

Living donors help to alleviate the shortage of cadaveric organs. In
order to prevent rejection of the donated organ, the medical community
prefers to use genetically related donors, nevertheless it increasingly
turns to unrelated donors’ organs. A growing commercialized market
in organs has developed from a combination of the willingness to use
living donors and the chronic dearth of transplant organs.

27, 1992, at A1 (describing the desperation of India’s poor, prompting them to sell
their organs for economic survival).

33. See RENEE C. FOX & JUDITH P. SWAZEY, SPARE PARTS 46-54 (1992) (dis-
cussing the use of living donors for kidneys, liver and lung lobe grafts); Paul Cotton,
Living-Donor Liver Transplants Cap Surgical Research for Decade of 1980’s, JAMA,
Jan. 5, 1990, at 13, 14 (explaining that the liver regenerates, making inter vivos liver
donations scientifically possible); Surgeons Transplant Liver From Living Donor, NEW
SCIETIST, Aug. 12, 1989, at 26 (implying that children will benefit most by new
procedures which increases the success of living donor liver transplants); Aaron Spital,
M.D. & Max Spital, M.D., Letters: The Ethics of Liver Transplantation From a Liv-
ing Donor, NEW ENG. J. MED., Feb. 22, 1990, at 549, 550 (arguing that parents
should have the right to assess the risks of living liver donations); Hearing, supra
note 1, at 173 (statement of Kaplan) (arguing that society will, however, have to
continue to rely on cadaveric organs).

34. See Gina Kolata, Unrelated Kidney Donors Win Growing Hospital Accep-
tance, N.Y. TIMES, June 30, 1993, at C14 (reporting that the number of unrelated
donors has grown since the mid-1980s). In 1988, there were fifty-six kidney trans-
plants from unrelated donors. Id. In 1991, the number of living unrelated donors was
over 50% higher than the 1988 rate. Id. Studies now show that kidney transplants
from related and unrelated living donors have about the same survival rates,
moreover, kidneys from unrelated donors fair better than cadaveric kidneys by 10%.
Id. See also Andrew S. Levey et al., Kidney Transplantation From Unrelated Living
Donors, NEW ENG. J. MED., Apr. 3, 1986, at 914-16 (preferring living kidney grafts
over cadaveric kidneys and criticizing the practice of rejecting unrelated living donors
as overprotective). Levey argues that living kidney grafts fair better than those with
cadaveric kidneys because the transplant surgery can be scheduled in advance so the
prospective donee can receive blood transfusions from the donor and begin taking
immunosuppressive drugs prior to surgery. Id. Levey also notes that medical teams
usually commit fewer technical errors when removing a liver from a living donor. Id.

35. See supra note 4 (quoting the preamble to the WHO Guiding Principles on
Human Organ Transplantation which expresses concern over the development of traf-
ficking in human organs).
The lower economic classes supply this international organ market by selling their organs for profit while alive. Americans and Europeans—both entrepreneurs and the poor—have sought to make a profit from this trade. The Third World, with its vast numbers of poor willing to sell kidneys for profit, encourages desperately ill Westerners and wealthy Arabs to flock to these countries for organ transplants. This

36. But see Furor Over Call to Sell Organs of Poor People, N.Y. TIMES, July 21, 1990, at A9 (presenting a proposal by a Milwaukee politician to sell the organs of deceased welfare recipients to pay for funeral expenses); Milwaukee County Official Suggests Selling Body Organs, Chi. TRIB., May 9, 1990, at 3 (reporting that the impetus behind the proposal was the increase in burial costs from $430 to $470).

37. See Margaret Engel, Va. Doctor Plans Company to Arrange Sale of Human Organs, WASH. POST, Sept. 19, 1983, at A9 (discussing Dr. Harry Jacobs’ proposal to start a kidney brokerage company). Jacobs, whose Virginia license to practice medicine was revoked in 1977 because of mail fraud, presented his proposal to Congress. Id. According to his plan, the federal government would continue to pay for the removal of organs for Medicare patients. Id. Donors would set the price for their kidneys and Jacobs would add $2,000-5,000 to the price of the kidney for his brokerage services. Id. The recipient would pay all of the costs associated with kidney procurement. Id. Prior to England’s ban on organs sales, poor Turkish citizens travelled to England to serve as donors for wealthy English citizens. See Turk Who Masterminded Trade in Human Kidneys Jailed For Two Years, INDEPENDENT, May 19, 1992, at 11 [hereinafter Turk Who Masterminded Trade] (discussing the criminal sentencing of a Turkish broker who brought poor Turks to England to donate kidneys). A West German entrepreneur established an organ brokerage company in 1988. See Bjorn Edlune, Courage Isn’t Up To Bank Heists?, Sell a Kidney, Cash Offered For Live Donors’ Organs, L.A. TIMES, Nov. 13, 1988, at 12 (reporting that the businessman’s proposal charged donors or recipients a $55 association membership fee for his brokerage services and six businessmen experiencing financial difficulties accepted his offer). In January 1994, a French man advertised to sell his kidneys for a job. O’Shaughnessy, supra note 30, at 27. Desperate Poles sell kidneys for cash plus expense paid travel to Western Europe, and Budapest doctors offer to sell organs to the Swiss. See id. (indicating that Eastern Europeans, including Russians, have entered the trade).

38. See Sanjoy Hazarika, India Debates Ethics of Buying Transplant Kidneys, N.Y. TIMES, Aug. 17, 1992, at A20 (questioning the possible exploitation of the poor under an organ market system). In India, living donors sell kidneys but usually middlemen reap the profits. See id. (reporting that donors receive from $275 to $553, where the average monthly income of worker is $11, but brokers charge recipients $1000 over the cost of procurement). Despite Egypt’s ban on unrelated, living donors, kidneys in Egypt sell for $10,000 to 15,000, or are bartered for apartments, televisions, and other electronic goods. See Egypt Doctors, supra note 23, at A16 (explaining that private laboratories send recruiters into the slums of Cairo to locate willing donors for wealthy Arabs). Philippine prisoners volunteer to donate kidneys in exchange for conditional pardon or parole. See Maria Teresa Villanueva, Philippine Prison Center of Lucrative Human Organ Trade, JAPAN ECONOMIC NEWswire, Dec.
trade raises serious ethical concerns about the exploitation of the poor by the wealthy.\textsuperscript{39}

This trade in adult living donor organs, however, differs substantially from the widespread rumored trafficking in children's organs. While adult donors consent to the sale and harvesting of their organs,\textsuperscript{40} these rumors suggest that foreigners kidnap and murder Latin American children\textsuperscript{41} for their organs.\textsuperscript{42} If true, this trafficking in children's organs surpasses mere economic exploitation and moves into the realm of human rights violations.

\textsuperscript{39} See Henry Hansmann, \textit{The Economics and Ethics of Markets for Human Organs}, 14 J. Health Pol., Pol'y & L. 57, 72-74 (1989) (arguing that it is paternalistic to ban a commercialized trade in organs because the ban denies the impoverished a freely chosen means of survival and belies the reality the poor must live). Hansmann compares organ donation with working at a dangerous job, but recognizes a weakness in the comparison because organ donation is irrevocable. \textit{Id.}

\textsuperscript{40} But see Wallace, supra note 32, at A1 (discussing the possibility of a criminal market in adult organs because some Indians have awakened in alleys with incisions across their abdomens that suggest kidney removal.).

\textsuperscript{41} See Booth, supra note 10, at C2 (relating tales which allege that abductors search for children in the countryside).

\textsuperscript{42} See K. Wengerter et al., \textit{Which Pediatric Donor Kidneys Should Be Transplanted to Adults?}, in ORGAN PROCUREMENT II: PROCEEDINGS OF THE SECOND INTERNATIONAL CONGRESS ON ORGAN PROCUREMENT 95 (Luis H. Toledo-Pereyra ed., 1986) [hereinafter ORGAN PROCUREMENT II] (reporting that kidney grafts, to adult recipients, from donors ages two through fifteen fair equal to or better than kidneys procured from adult donors). Within a few weeks after transplant, pediatric kidneys achieve adult size. \textit{Id.} Many transplant facilities will not perform single kidney grafts with cadaveric, pediatric kidneys from donors ages two to fives years old because of potential function problems with a single transplanted kidney. See D.C. Dafoe et al., \textit{Use of Single Kidneys From Donors Two to Five Years of Age for Transplantation Into Nonpediatric Recipients}, in ORGAN PROCUREMENT II, supra, at 97-99 (protesting that this practice needlessly halves the supply of kidneys available for transplant).
C. THE RUMORS OF TRAFFICKING IN CHILDREN'S ORGANS

The rumors of trafficking in children's organs, originating in colonial Latin American folklore, first surfaced in the press in 1987. Updating and playing on deep-seated folklore beliefs, Leonardo Villela Bermudez, General Secretary of the Honduran official welfare agency, alleged in January 1987 that foreign couples willingly adopted handicapped children only to dismember them for use in North American organ transplants. Bermudez later retracted his story, but Latin American fears kept the rumor alive. The Soviet government's newspaper, Pravda, printed the story in April 1987, giving it international attention. Leftist sympathetic groups advanced the rumors in the

43. See Perrera, supra note 7, at F3 (relating Mayan mothers' belief that pale, anemic European men needed the blood of healthy, brown-skinned infants to recover their health); Veronique Campion-Vincent, The Baby-Parts Story: A New Latin American Legend, W. FOLKLORE, Jan. 1990, at 9, 19 (explaining the prevalent Third World stories about the "white ogre," evil white men with supernatural attributes who require the blood or organs of indigents). Other tales involve the Spanish mantequero character who steals fat from Indians at night. Campion-Vincent, supra. These evil "bogeymen" take on a slightly different form in each country, but the root tale remains the same. See In Guatemala, Rumors Fly and Military Hovers, L.A. TIMES, Apr. 3, 1994, at A23 (accounting tales of the local Guatemalan "bogeyman," Miculash, who allegedly steals fat to make soap); Fiona Neill, Guatemala: Wild Baby-Stealing Fears Take Root in Guatemala, REUTERS, May 24, 1994 (commenting that some Guatemalans believe that Miculash draws spinal fluid from children for unknown purposes); Robert Lillich, Health, Human Rights, and International Law, 82 AM. SOC'Y INT'L L. PROC. 122 (1988) (audio) (stating that Brazil's "bogeyman," Papa Figo, allegedly roams the countryside at night with a sack ready to steal children); William R. Long, Adopting a Tougher Policy, L.A. TIMES, Apr. 16, 1994, at A1 (describing tales of the Peruvian "bogeyman," Pishtako, who reportedly stole body "greases" for export to the United States as machinery lubricants, and the victims' blood sold to blood banks); Campion-Vincent, supra, at 20 (claiming that Pishtako has been replaced by "Sacojos," eye robbers, who allegedly kidnap children only to return them with missing eyes).  

44. USIA, supra note 6, at 6; Campion-Vincent, supra note 43, at 10-11.  

45. See Campion-Vincent, supra note 43, at 10 (explaining that Bermudez believed that adoptive parents were selling handicapped children for a price of $10,000). 

46. Id. 

47. See USIA, supra note 6, at 3 (asserting that the rumors will persist for many years because of the stronghold the rumors have in people's minds).  

48. Id. at 2; Campion-Vincent, supra note 43, at 11.  

49. See Campion-Vincent, supra note 43, at 11 (noting that the Pravda article was transmitted by the Tass agency worldwide).
press and at the United Nations. The controversy strained relations between the United States and the former Soviet Union to the point of affecting arms control talks. Soviet leader Mikhail Gorbachev vowed that he would cease the disinformation campaign in December 1987, but the rumors persisted. In November 1988, the European Parliament condemned the involvement of the United States in such an illicit, unethical activity. In response, the United States began an education campaign aimed at explaining the impossibility of such a trade.

During the spring of 1994, stories surfaced about child abductors roaming the countryside in a van or truck to kidnap children for their organs. This resurgence of the rumors sparked a xenophobic back-

50. See USIA, supra note 6, at 2 (discussing the one-person disinformation campaign initiated by Mrs. Bridel of the International Association of Democratic Lawyers (IADL), a Soviet front group); Campion-Vincent, supra note 43, at 12 (stating that on Sept. 15, 1988, a French representative with communist party ties presented a resolution to the European Parliament to condemn the trafficking in children's organs).

51. See DEPARTMENT OF STATE, ADVANCING U.S.-SOVIET RELATIONS: THE CHALLENGE OF ARMS CONTROL (Nov. 1987) (stating, in reference to charges of trafficking in children's organs, that "as long as the Soviet Union continues to spread venomous propaganda against us, it cannot be said to be seeking to conduct relations in a truly civilized manner").

52. See Linda Feldmann, Soviets Smile, But Fake Stories Continue, THE CHRISTIAN SCI. MONITOR, Sept. 6, 1988, at 1 (quoting Gorbachev as saying in 1987, "No more lies, no more disinformation").


55. See Booth, supra note 10, at C2 (detailing further that allegedly someone
lash that resulted in violence. Both Guatemala and the United States took immediate steps to curb the violence. Investigations by various governmental and non-governmental organizations have not discovered any basis for the rumors. Inquiries did, however, unearth the disappearances of Latin American children for underground adoptions, which may feed fears that children are being stolen to supply an organ trade.

uncovered a dead boy’s body stuffed with $100 and a thank-you note); Lillich, supra note 43 (commenting on similar stories in Peru).

56. See Booth, supra note 10, at C2 (remarking that the recent revival of the rumors in Guatemala could be the work of the military). The military purportedly instigated crowds to create an atmosphere of social unrest which the military hoped would keep international human rights observers out of Guatemala. Id. These observers planned to investigate human rights violations, most of which the military allegedly committed, that transpired during the recently ended thirty-three year civil war in Guatemala. Id. The military may also have prompted the violence to enable a reassertion of military power in spite of the civilian controlled government. Id.

57. See id. (providing an in-depth report on the attacks on American tourists in Guatemala).

58. See Government Communique on Attack on U.S. Woman Falsely Accused of Child-Trafficking, (Cadera de Emisoras Unidas Radio, Guatemala City, Mar. 31 1994), rebroadcast (BBC Summary of World Broadcasts, Apr. 1, 1994) [hereinafter Government Communique] (broadcasting a condemnation of the violence against tourist June Weinstock and reaffirming her innocence to the charges of child stealing); Barbara Ann Curcio, Worldwise: Travel Warnings, WASH. POST, Apr. 3, 1994, at E3 (publicizing the travel advisory to Guatemala and further advising that individuals aiming to adopt Guatemalan children should have the correct paperwork and should avoid public appearances with Guatemalan children); Booth, supra note 10, at C2 (noting that Peace Corps volunteers retreated from the countryside).

59. See USIA, supra note 6, at 6-8 (listing the international agencies which have investigated the rumored trade without finding any evidence to support the allegations); Muntarbhorn, supra note 5, at 20 ¶ 110-11 (explaining that government members of the Convention and non-governmental agencies completed questionnaires and all refuted the existence of the sale of children for organ transplants within their jurisdictions).

60. See Booth, supra note 10, at C2 (connecting the rumored trade with adoptions); Perrera, supra note 7, at F3 (indicating that six children disappear per day in Guatemala); FRANCISCO GOLDMAN, THE LONG NIGHT OF WHITE CHICKENS (1992) (giving a fictional account of Guatemalan adoption rings). Activists worry that the great numbers of street children in Latin America may provide a large supply of organs for the international organ trade. See Summary Record, supra note 5, at 21 ¶ 94 (statement of Mr. Graves, Int’l Comm’n of Health Professionals) (stressing that street children are vulnerable to the organ trade). There are one hundred million street children worldwide, the common age ranging from age eight to fifteen: twenty-five million live on the streets, seventy-five million work on the streets. Street Children: A
The United States Information Agency (USIA) adamantly avers the baselessness of the rumors. From the perspective of the USIA, any discussion of the matter only legitimizes dangerous lies. These lies, the USIA argues, result in fewer adoptions and scare away potential organ donors. This Comment concedes that the tales of trafficking in children’s organs scare away potential donors, strain international relations, and decrease international adoptions. This Comment main-

Global Disgrace: Hearing before the House Select Comm. on Hunger, 102d Cong., 1st Sess. 53 (Nov. 7, 1991). In Latin America alone, there are forty million street children. Id. at 54. See generally AMNESTY INTERNATIONAL, GUATEMALA (July 1990) (highlighting the abuses against street children); AMNESTY INTERNATIONAL, GUATEMALA: CHILDREN IN FEAR (May 1992) (examining the human rights abuses against street children).

61. See USIA, supra note 6, at 1 (referring to the charges of trafficking in children’s organs as “totally unfounded,” “horrifying,” “ghastly—and totally untrue”).

62. See USIA, supra note 6, at 3 (explaining that discussing the rumors only prolongs their duration):

[The ‘baby parts’ rumor has frequently been spread by well-meaning individuals who either believe that the rumor is true or worry that it may be. Tragically, the publicity these usually well-intentioned individuals have given the rumor by deploring a non-existent crime has inadvertently contributed to its credibility and the resultant damage it has done.]

Id. Yet despite apparent dislike of media attention and a desire to silence the rumors, Todd Levanthal of USIA appeared on the primetime TV news program 20/20 to belabor the baselessness of the allegations. See Americans Beware!, supra note 12 (televising a report on the violence in Guatemala during the spring of 1994).

63. See USIA, supra note 6, at 9, 12 (criticizing the negative impact of the rumors on international adoptions).

64. See id. (worrying that many will die if the rumors dissuade voluntary organ donations).

65. See Trade Blamed for Drop in Kidney Transplants, TIMES (London), July 31 1989, at 5 (discussing the decline in kidney transplants connected to the international organs-for-sale trade based in London prior to passage of legislation banning sales in July 1989); Peter Pallot, Transplants Rise as Kidneys-for-Sale Outcry Dies Down, DAILY TELEGRAPH, Aug. 1, 1989, at 7 (reporting that the number of donations increased 3% from June to July after publicity concerning the trade dwindled).

66. See DEPARTMENT OF STATE, supra note 51 (arguing that allegations troubled the relationship between the United States and the Soviet Union and influenced the conduct of arms-talks with Gorbachev); Curcio, supra note 58, at E3 (explaining State Department’s travel advisories to Guatemala); Government Communiqué, supra note 58 (denouncing the violence against June Weinstock); Tim Johnson, Attacks Lead To Guatemalan Tourism Crisis, MIAMI HERALD, Apr. 14, 1994, at A20 (reporting that tourism to Guatemala dropped after the upsurge of violence targeted against foreigners).

67. See Hugh O'Shaughnessy, El Salvador: Takeaway Babies Farmed to Order,
tains, however, that ignoring the rumors will not eradicate them forever. Insufficient investigation into the rumors will only magnify the concerns of Latin Americans, making the next resurgence of the rumors possibly more violent. Most importantly, perhaps, the rumors warn that the time has come to address the scarcity of adult and child organs for transplant and to reconsider current organ procurement strategies.63

II. AN ANALYSIS OF EXISTING SOURCES OF REGULATION

A. CONVENTION ON THE RIGHTS OF THE CHILD

1. Background/Analysis


---

68. See Lillich, supra note 43, at 130 (arguing that inefficiencies in the organ procurement system in the United States must be resolved).


71. See Cohen, supra note 70, at 1448 (analyzing the Convention’s preamble).
mates political, civil, economic, humanitarian, and legal rights already well-established by other international agreements, the Convention specifically imports these rights to children.\(^72\)

The Convention on the Rights of the Child makes no explicit reference to the sale of children for organ transplants.\(^73\) While the Convention's general provision reaffirming children's right to life\(^74\) protects children from criminal trafficking in their organs,\(^75\) Articles 23, 11, 21, and 35 are more closely connected to this trade and ensure more focused protection, at least in principle. Article 23 guarantees mentally and physically disabled children "a full and decent life."\(^76\) Article 11 of the Convention protects children from "illicit transfer" to foreign countries.\(^77\) Article 21 shields children from illegal adoptions, which may result in their bodily harm, by ensuring that the "paramount consideration" in all adoptions is the best interests of the child.\(^78\) Article 35

The Convention quotes the 1959 Declaration of the Rights of the Child [hereinafter 1959 Declaration], stating that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth." Conv. pmbl. \(\|$\) 9, supra note 69 (citing the 1959 DECLARATION, 14 U.N. GAOR Supp. (No. 16), at pmbl. \(\|$\) 3, U.N. Doc. A/4059 (1959)).

72. See Cohen, supra note 70, at 1448, 1450 (providing a concise history of the drafting of the Convention).

73. See generally Conv., supra note 69 (showing no provision on organ transplantation).

74. Id. art. 6 (declaring that "States Parties recognize that every child has the inherent right to life").

75. See Muntarbhorn, supra note 5, at 19 \(\|$\) 105 (arguing that the Convention's protection of the right to life impliedly protects children from organ trafficking).

76. Conv. art. 23., supra note 69. In full, article 23 states: "States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community." Id.

77. Id. art. 11. In full, Article 11(1) says, "States Parties shall take measures to combat the illicit transfer and non-return of children abroad." Id.

78. Id. art. 21. Article 21 permits adoptions only by competent authorities. Id. These authorities should only contemplate international adoption if a placement cannot be found in the child's country of origin. Id. International adoption shall be protected by the same safeguards as national adoptions. Id. Adoptions may not serve as a means for financial gain. Id. Placement in the country of destination shall be handled by competent authorities. Id. See Ahilemeh Jonet, International Baby Selling for Adoption and the United Nations Convention on the Rights of the Child, 7 J. Hum. RTS. 82 (1989) (detailing the draft Convention as it applies to the problem of baby-selling and focusing on the elimination of independent adoptions).
criminalizes "the abduction, the sale of or trafficking in children for any purpose or in any form."

Article 23 directly applies to the allegations about dismemberment of disabled children for organ transplantation. It is clear that if abductors dismember disabled children for use as organ sources, they completely deprive children "of a full and decent life."

Articles 11, 21, and 35 address the international movement of children in some fashion. These articles apply to the rumored trade in children's organs if abductors transport the living children themselves abroad through "illicit transfer" (Article 11), adoption (Article 21), or "sale . . . or trafficking" (Article 35). A problem arises, however, if the living children do not travel abroad for organ removal, but rather surgeons remove the organs in a domestic facility and co-conspirators ship only the harvested organs abroad. Article 11 arguably would not encompass such a trade because the article's precise language refers to "children," not body parts. Likewise, Article 21 could not apply to such transactions because families adopt "children," not "organs" or "body parts." Only Article 35 protects children if transferred abroad for organ retrieval or if dismembered in their native country. Article 35, like Article 11, refers explicitly to children, but Article 35 also prohibits the "abduction, sale of or trafficking of children in any form." (emphasis


80. See supra note 45 and accompanying text (discussing the allegation about trafficking in disabled children's organs by Honduran official Bermudez).

81. See Congressional Probe of Child Killings, Latin Am. Regional Rep.—Braz., Mar. 19, 1992, at 4 (referring to the Dominican priest, Paul Barruel, who believes that foreigners, especially Italians, adopt Brazilian children as "living organ banks" for transplants in the country of destination). According to Brazilian authorities, in 1991, Italian couples adopted approximately 4000 children, but the Italian registry reported that only 1000 Brazilian children entered Italy. Id.

82. See Sottas Report, supra note 10, at 4-5 (detailing the alleged trafficking in Argentina and Colombia). Investigations in Argentina uncovered dead psychiatric patients with corneas removed and mutilated eyeballs. Id. In 1992, in Colombia, exhumation near a medical facility revealed corpses of missing poor people with missing organs. Id. Two Colombian children were reportedly kidnapped and had their eyeballs removed. Id.

83. Conv. art 35, supra note 69.
added) The addition of the clause "in any form" broadly bans the domestic removal of children's organs and the subsequent sale of these body parts abroad.

2. Shortcomings of the Convention in Applicability to the Alleged Problem of Trafficking in Children's Organs

The mission and tone of the treaty proscribe the sale of children for their organs. The Special Rapporteur, for example, stated that "the implication of the Convention . . . which protects children's right to life and freedom from abuse and exploitation is that the sale of children for organ transplants is totally illegal." The lack of specific language about organ trafficking, however, renders the treaty inadequate protection against the sale of children for this purpose.

The enormity of problems addressed by the Convention also diminishes its effectiveness to combat the alleged trafficking in children's organs. The Convention mandates the Special Rapporteur to investigate child prostitution, pornography, and all "sales of children," which includes the sale of children for adoptions, labor exploitation, human organ transplantation, and all other conceivable forms of sale. These forms of sale merit singular attention, but the nature of the Special Rapporteur's mandate and understandable time and resource constraints impede prolonged discussion of these abuses at the United Nations.

84. See Muntarbhorn, supra note 5, at 19 ¶ 105 (explaining that the Convention impliedly criminalizes the trade in children's organs).
85. Id.
86. Id. at 1 ¶ 1 (providing the history of the Special Rapporteur's mandate). The Commission on Human Rights first enacted the mandate in 1990 for one year, but has since renewed the mandate. Id.
87. Id.
88. Id.
89. Id. The "sale of children" as defined by the Special Rapporteur's mandate includes "the transfer of a child from one party (including biological parents, guardians, and institutions) to another, for whatever purpose, in exchange for financial or other reward of compensations." Id. at 5 ¶ 28. The Special Rapporteur requests that the term "sale" take on a flexible meaning with the primary issue being "the exploitation of the child, which usually entails the action of another benefiting from the child in violation of his/her rights." Sale of Children: Report of Mr. Vitt Muntarbhorn, Special Rapporteur, Comm. on Human Rights, 47th Sess., Agenda item 12, at 3 ¶ 10, U.N. Doc. E/CN.4/51 (1991) [hereinafter Sale of Children].
90. Muntarbhorn, supra note 5, at 4 ¶ 22.
91. Id. at 1 ¶ 2 (explaining that the Special Rapporteur's mandate encompasses the investigation of the sale of children in both developed and developing countries,
1. Background/Analysis

WHO Guiding Principles on Human Organ Transplantation\(^{93}\) do not legally bind members but nevertheless provide guidance for governments and health professionals.\(^{94}\) The WHO drafted the Guiding Principles in 1991 after detecting growing angst about trafficking in organs.\(^{95}\) The WHO expressed particular concern over the potential traffic in people, which seemed the foreseeable product of the international paucity of transplant organs and the growing market value of these organs.\(^{96}\) The WHO also stressed the need to protect "minors and other vulnerable persons from coercion and improper inducement to donate organs."\(^{97}\) Those concerned with the sale of children for their organs suggest the
adoption of all nine Principles, but Principles 4 and 5 prove to be the most relevant to the rumored trade.

Principle 4 calls for the absolute prohibition of the use of minors’ organs for human transplant. Many countries already completely ban the use of minors’ organs. The restriction on underage donations stems from the fear that family members or kidney brokers might coerce or induce minors to donate organs. As a result, this principle prevents the consensual donation by minors to genetically-related individuals waiting for organ transplants.

Principle 5 forbids payment to organ donors beyond reasonable expenses attributable to organ harvesting surgery, such as travel, hospital fees, and recovery. Similar national prohibitions against financial transactions developed in response to the growing commercialization of organ donation. In the United States, vague ethical and moral beliefs
that altruism and voluntarism enhance the sanctity of the organ gift suppressed full-scale consideration of remuneration.

2. Shortcomings in Applicability to the Alleged Problem of Trafficking in Children’s Organs

The complete ban on the use of living minors as organ donors may best protect children from organ trafficking. This absolute prohibition, however, seems unduly severe because it denies minors the choice to donate organs to siblings desperately needing transplants, thereby jeopardizing the life of the sibling.

Principle 5 bans financial compensation of donors, a tactic which, if permitted, could increase the supply of transplant organs. By limiting cadaveric organ procurement to voluntary, post-mortem contributions or to a presumed consent system, the WHO unnecessarily restricts the number of organs acquired.

plantation if the transfer affects interstate commerce.” Id. Congress was prompted to pass this legislation after growing outrage over Dr. Harry Jacobs' proposal to establish a kidney brokerage company. See Engel, supra note 37, at A9 (discussing Jacobs' plan in detail). England also prohibits the introduction of financial incentives into organ donations and procurement:

A person is guilty of an offense if in Great Britain he—(a) makes or receives any payment for the supply of, or for an offer to supply, an organ which has been or is to be removed from a dead or living person and is intended to be transplanted into another person whether in Great Britain or elsewhere.

The Human Organ Transplants Act of July 27, 1989, reprinted in LEGISLATIVE RESPONSES, supra note 4, at 375. This legislation was passed in response to the increasing use of poor Turkish citizens as organ donors in England. See Turk Who Master-minded Trade, supra note 37, at 11 (accounting the conviction of a Turkish kidney broker).

105. See Hastings Centre Report, 1983, reprinted in LEGISLATIVE RESPONSES, supra note 4, at 409-10 (concluding that the introduction of financial incentives into the organ procurement system will damage the moral principles which motivate people to donate organs and will thereby hinder the efficient operation of the system).

106. See Hearing, supra note 1, at 174-75 (statement of Kaplan) (testifying that “many Americans found the prospect of a market in body parts distasteful . . . ”).

107. See supra note 98 (advocating an absolute ban on the use of minors as organ donors).

108. See Hearing, supra note 1, at 173 (stating that everyday a child dies while waiting for an organ transplant in the United States).

109. See WHO Guiding Principles, Principle 1 and Commentary, supra note 4 (explaining that people may “opt in” to organ donation by giving explicit consent, or may “opt out” of a presumed consent system by voicing their objections to organ donation while alive).
Principles 4 and 5 overregulate organ procurement. These excessive restrictions aggravate the limited supply of human organs for transplant. Desperate individuals waiting for a transplant may resort to underground channels to obtain human organs, which puts children in danger of abduction for organ retrieval.\(^{110}\)

C. DOMESTIC RESTRICTIONS ON THE CAPACITY OF MINORS TO CONSENT TO INTER VIVOS ORGAN DONATION

1. Introduction

Physicians must obtain voluntary\(^{111}\) and informed\(^{112}\) consent for the specific medical treatment\(^{113}\) they will perform on a patient. Most importantly, consent is only valid if obtained from a person "legally and mentally competent" to consent.\(^{114}\) As a general rule, medical treatment of minors cannot proceed without parental consent.\(^{115}\) Medical treat-

---

110. See supra note 42 (explaining that doctors can safely transplant children's kidneys into adults).


112. See id. (defining "informed" as awareness of the nature, foreseeable risks, potential benefits, need for further treatment, and possible alternatives of the discussed medical treatment). But see Carl H. Fellner & John R. Marshall, Kidney Donors—The Myth of Informed Consent, Am. J. Psychiatry, Mar. 9, 1970, at 1245-51 (explaining that family members often choose to donate an organ instantaneously when confronted by the illness of a loved one, thus failing to give truly informed consent).


114. Id.

115. William J. Curran, A Problem of Consent: Kidney Transplantation in Minors, 34 N.Y.U. L. Rev. 891, 892 (1959). Exceptions to this general rule include the "mature minor" rule, which allows minors below the statutory age of majority to consent on his or her own behalf, if the court concludes that the minor is mentally capable of understanding the specific medical procedure in question and the consequences of undergoing the procedure; and the "emancipated minor" rule, which the court applies when it determines that the minor lives apart from his or her parents, is self-supporting, or is married. See Dix et al., supra note 100, at 86-87 §§ 513-516 (1988) (presenting Australian interpretation of the mature minor rule); Paxman & Zuckerman, supra note 111, at 12-14 (1987) (exploring the abilities of minors to consent to various medical procedures in Canada and the United States); Ellen I. Picard, Legal Liability of Doctors and Hospitals in Canada 56-57 (2nd ed. 1984) (discussing the mature and emancipated minor exceptions in relation to Canadian common law).
ment generally provides the minor with a direct physical benefit. As such, non-therapeutic medical procedures, such as organ donation for the benefit of another, create special concerns. Assuming donations by minors presumably would be for the benefit of a family member, allowing parental consent to be determinative could pose a conflict of interest and would not protect the interests of children. For simplicity, many countries place a blanket prohibition on all inter vivos donations by minors. The ensuing discussion will explore the permissive practices in countries which allow minors to make inter vivos organ donations under limited circumstances.

2. Statutory Legislation: France, Luxembourg and Quebec

Inter vivos organ donations by minors are governed by statute in France and Luxembourg. France and Luxembourg law share the general principle that minors of any age can donate organs upon the consent of the minor's legal representative and authorization by an independent committee. These laws also require the consent of the prospective donor, as stipulated in French law No. 76-1181, in LE

---


117. Id. Courts generally do not accept the mature minor and emancipated minor exceptions discussed above, supra note 115, as sufficient basis for authorizing non-therapeutic medical procedures. See infra notes 120-138 (discussing statutory and common law restrictions on the ability of minors to consent to organ donations).

118. See GILBERT SHARPE, LAW & MEDICINE IN CANADA 320 (2nd ed. 1987) (quoting Gerald Dworkin, Professor of Law at the University of Southhampton, "Parents...cannot be philanthropic on behalf of their children and the law must protect a child even against his own philanthropy"); William F. Cook, Incompetent Donors: Was the First Step or Last Taken in Strunk v. Strunk?, 58 CAL. L REV. 754, 767 (1970) (upholding the common law view that parental determinations of their minor child's best interests is not controlling because the court retains the power to intervene for the sake of the child); Michael J. Saks, Social Psychological Perspectives on Consent, in CHILDREN'S COMPETENCE TO CONSENT 48-49 (Gary B. Melton et al. eds., 1983) (admitting the potential for intrafamily conflict and indicating that doctors often use the excuse of genetic incompatibility to shield a prospective donor from family pressure if the intended donor chooses not to donate).

119. See supra note 100 (naming countries which ban donations by minors).

120. See French Law No. 76-1181, in LEGISLATIVE RESPONSES, supra note 4, at 199.

The organ may be removed only with the consent of the person's legal representative and after authorization has been given by a committee made up of at least three experts, including two physicians, one of whom shall provide evidence of 20 years' practice of the medical profession. This committee shall give its opinion after examining all the foreseeable consequences, both physical and psychological, of the procedure.
child donor if the child is capable of reaching an independent decision about whether to donate.\textsuperscript{121} France and Luxembourg differ, however, in their specification of intended recipients. French law mandates that minors may donate only to a brother or sister.\textsuperscript{122} Luxembourg law, by contrast, does not restrict the relationship between the prospective donor and the intended recipient.\textsuperscript{123}

The Civil Code of the Province of Quebec also legislates organ donations by living minors.\textsuperscript{124} This legislation resembles that of France and Luxembourg with two major differences. First, Quebec only empowers minors "capable of discernment" to make inter vivos organ donations.\textsuperscript{125} The prospective underage donor must personally consent to organ donation.\textsuperscript{126} Negative inference suggests that this limitation precludes minors incapable of reaching an independent decision about organ donation from donating.\textsuperscript{127} Second, Quebec requires authorization by the Quebec Superior Court, not simply the consent of a committee of experts.\textsuperscript{128}


121. \textit{See} French Law No. 76-1181, \textit{supra} note 120 (stating, "[w]here it is possible to obtain the views of the minor, refusal by the latter to agree to removal of the organ shall in all cases be respected"); Leenen, \textit{supra} note 120, at 102 (explaining that Luxembourg Law of 25 November 1982 demands the consent of intended donor if the minor is "capable of discernment").

122. \textit{See} French Law No. 76-1181 (stating, "[w]here the prospective donor is a minor, an organ may be removed only if the person in question is the brother or sister of the recipient").


124. \textit{See} MARGARET A. SOMERVILLE, \textit{Consent to Medical Care} 76-77 (1979) (discussing article 20 of the Civil Code of the Province of Quebec); Elkin Rozovsky & Fay Adrienne Rozovsky, \textit{The Canadian Law of Consent to Treatment} 81 (1990) (distinguishing Quebec Civil Code, art. 20, from the laws in the other Canadian provinces which proscribe tissue donations by living minors). Rozovsky suggests that the Canadian laws which ban organ donations by minors arguably violate the Canadian Charter of Rights and Freedoms, section 15(1), by discriminating against children as a class. Rozovsky, \textit{supra}, at 82.

125. Somerville, \textit{supra} note 124, at 76 (quoting Quebec Civil Code, art. 20).

126. \textit{Id.} The person with parental authority over the minor must also consent to the donation. \textit{Id.}

127. \textit{See id.} at 77 (suggesting that parental consent should be merely "enabling or declarative," whereas the minor's consent must be "constitutive").

128. Rozovsky, \textit{supra} note 124, at 81. Typically, the court will authorize the
3. Common Law: The United States

In the United States, regulation of donations by minors is the purview of common law, not statute. United States courts first approached the question of inter vivos donations by those incapable of legally consenting through application of the doctrine of substituted judgment. This doctrine authorizes the court to answer as would the minor, if the minor were legally capable of consenting. To truly enter its substituted judgment, the court must base its decision on clear and convincing evidence that exhibits the minor's intent or opinion toward organ donation. The necessity of determining the minor's intent excludes minors too young to formulate an opinion on, or engage in a discussion on, the subject of donation. In more recent cases, United States procedure if the child donor does not face any "serious risk" of physical injury. See Strunk, 445 S.W.2d at 145 (opining that courts of equity have the power to permit the removal of an organ from an incompetent ward of the state for transplantation into the ward's sibling). But see WHO SPEAKS FOR THE CHILD: THE PROBLEMS OF PROXY CONSENT 186-87 (Willard Gaylin & Ruth Macklin eds., 1982) [hereinafter WHO SPEAKS FOR THE CHILD] (arguing that judges and doctors do not have the training to impose value judgments on families faced with the choice of whether a child should donate to an unhealthy sibling, therefore the courts should only interfere with the privacy of the family if probable cause exists to believe that the parents are exploiting one child for the sake of another child).

129. See Strunk, 445 S.W.2d at 148 (expanding the doctrine of substituted judgment to cover not only property issues but also any matter affecting the well-being of the ward).

130. See Strunk, 445 S.W.2d at 148 (expanding the doctrine of substituted judgment to cover not only property issues but also any matter affecting the well-being of the ward).

131. Id. See John A. Robertson, Organ Donations by Incompetents and the Substituted Judgment Doctrine, 76 COLUM. L. REV. 48 (1976) (supporting the substituted judgment doctrine as a sensible and ethical standard when faced with subjecting incompetents to non-therapeutic medical procedures). But see WHO SPEAKS FOR THE CHILD, supra note 129, at 218 (criticizing the standard for its ambiguity).


133. See id. at 1326 (holding that ascertaining the opinion or intent of three-year old twins regarding bone marrow donation to their half-brother suffering from a rare form of leukemia was impossible and any efforts to use substituted judgment would be based on "speculation and conjecture"). Some suggest that the traditional age of reason, age seven, be established as the minimum age for organ donation. See Norman Frost, Children as Renal Donors, in ORGAN SUBSTITUTION AND TECHNOLOGY 82 (Deborah Mathieu ed., 1988) (arguing, however, that children over age seven, like adults, probably cannot give truly informed consent). But see WHO SPEAKS FOR THE CHILD, supra note 129, at 135-36 (suggesting that the opinion of children over the
courts studied and weighed the possible positive and negative effects of donation on the minor. Typically, courts in the United States review the child’s relationship with the prospective recipient, the possible detrimental psychological effects on the minor from the death of the intended recipient, the risks of organ harvesting to the donor, and the possible psychological benefits of donation. Courts undergo this balancing process in order to ascertain whether the donation serves the child’s best interests.

These statutory and common law approaches afford children substantial protection against a trade in children’s organs despite the permissive use of underage donors. These approaches, unlike WHO Guiding Principles of eight to ten should be respected in the decision to donate; SHARPE, supra note 118, at 319 (presenting the opinion of Dr. Murray of the Peter Bent Brigham Hospital in Boston, who feels that children under age twelve neither experience the psychological benefit of organ donation nor the trauma resulting from refraining from donating); J.K. MASON & R.A. MCCALL SMITH, THE LAW AND MEDICAL ETHICS 170 (1983) (belittling the adoption of an arbitrary age at which point children can be said to understand sufficiently so as to give legally valid consent and urging a case-by-case analysis).

134. See Hart v. Brown, 289 A.2d 386 (Conn. Super. 1972) (weighing the strong bond between identical seven-year, ten-month-old twins as a factor in its decision to permit one twin to donate a kidney to the other); Little v. Little, 576 S.W.2d 493, 498 (Tx. Civ. App. 1979) (permitting organ donation because of incompetent’s close bond to ailing sibling).

135. See Strunk, 445 S.W.2d at 146 (arguing that the death of the unhealthy sibling would have a damaging emotional impact on the prospective donor).

136. See id. at 148-49 (evaluating the few, but very real, short and long term risks to the donor); Hart, 289 A.2d at 386 (basing its decision to allow a seven year and ten month old twin to donate a kidney to her twin primarily on the fact that the risks to the donor child were minimal and granted the donee a continued life).

137. See Little, 576 S.W.2d at 499 (naming the psychological benefits of organ donation, including “heightened self-esteem, enhanced status in the family, renewed meaning in life . . . and transcendental or peak experiences flowing from their gift of life to another”); SOMERVILLE, supra note 124, at 79 (arguing that courts seek to find a psychological benefit for the donor in order to conclude that donation serves the “best interests” of the child because the physical benefit of therapeutic medical procedures is absent).

138. See Curran, 566 N.E.2d at 1319 (denying permission for three and one-half year old twins to submit to bone marrow harvesting for the benefit of their half-brother because the procedure was not in the best interests of the twin girls); Strunk, 445 S.W.2d at 149 (holding that organ donation was in “the best interest” of the incompetent ward); Little, 576 S.W.2d at 498 (stating that whether courts use the doctrine of substituted judgment or not, courts primarily focus on the benefits of organ donation to the child donor).
ple 4, recognize the continual scarcity of transplant organs. Rather than helplessly allowing a child to die because of an absolute prohibition on living minor donors, France, Luxembourg, Quebec, and the United States embrace flexible solutions which may save an unhealthy child's life.

III. PROPOSED REGULATIONS

To increase the supply of transplant organs, alternative measures have been proposed to replace the current voluntary, post-mortem donative system in the United States. Proposals to lessen the shortage of transplant organs include an organ draft,\textsuperscript{139} presumed consent/routine salvage,\textsuperscript{140} or financial incentives through a death benefit,\textsuperscript{141} an open market,\textsuperscript{142} or a futures market.\textsuperscript{143}

A. AN ORGAN DRAFT

An organ draft completely restricts a person's right to choose not to become an organ donor after death.\textsuperscript{144} The draft requires the state's

\begin{itemize}
\item \textsuperscript{139} See Theodore Silver, The Case for a Post-Mortem Organ Draft and a Proposed Model Organ Draft Act, 68 B.U. L. Rev. 681 (1988) (proposing an organ draft to increase the supply of transplant organs for the national health and arguing that conscription correctly aligns society's priorities by placing the living before the dead).
\item \textsuperscript{140} See id. at 703 (explaining that presumed consent organ procurement tactics are operative in Austria, Czechoslovakia, Denmark, France, Finland, Greece, Israel, Italy, Japan, Norway, Poland, Spain, and Switzerland). See generally LEGISLATIVE RESPONSES, supra note 4 (printing individual countries' organ transplant regulations).
\item \textsuperscript{141} See infra notes 153-56 and accompanying text (discussing the death benefit).
\item \textsuperscript{142} See infra notes 157-63 and accompanying text (examining the open-market proposal).
\item \textsuperscript{143} See Lloyd R. Cohen, Increasing the Supply of Transplant Organs: The Virtues of a Futures Market, 58 GEo. WASH. L. Rev. 1 (1989) (advocating the implementation of a futures market).
\item \textsuperscript{144} See Silver, supra note 139, at 681, 689-92, 714-15 (showing that advocates argue that there is no property right in the human body after death, but at most a "quasi-property" right exists which allows for burial of choice). Some challenge the constitutionality of the draft on the grounds that it violates the right to privacy guaranteed in the Fourteenth Amendment. Id. at 716-18. Supporters dispute that a corpse is not a "person" as defined in the Constitution, and moreover, even if a corpse were a "person," the state's interest in serving the national health through an organ draft usurps a person's interest in bodily integrity after death. Id. at 718. Still others base their objections in psycho-social terms, protesting that an organ draft would destroy society's ability to express its altruism. Id. at 696. Professor Ramsey, for instance, argues that "the routine taking of organs would deprive individuals of the exercise of
routine harvest of all suitable cadaveric organs, i.e. organs which have a tissue match on the recipient waiting list. Only a religious objection can obstruct the routine salvage of organs. The state overlooks any other objection expressed by the decedent prior to death or by decedent’s family.

B. PRESUMED CONSENT

Presumed consent, also known as routine salvage, empowers a person to opt out of automatic post-mortem organ retrieval simply by expressing this desire before death. In effect, however, the presumed consent plan mirrors the organ draft because often individuals do not understand that they can prevent the routine salvage of their organs. By not voicing their opposition to donate, the state may retrieve a person’s organs against their true wishes. To avoid this result, physicians in a presumed consent state often seek the consent of the decedent’s next of kin, which yields fewer organ donations than anticipated by the presumed consent doctrine.

C. LIMITED COMPENSATION: THE DEATH BENEFIT

Limited compensation may take the form of a death benefit to the decedent’s family. This benefit would entail a single standard payment of approximately $1,000-2,000 to cover burial expenses. If
enacted in the United States, this plan would cost the government approximately $4 million annually, but presumably would greatly increase the supply of transplant organs.

D. AN OPEN MARKET FOR ORGAN SALES

Implementing an open market for organs would require the repeal of legislation prohibiting the sale of organs and the establishment of a property right in the human body and its parts. An open laissez-faire market may augment the number of living donors, but at the same time may reduce altruistic donations and increase the number of unhealthy organs. An open-market would increase the costs of organ transplants, but should not preclude the lower economic classes from undergoing this potentially life-saving procedure. Yet another negative consequence may be the further waning of public trust in health professionals because of the potential for blatant favoritism to the wealthy.

---

155. Id. at 1304. Peters claims that this expenditure would not have a significant impact on total organ procurement costs, and moreover, that increased acquisition rates would offset overall expenses because continued dialysis treatment costs more than organ substitution. Id.

156. Id.

157. Stephen Ashley Mortinger, Spleen for Sale, 51 OHIO ST. L.J. 499, 508 (1990); Hansmann, supra note 39, at 72-74 (fearing that the inter vivos sale of human organs could potentially exploit the poor).

158. See Jaffe, supra note 148, at 551 (stating that a property right consists of the power to use, possess, exclude, sell, and destroy the property).

159. See Hansmann, supra note 39, at 68 (noting that the sale of blood diminished blood donations).

160. See Mortinger, supra note 157, at 508 (arguing that the sale of organs will increase the supply of diseased organs because the plan motivates the lower economic classes, who often have poor health habits, to donate).

161. See Organ Transplantation, 103 HARV. L. REV. 1614, 1628-29 (1990) (suggesting that the costs of organ procurement would be outweighed by the benefits).

162. See id. (predicting that the federal government would likely continue to pay for the majority of organ substitution surgeries).

163. See id. at 1629-30 (arguing that an open-market is presently unworkable, and stating that health professionals fear that such a market will diminish trust in the medical community).
E. A Futures Market in Transplant Organs

A futures market allows people to contract during their lifetime for the post-mortem removal of any or all of their organs. As compensation for donating organs, a donor may earn cash money, tax deductions, preferential access to organs for the donor’s family, a discount on health insurance, or a survivor’s pension/insurance to the donor’s family. Although some fear that a potential criminal market may seek to make a profit by murdering contracted donors, discussed precautions should effectively bar this consequence. First, if the donor elects post-mortem compensation, then the future donor must name a beneficiary to ensure that only the designated beneficiary will receive compensation from the fulfilled contract. Second, to execute the contract, the donor must die in a hospital where organ harvesting can take place. To pacify fears of economic exploitation of the poor, individuals may opt out of the contract and forego future compensation.

These alternative organ procurement strategies recognize the inadequacy of a procurement system based on voluntary, uncompensated donations. These strategies adhere to a value system which places the elimination of organ shortage ahead of moral concerns raised by the commercialization of the process of organ donations.

164. See generally Cohen, supra note 143 (detailing a futures market plan).
165. Id. at 33.
166. Ann McIntosh, Regulating the "Gift of Life"—The 1987 Uniform Anatomical Gift Act, 65 WASH. L. REV. 171, 179 (1990) (proposing that a futures market enjoys the benefits of financial incentives while upholding the virtues of altruism).
167. Id.
168. Id.
169. See Cohen, supra note 143, at 33, 35 (arguing that payments to a family after removal of decedent’s organs operate, in effect, as a supplementary life insurance policy, the value of which may depend on the number of organs harvested from the decedent).
170. Id. at 41 (admitting that financial incentive to murder may exist in a futures market system, but that the threat is insignificant).
171. Id.
172. Id.
173. Id.
174. Id.
IV. RECOMMENDATIONS

The existing legislation described in detail above inadequately protects children and does little to assuage deep-rooted fears of Latin Americans, who continue to fear the murder and exploitation of their children by powerful and wealthy foreigners.175 Economic well-being would leave Latin Americans less vulnerable to abduction and corrupt government practices,176 but as finding a cure to poverty is not a tenable solution, the recommendations below aim to prevent the development of such a trade. These recommendations are not mutually exclusive and would serve children best if implemented jointly.

A. STRICHER REGULATION OF INTERNATIONAL ADOPTIONS

Although outside the scope of this discussion, the disappearances of children for illicit adoptions intensify Latin American anxiety about trafficking in children’s organs.177 Stricter regulation of international adoptions178 could reduce instances of child kidnapping for illegal

175. See Booth, supra note 10, at C2 (sketching the unrest in Guatemala during the spring of 1994).
176. See Sale of Children, supra note 89, at 7 ¶ 25 (stating that “the root causes [of trafficking in children’s organs] are linked with family needs and social dispari-
ties”); Daniel Rothenberg, Heeding a Grotesque Morality Tale from Latin America, CHI. TRIB., July 8, 1994, at 17 (attesting that the rumors, whether true or not, sym-
bolically reflect the exploitation and marginality of Latin American poor).
177. See Booth, supra note 10, at C2 (connecting the disappearances of children for adoption with the rumored trade in children’s organs).
178. See Conv. art. 21, supra note 69 (regulating international adoptions); ADOP-
TION LAWS IN LATIN AMERICAN COUNTRIES (Hector Faundez Ledezma, International Social Service ed., 1982) (compiling national adoption laws). For analysis and criti-
cism of the regulations governing international adoptions, see also Richard R. Carlson, Transnational Adoption of Children, 23 TULSA L.J. 317 (1988) (studying federal im-
adoptions, and thereby proportionally diminish fears about trafficking in children's organs.

B. AMEND THE 1989 CONVENTION ON THE RIGHTS OF THE CHILD

Parties to the Convention on the Rights of the Child should amend the treaty to include specific language addressing the sale of children for organ transplants. An additional article to the Convention would echo Article 35, but apply explicitly to organ trafficking. The addendum article should read as follows:

States Parties shall take all appropriate measures to prevent the abduction of, sale of or trafficking in children and their body parts in any form.¹⁷⁹

Signatory parties should not seek to amend the Convention, however, until and unless United Nations' investigators can document the trade. Without documentation, it is unlikely that parties to the treaty will willingly expend time and resources to adopt an amendment based on sheer speculation. Likewise, the United States, given its position on the subject, would never agree to such an amendment.¹⁸⁰ The abstention of the United States in amending the Convention could potentially incite greater consternation because of the alleged involvement of Americans in the trafficking of children's organs.¹⁸¹ If investigations substantiate the existence of the trade, an amendment to the Convention which explicitly bans the trafficking in children for the subsequent sale of their body parts and the trafficking in children's body organs would ensure greater protection for children by unequivocally declaring the illegality of the trade and by demanding compliance with the Convention. If thorough research does not verify the rumors, then the need for an amendment will prove to be moot.

---

¹⁷⁹. See Conv. art. 35, supra note 69, and accompanying text (prohibiting "the abduction of, sale of or trafficking in children in any form").

¹⁸⁰. See Cohen, supra note 70, at 1449 (stating the United States was reluctant about the treaty from the start for establishing as "rights" what were considered "merely good social policy").

¹⁸¹. See supra note 7 (naming those countries allegedly involved in the trade of children's organs).
C. ADOPT AN INTERNATIONAL TREATY REGULATING ORGAN TRANSPLANTATION

The international community should adopt a treaty based on WHO Guiding Principles on Human Organ Transplantation with the exception of Principle 4, which absolutely bans the use of minors as living organ donors, and Principle 5, which prohibits financial compensation for organ donors. Provisions to replace Principles 4 and 5 are provided below.

1. Replacing Principle 4

Principle 4 should permit limited, inter-vivos organ donations by minors to siblings subject to judicial review. The amended principle should read as follows:

No organ or regenerative tissue should be removed from the body of a living minor for the purpose of transplantation. Exceptions may be made if the minor is the brother or sister of the intended recipient. In that case, the organ or regenerative tissue may be removed only with the consent of the person’s legal representative and after authorization has been given by the court based on its determination of the best inter-

---

182. See supra note 98 and accompanying text (enumerating supporters of the international adoption of WHO Guiding Principles).

183. See supra note 99 (quoting WHO Guiding Principle 4, stating “no organ should be removed from the body of a living minor for the purpose of transplantation”).

184. See French Law No. 76-1181 of 22 December 1976, supra note 120 (permitting minors to donate only to siblings). “Brother or sister” may include half-brother and sisters, or adopted siblings, subject to national law, with the understanding that such a broad interpretation poses a potential risk of falsified relationships. But see MASON & MCCALL SMITH, supra note 133, at 171 (1983) (advocating that minors should only donate to full siblings because such a restriction provides a higher degree of certainty in applying the law). Furthermore, Mason and McCall Smith believe the high degree of genetic incompatibility among adoptive siblings justifies this limitation. Id. This reasoning is flawed, however, because of the growing acceptance and use of unrelated living donors. See supra note 34 (discussing the increased use of unrelated donors).

185. See supra note 120 (explaining that French and Luxemborg legislation requires the consent of the minor’s legal representative).

186. See supra note 129 (discussing the holding in Strunk); Saks, supra note 118 (finding that “the more adversarial the structure of the forum, the more the people whose interests are at stake are satisfied with the fairness of the process”).
ests of the child after hearing testimony by the minor's physician, the intended recipient's physician (who may not be the same physician attending to the minor donor), and the minor's psychologist/social worker. If the child is over age seven, then the child's viewpoints must enter into the court's decision. If the minor unequivocally refuses donation, then the minor's wishes shall be respected. Violations of this provision shall be punishable by fine or imprisonment subject to national law.

This language incorporates the protection afforded to children under common-law and existing statutory legislation. It should adequately paralyze any trade in children's organs. The adoption of this provision would punish any violators, including organ brokers, child abductors, and all health professionals, especially physicians. Clearly, without physicians' acquiescence and cooperation, the rumored trade could never develop. Doctors who retrieve organs from living minors without verifying consent, without establishing the relationship between the donor and the intended recipient, and without obtaining judicial authorization will suffer criminal penalties subject to national determination. The law equally compels physicians who perform the recipient's transplant to

187. See supra note 138 (studying this American common law standard of review).
188. See supra note 120 (quoting French Law No. 76-1181 which requires the consent of a committee with at least two physicians, one of whom must have at least twenty years of medical experience, before a minor may donate an organ to a sibling).
189. See WHO Guiding Principles, Principle 2 and Commentary, supra note 4 (anticipating a potential conflict of interest, the WHO advocates that physicians who declare the death of the prospective donor not be involved with the removal of the donor's organs or the health care of the intended recipient).
190. See supra note 137 (explaining that United States courts weigh the psychological benefits of donation on the child donor).
191. See supra note 133 (discussing when children may develop the requisite mental capacity to consent to organ donations).
192. See supra note 121 (citing French and Luxemborg law which require that reviewing committees abide by the decision of a minor capable of discernment).
193. See NOTA § 301 (b), 98 Stat. 2346 (to be codified at 42 U.S.C. 274 (e)) (permitting fines of not more than $50,000 or imprisonment for no more than five years or both for those involved in the purchase or sale of human organs).
194. See WHO Guiding Principles, Commentary to Principle 5, supra note 4 (stating, "[t]he method of prohibition, including sanctions, will be determined independently by each jurisdiction").
195. See USIA, supra note 6, at 4 (describing the impossibility of an illicit trade in children's organs because transplants demand the skills of many highly-trained health professionals).
confirm the donor's and the donor's family's consent, the relationship of
the donor to the recipient, and judicial authorization. Overall, physicians
will be less likely to engage in an underground trade in children's or-
gans if they know they face criminal charges. Admittedly, judicial
review consumes more time than WHO Principle 4, however, the
amended provision avoids the side-effect of an all-out ban on donations
by minors.

2. Replacing Principle 5

National governments proscribe financial compensation to organ do-
nors based on principles of altruism and the sanctity of the organ gift.
Unfortunately, as society steadfastly stands by its principles, people die
needlessly because of the shortage of donated organs. The imple-
mentation of a futures market for organs should alleviate this organ
shortage. The replacement of Principle 5 encourages the development of
this type of market. The amended provision should read as follows:

(a) Cadaveric organs should be utilized before resorting to transplants
from living donors. Living donors shall not receive any payment for
donating organs, including any other compensation or reward beyond
reimbursement for costs attributable to the organ removal surgery.
Violations of this provision shall be punishable by fine or imprisonment
subject to national law.

(b) The procurement of cadaveric organs shall be encouraged through the
offer of compensation to adult individuals who contract for the post-mor-
tem removal of their organs. This “futures market” shall be subject to
national law, but may take the form of cash payment, reduction in health
insurance premiums, or survivors' insurance to the decedent's family.
Contracted donors may retract their decision to donate at any time during
their lifetime and forego compensation.

196. But see id. at 4 (arguing that even without criminal sanctions, health profes-
sionals receive such large salaries through legitimate practice that there is no incentive
to enter into a clandestine trafficking ring).

197. See supra note 28 (listing mortality rates for the population waiting for an
organ transplant).

198. See supra note 4 (quoting WHO Guiding Principle 5).

199. See supra note 193 (citing the penalties imposed by NOTA) and 194 (quoting
WHO Guiding Principles, Commentary to Principle 5).

200. See supra notes 165-69 and accompanying text (listing the various incentives
a futures market may offer).

201. See supra note 174 and accompanying text (noting that permissive withdrawal
reduces the risks of exploitation of desperate individuals).
Opponents of the futures market proposal believe that any increment of commercialism offends society’s morals, but to deny the commercialism of the existing system is naive. Organ transplants are a lucrative business for hospitals and physicians. Equity demands that organ donors also receive some financial compensation.

The futures market will likely increase the supply of transplant organs because it encourages people to donate for their own self-interest, without any subsequent pain and suffering, as well as for the recipient. The increased number of available transplant organs will help match the present excessive demand. Greater satisfaction of this formerly unmet demand should minimize the need for people to purchase organs covertly, thus attacking the underlying financial incentive for the development of an illegal trade in children’s organs. With the motivating force behind the alleged trafficking in children’s organs significantly abated, children should be sufficiently protected from abduction for organ donation.

CONCLUSION

Organ transplants occur more frequently than in the past due to increasing success rates in organ substitution surgery. The frequency

202. See Evans, supra note 26, at 3115, 3116 (indicating that hospitals bill patients up to 200% more than what organ procurement organizations charge the hospital for organ acquisition, often billing the highest rates for kidneys).

203. See Ronald Bailey, Should I Be Allowed To Buy Your Kidney?, FORBES, May 28, 1990, at 365-66 (quoting a physician who disapproves of the current organ procurement system because donors are the only actors not making a profit).

204. See Cohen, supra note 143, at 34 (arguing that the futures market offers a “robust solution” to the shortage of organs by providing sufficient incentives to donate).

205. See Kolata, supra note 34, at C14 (explaining that living kidney donors undergo complex surgery requiring a “12 inch incision” and the “removal of a rib” followed by “weeks of recuperation”).

206. See Cohen, supra note 143, at 6 (contending that “the current untapped supply of cadavers appears to be more than adequate to meet the current demand of all organs . . .”).

207. See supra notes 33-39 (describing the growth of an international trade in adult human organs) and 42 (demonstrating how physicians can successfully transplant children’s organs into adult recipients).

208. See supra note 5 and accompanying text (implying that the economic incentive for the trade in adult organs could also spawn the criminal trafficking in children’s organs).

209. See supra notes 1-3 and accompanying text (accounting the medical progress
of these surgeries, however, raises the demand which greatly exceeds the supply of donated organs. This unmet demand stimulated the growth of a profitable trade in adult organs. The much-publicized market in adult living donors now worries many that children will become the next source of transplant organs. The lack of substantiation of the rumors of trafficking in children’s organs should not bar discussion of legal avenues to protect children from this trade. As noted above, the Convention on the Rights of the Child makes the sale of children for their organs illegal, but it does not explicitly address the trade. By not directly prohibiting the sale of children for their body parts, the Convention fails to give children the degree of protection warranted by the horrors of the rumored trade.

To truly protect children, the international community should adopt an international treaty based on the WHO Guiding Principles to regulate organ procurement and allocation because the primary threat to children lies in the international scarcity of transplant organs. The treaty, however, should replace WHO Guiding Principles 4 and 5, which now ban the use of minors as living organ donors and financial compensation for organ donors respectively. If doctors cannot locate a suitable cadaveric or living donor, the court should permit minors to donate organs in transplant surgeries).

210. See supra notes 1-3 and accompanying text.
211. See supra notes 16-32 and accompanying text (highlighting the reasons behind the shortage of transplant organs).
212. See supra notes 33-39 and accompanying text (noting the creation of a commercial market in human organs).
213. See supra note 5 and accompanying text (deducing a threat to children based on the severe shortage of organs and their current economic value on the underground market).
214. See supra note 59 and accompanying text (indicating that, to date, the rumors remain unconfirmed).
215. See supra notes 84-85 and accompanying text (arguing that the illegality of the trafficking in children’s organs stems from children’s inherent right to life and freedom from abuse and exploitation).
216. See supra note 73-83 and accompanying text (discussing applicable provisions of the Convention to the alleged trafficking in children’s organs).
217. See supra notes 86-92 and accompanying text (examining the shortcomings of the Convention in protecting children from the alleged problem of trafficking in children’s organs).
218. See supra notes 182-208 and accompanying text (detailing a proposed treaty to regulate organ transplantation).
219. See supra notes 183-201 and accompanying text (modifying the principles proposed by the WHO).
to siblings if the minor and the minor’s family consent and if the donation serves the best interests of the minor donor. 220 Furthermore, the treaty should encourage a futures market in organs. 221 By increasing the supply of organs through a futures market, 222 the profit of a trade in children’s organs will fall significantly. 223 The elimination of economic gain from trafficking in children’s organs will grant children the utmost protection from non-consensual, violent organ procurement.

220. See supra notes 184-192 and accompanying text (detailing the limited, permissible use of children as living organ donors).
221. See supra notes 198-203 and accompanying text (advocating the adoption of a futures market in human organs).
222. See supra notes 204-207 and accompanying text (noting the potential for increasing the supply of transplant organs through the implementation of a futures market).
223. See supra note 208 and accompanying text (equating the market incentives behind the trafficking in children’s organs to those encouraging the trade in adult organs).